briefing note

ACTU
australian council of trade unions

6 Dec 2022

Secure Jobs, Better Pay Bill 2022

Summary

1. *The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**Bill**) is the first major piece of industrial relations reform by the newly elected Albanese Labor Government, ending 9 years of attacks on working conditions by the previous Government. The Bill, as passed on 2 December2022, makes a number of positive changes to the *Fair Work Act* including:
    - Strengthening laws on equal pay, tackling sexual harassment and discrimination at work and improving the right to request flexible working arrangements.
    - Beginning to tackle insecure work by limiting the use of fixed term contracts.
    - Making bargaining more accessible, including by introducing or improving multi-employer bargaining streams and simplifying approval processes.
    - Dealing with termination of agreements and "sunsetting" zombie agreements.
    - Beginning to strengthen compliance by lifting the cap on small claims.
    - Abolishing the ABCC and ROC.
2. The Government has indicated that a second tranche of IR legislation will be introduced next year, including changes to clamp down on all aspects of insecure work, including casuals, gig economy and labour hire, as well as more reforms to combat wage theft, among others.
3. This briefing note provides a summary of the key changes that the Bill will make. It is an updated version of the earlier briefing note of 28 October 2022, incorporating changes to the Bill as passed.
4. A table outlining the operative date of all parts of the Bill is included in Appendix 1 of this briefing note.

Introduction

5. The Bill was introduced to the House of Representatives in the 47th Parliament on 27 October 2022.
6. In relation to the Bill, the Minister for Employment and Workplace Relations said:[1]

> 'This bill delivers on the government's commitment to ensure a fairer workplace relations system that provides Australians with job security, gender equity and sustainable wage growth.
> This bill will not fix every problem in our workplace relations system, but it's a strong start, and it will provide a strong foundation on which we can continue to build a fairer and more equitable system Australians need, want and deserve.'

Setting the Framework – the Objects of the Fair Work Act 2009

7. The Bill amends ss 3, 134 and 284 of the FW Act to include job security and gender equality within the objects of the FW Act and the Modern Awards Objective, and gender equality in the Minimum Wages Objective.
8. Section 3 will now provide that the FW Act is to provide workplace relations laws that promote job security and gender equality, emphasising their importance as interpretive considerations.
9. Section 134 will now provide that the Fair Work Commission (FWC) must ensure that modern awards provide a fair and relevant minimum safety net, taking into account the need to improve access to secure work across the economy, and 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.

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[1] Minister for Employment and Workplace Relations the Honourable Tony Burke MP, *Delivering secure jobs, better pay and a fairer system* (Media Release, 27 October 2022) <https://ministers.dewr.gov.au/burke/delivering-secure-jobs-better-pay-and-fairer-system>

10. Section 284 will now provide that the FWC must establish and maintain a safety net of fair minimum wages, taking into account the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work, and addressing gender pay gaps.
11. These changes mean gender equality and job security will both be at the heart of the Fair Work system, and the FWC must take into account the need to achieve gender equality and job security in the performance of all of its functions and exercise of powers under the FW Act.

Cultural and Linguistic Diversity

12. The Bill inserts new provisions into the FW Act which would require both the FWC and the FWO, when performing their functions, to have regard to the need to publish materials and conduct community outreach in multiple languages.[2]

Expert Panels

13. The Bill amends the FW Act to provide for two new FWC expert panels:
    - A Pay Equity Expert Panel; and
    - A Care and Community Sector Expert Panel.
14. The Bill will allow for the appointment of FWC members with expertise in gender pay equity, anti-discrimination and the care and community sector.
15. Where matters relevant to these issues or sectors arise, the President of the FWC must constitute an appropriate panel. A majority of members of the panel must have relevant knowledge or experience, meaning that decisions made by the FWC on issues such as equal pay in feminised industries will be made quickly, efficiently and by people who are specialists in that area. For example, matters involving gender pay equity determinations or equal remuneration orders must be decided by the Pay Equity Panel, and matters involving determinations, modern awards or equal remuneration orders in the Care and Community sector must be decided by the Care and Community Panel.

Job Security

16. The Bill provides greater job security by limiting the use of fixed term contracts to create insecure work.
17. The Bill inserts a new Part 2-9 Division 5, which effectively limits the term of any fixed or maximum term contract to two years (subject to limited exceptions).[3]
18. An employer will contravene proposed s 333E if they enter into a fixed or maximum term contract for an employee who is not a casual and:[4]
    - The specified duration of the contract is greater than 2 years;[5] or
    - The contract is capable of being extended more than once or for greater than 2 years;[6] or
    - The contract is consecutive with a previous contract which regulated the same or substantially similar work, there is substantial continuity of employment and the combined specified duration of both contracts (or a prior consecutive fixed term contract) is greater than 2 years or the contract contains a renewal or extension option.[7]
19. These provisions will not apply to certain categories of worker, such as high-income earners, trainees, essential workers in peak periods, backfill positions or certain positions subject to Government

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[2] Bill Part 25AA
[3] Bill Sch 1 Part 10 Cl 441; Note: The term "fixed term contract" is used, whereas the definition appears to also capture maximum term contracts, see proposed Div 5 s 333E(1)(b)
[4] Proposed s 333E(1)
[5] Proposed s 333E(2)
[6] Proposed s 333E(3)
[7] Proposed s 333E(4)-(5)

funding.[8] The limitation on fixed and maximum term contracts also will not apply if such contracts are permitted by a modern award.[9]

20. The new provisions will also require the FWO to produce a Fixed Term Contract Information Statement, which employers must provide to relevant employees.[10]
21. The ACTU has raised concerns that certain aspects of the provisions, as presently drafted, may undermine the intent of these changes to limit the use of fixed term contracts. This part of the Bill will not come into effect until 12 months after 6 December 2022, allowing time for further discussions and changes to address these issues.

Collective Bargaining

22. The Bill amends the FW Act to provide for four streams of collective bargaining. These will be:
    - Single Employer Enterprise Bargaining;
    - Single Interest (multi-employer) Bargaining;
    - Supported Bargaining; and
    - Co-operative Bargaining
23. Three of these streams provide for bargaining across multiple enterprises and with multiple employers. However, in approving a multi-enterprise agreement, the FWC must be satisfied that it does not cover workers in general building and construction or civil construction work.
24. The ACTU understands that the changes to collective bargaining are likely to take effect from 1 July 2023.

<u>Types of Bargaining</u>

Single Employer Enterprise Bargaining

25. The existing stream of "single enterprise agreement" bargaining will continue as normal (save as noted elsewhere in this document) insofar as it involves only one employer or relates to employers that are engaged in a joint venture, common enterprise or are related bodies corporate (i.e. the existing classes of employers that can bargain together without the need for a single interest authorisation).
26. There will be an additional method of initiating bargaining which will remove the requirement to seek to majority support in some cases. If bargaining is for the replacement of a single enterprise agreement and no more than 5 years have passed since the nominal expiry date, the bargaining representative for the employees can send a written request to start bargaining. The receipt of this notice is taken to signify the "notification time" for the proposed agreement. This, among other things, means that the good faith bargaining requirements start to apply, and a protected action ballot application may be made (subject to other requirements).

Single Interest (multi-employer) Bargaining

27. The Bill will amend the FW Act to provide for "single interest" multi-employer bargaining, essentially by expanding the class of employers that may be specified in a single interest authorisation. The making of a single interest employer authorisation will require majority support and that at least some of the employees are represented by a union.
28. Additionally, the employers must have "clearly identifiable common interests" (which includes considerations of geography, regulatory regime, the nature of the enterprises and the terms and conditions in place) and reasonably comparable operations and activities and, making the authorisation

[8] Proposed s 333F
[9] Proposed s 333F(1)(h)
[10] Proposed ss 333J, 333K

must not be contrary to the public interest. Franchisees are not required to have a "clearly identifiable common interest'. It is instead sufficient that they have the same franchisor or are related bodies corporate of the same franchisor.

29. A single interest employer authorisation cannot be made in relation to an agreement which would cover workers in the general building and construction or civil construction industries.[11]
30. A bargaining representative of employees will be able to initiate the process for obtaining a single interest employer authorisation. Businesses with fewer than 20 employees cannot be included in a single interest employer authorisation unless they agree. For those with 50 or more employees it is presumed that the 'clearly identifiable common interest' test is met unless proven otherwise and then it is also presumed that the 'reasonably comparable' test is met unless proven otherwise.
31. Other employers will be able to be "roped in" to agreements where a majority of employees support this, provided there are common interests among the employers as above. Employers with an agreement within its term are excluded as are those with a written agreement with the union to bargain for an agreement for the same or substantially the same group of employees.
32. Employers may be excluded from a single interest authorisation or an application to add employers to an agreement where they can demonstrate that they are bargaining in good faith for a new agreement, they have a history of bargaining and less than 9 months has passed since the expiry of their last agreement. Employers will be able to exit coverage of a multi-enterprise agreement where this is approved by a majority vote of employees and the employee organisation consents.

Supported Bargaining

33. Supported Bargaining will allow the FWC to facilitate bargaining between employee organisations and multiple employers.
34. Bargaining under this stream requires the FWC to make a "supported bargaining authorisation", which is a re-vamp of the process for low paid bargaining authorisations. Supported bargaining authorisations must be made where the FWC considers it appropriate, having regard to prevailing pay and conditions, whether employers have a common interest, whether, having regard to the number of bargaining representatives, the process would be manageable and any other matter it considers appropriate. Common interests are to be determined having regard to factors including geography, nature of the enterprises and government funding. Supported bargaining authorisations cannot be made unless at least some of the employees are represented by a union. The FWC must also make a supported bargaining authorisation if one is sought in relation to an industry declared by the Minister. A supported bargaining authorisation cannot be made in relation to the general building and construction or civil construction industries or in relation to an employee who is covered by a single enterprise agreement (unless the agreement was made with the intention of the employer being to avoid an authorisation).
35. If supported bargaining does not produce an agreement, there is a pathway to arbitration through intractable bargaining declarations and determinations. Protected industrial action is also available.
36. Majority Support Determinations will not be required to initiate supported bargaining.
37. Employers can be "roped in" to supported bargaining agreements on application to the FWC by consent where the employees agree and without consent if the employees agree and the FWC is satisfied it is appropriate to do so.
38. Employers will be able to exit coverage where this is approved by a majority vote of employees and the union consents.
39. If a supported bargaining agreement comes into operation, it replaces a single enterprise agreement.

[11] Note: There is a rebuttable presumption that employers with greater than 50 (permanent or regular casual) employees will have comparable operations and activities.

Co-operative Bargaining

40. The cooperative bargaining stream is multi-enterprise bargaining without a single interest or supported bargaining authorisation attached. The consequence is that protected industrial action is not available, the FWC cannot assist with bargaining disputes unless all bargaining representatives agree, there is no route to "intractable bargaining" arbitration and the good faith bargaining requirements are not enforceable.
41. In order for a co-operative agreement to be approved by FWC, at least some of the employees need to be represented by a union.
42. Additional employers can be roped into a cooperative agreement by consent and with the approval of a majority of employees.

Small Business

43. Single Interest (multi-employer) bargaining will not be available in respect of businesses with fewer than 20 employees, unless they agree.
44. Small businesses cannot be roped into a single interest agreement unless they agree.

Industrial Action

45. Protected industrial action will be available in respect of all forms of bargaining except for co-operative bargaining.
46. Conciliation will be required prior to the close of a protected action ballot, but cannot be used to slow down the taking of action. A failure to comply with an order to attend conciliation by an employee bargaining representative will render that representative and the employees they represent incapable of organising or engaging in protected employee claim action. Similarly, a failure to comply with an order to attend conciliation by an employer or employer bargaining representative will render them unable to engage in or organise employer response action.
47. The default notice period for the taking of employee claim action will be extended to 120 hours where action is taken in relation to a proposed multi-enterprise agreement.
48. There will be de-facto permit/registration scheme for protected action ballot agents to remove the requirement to assess suitability of agents for each protected action ballot application.

Bargaining Disputes

49. The FWC will be given broad powers to oversee bargaining, including to compel attendance, order production of documents and schedule meetings.
50. If the FWC makes an intractable bargaining declaration, it will have the power to arbitrate the outstanding matters. "Serious Breach Declarations" (which are currently available after serious breaches of bargaining orders) are replaced by "Intractable Bargaining Declarations".[12] These declarations will be available on application following the FWC dealing with a section 240 Bargaining Dispute, where the FWC considers that there is no reasonable prospect of agreement being reached and it is reasonable in the circumstances to make the declaration.[13]
51. A minimum bargaining period must have elapsed before an intractable bargaining declaration is made. That period is 9 months after the latter of either the nominal expiry date or the day bargaining starts. An intractable bargaining declaration may only be made in relation to a proposed multi-enterprise agreement if a supported bargaining authorisation or single interest employer authorisation is in operation.[14]

[12] Bill Sch 1 Part 18, see in particular cl 543 which replaces Part 2-4 Div 8 Sub-div B
[13] Bill Sch 1 Part 18 cl 543 which replaces FW Act s 235
[14] Bill Sch 1 Part 18m proposed s 234

52. The consequence of an Intractable Bargaining Declaration being made is that if the parties cannot reach agreement in the subsequent "post-declaration negotiating period", the FWC must make a (Intractable Bargaining) Workplace Determination.[15] Protected industrial action cannot be taken after an intractable bargaining declaration is made.

Agreement Approval

Pre-approval requirements

53. The Bill modifies the pre-approval requirements relating to enterprise agreements by removing the 7-day access period which currently precedes voting. Employers must still take all reasonable steps to explain the terms of the agreement and their effect to employees.
54. An employer is only permitted to put a multi-enterprise agreement to a vote of employees if they have the agreement of each bargaining representative or the FWC has made a "Voting request order".

Genuine Agreement

55. FWC must make and publish a statement of principles on when an enterprise agreement has been genuinely agreed, and take these principles into account when approving agreements.

Better Off Overall Test

56. The Bill modifies provisions relating to the BOOT (which remains in place).
57. A new section specifies that the BOOT requires a "global assessment" and sets up a rebuttable presumption that an employee belonging to a class of employees who are better off, will also be better off.[16] The concept of 'each prospective award covered employee' is replaced with 'each reasonably foreseeable employee'. The FWC must also give primary consideration to any views held in common by the bargaining representatives.[17]
58. Under the new provisions, the FWC will have the power to amend an agreement (and must take into account the views of workers, employers and bargaining representatives) to address a concern that it otherwise would fail the BOOT.
59. In applying the BOOT, the FWC will only have regard to patterns of work (i.e. rosters etc.), kinds of work or types of employment that are "reasonably foreseeable" at the time.[18] However, the FWC may (on application) reconsider whether the agreement continues to pass the BOOT in light of subsequent patterns or kinds of work, or types of employment which have emerged post-approval (for example, a change of roster).[19] If on reconsideration of an agreement, the FWC makes a variation with an operative date that precedes the date of the variation, then a party that has engaged in conduct before the variation is made cannot be subjected to a pecuniary penalty in relation to that conduct.

Small Cohort Agreements

60. The Bill tightens a loophole exploited by employers, involving the practice of making agreements with a small group of workers and then subsequently applying that agreement to a much greater number of workers.[20]

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[15] Bill Sch 1 Part 18 cl 543, 545-6
[16] Bill Sch 1 Part 16 cl 528 which inserts FW Act s 193A(4)
[17] Bill Sch 1 Part 16 cl 528 which inserts FW Act s 193A(2), 193A(7)
[18] Bill Sch 1 Part 16 cl 528 which inserts FW Act s 193A(6)
[19] Bill Sch 1 Part 16 cl 534 which inserts FW Act s 227A
[20] Bill Sch 1 Part 14; for case law see *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU) (2018)* 262 FCR 527 at [168] on appeal from *Construction, Forestry, Mining and Energy Union v One Key Workforce Pty Ltd [2017]* FCA 1266; Contra *Aldi Foods Pty Ltd v Shop, Distributive & Allied Employees Association* [2017] HCA 53, *CFMEU v John Holland Pty Ltd* [2015] FCAFC 16

61. Under the changes, the FWC will be unable to be satisfied that an agreement was genuinely agreed to (and therefore unable to approve the agreement) without being satisfied that the employees who approved it had sufficient interest in the terms of the agreement and were sufficiently representative of the employees (i.e. classifications etc.) whom the agreement was expressed to cover.[21]

Termination of Enterprise Agreements

In deciding whether to terminate, the FWC must have regard to whether bargaining is occurring and whether termination of the agreement would adversely affect employees' bargaining position.[22]

62. The Bill will bring the FW Act's agreement termination provisions closer to their originally intended effect by limiting an employer's ability to seek a short-term advantage during bargaining negotiations through the strategic use (or threat) of the termination of expired agreements.
63. The Bill achieves this by:
    - limiting agreement termination to circumstances where there is a significant threat to the viability of the business and termination will reduce the potential for redundancies ;[23] and,
    - requiring a guarantee of employment termination entitlements;[24]
64. The FWC must terminate the agreement under the new s 226(1) only if it is satisfied that it is appropriate in all the circumstances to do so.
65. In deciding whether to terminate, the FWC must have regard to whether bargaining is occurring and whether termination of the agreement would adversely affect employees' bargaining position.[25]
66. The new provisions will apply after 6 December 2022 to any new application and any existing application which has not yet been determined.[26]

Zombie Agreements

67. The Bill will slay "Zombie" agreements by automatically terminating Workchoices-era agreements which have remained in force since that time, locking workers onto low wages and conditions.[27]
68. Agreement-based transitional instruments will automatically sunset 12 months after the Bill enters into force.[28]
69. The FW Act will allow for the FWC to consider applications to keep specific agreements in operation.

Gender Equity

70. The Bill contains a number of important measures aimed at improving gender equality. In addition to including it in the objects of the FW Act, the Bill establishes Expert Panels, strengthens gender-discrimination provisions, introduces a statutory equal remuneration principle, prohibits pay secrecy clauses, provides stronger access to flexible working arrangements, and gives victim-survivors stronger protections against workplace sexual harassment.

Anti-Discrimination

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[21] Bill Sch 1 Part 14 cl 509 (amendment of FW Act s 188)

[23] Bill Sch 1 Part 12 sub-items 226(2)(c)(i)-(ii)
[24] Bill Sch 1 Part 12 sub-item 226(2)(c)(iii)
[25] Bill Sch 1 Part 12 item 226(4)(c)
[26] Bill cl 2, Sch 1 Part 26 Cl 660 (Div 10 Cl 65)
[27] Bill Sch 1 Part 13;
[28] Note: Agreement-based transitional instruments (aka "Zombie Agreements") are pre-FW Act agreements, a list of which is set out in *the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)* Sch 3 sub-cls 5(c)-(d); These provisions enter into force the day after Royal Assent (Bill cl 2)

71. The Bill amends the FW Act to strengthen the anti-discrimination framework in the FW Act and ensuring consistency with *the Sex Discrimination Act 1984 (Cth)* by adding three protected attributes - breastfeeding, gender identity and intersex status – to existing anti-discrimination provisions, including the general protections provisions in s351 of the FW Act.
72. The FW Act will also be amended to confirm that 'special measures to achieve gender equality' are matters pertaining to an employment relationship, and are not discriminatory terms, and can therefore be included in an enterprise agreement.

Pay Secrecy

73. Pay secrecy clauses in employment contracts or other instruments will be prohibited in new provisions in Part 2-9 of the FW Act. Workers will have the right to disclose (or not disclose) their remuneration and any terms and conditions of employment that are reasonably necessary to determine their remuneration – for example, the number of hours they work. Employees also have the right to ask other employees about their remuneration (whether or not they work for the same employer). These rights are both considered to be 'workplace rights' for the purpose of the general protections provisions.
74. Breach of the provisions is a civil penalty provision and pay secrecy terms will have no effect to the extent that they are inconsistent with the new provisions.
75. The changes took effect for new contracts, including variations to existing contracts on 6 December 2022. Restrictions in existing contracts will remain until the contract is varied or a new contract is entered into.

Equal Remuneration Principles

76. The Bill provides new guidance for equal remuneration and work value cases. When considering whether amending an award is justified for work value reasons, consideration of work value reasons must be free of assumptions based on gender, and include consideration of whether the work has been historically undervalued due to gender-based assumptions.
77. The Bill amends the FW Act to include equal remuneration principles based on those applying in the Queensland state jurisdiction. In deciding whether there is equal remuneration for work of equal or comparable value, the FWC may take into account whether the work has been undervalued on the basis of gender. Comparisons between occupations and industries are not limited to similar work and importantly, the requirement for applicants to tender evidence of a "male comparator" is removed. There is also no requirement for the FWC to find that there has been gender discrimination to establish that the work has been undervalued or to grant an equal remuneration order.
78. The FWC will now also be able to make an equal remuneration order on its own initiative, as well as on application.
79. This will mean it will now be possible for women to win pay equity claims, especially in sectors where it is impossible to find a male comparator.

Prohibiting Sexual Harassment

80. Currently, the FW Act does not prohibit sexual harassment, and stop sexual harassment orders are only available to some workers, under the same flawed provisions that apply to bullying at work. The Bill will take sexual harassment out of the stop bullying provisions (Part 6-4B) and sexual harassment will be dealt with in a new Part 3-5A of the FW Act.
81. Part 3-5A will explicitly prohibit sexual harassment (including perpetrated by third parties) of workers, prospective workers and persons conducting business or undertakings (PCBUs) in the FW Act, and a breach of this provision will attract a civil penalty. Worker is defined broadly to be consistent with the *Work Health and Safety Act 2011* to include an individual who performs work in any capacity.

82. The Part also creates a new dispute resolution function for the FWC, modelled on those for general protections dismissal disputes. In most cases, the FWC would first deal with a dispute by conciliation. If it remained unsettled, parties can proceed to consent arbitration or make an application to a Federal Court.
83. Workers alleging they have been sexually harassed can make applications to the FWC to deal with a sexual harassment dispute, including an application for a stop sexual harassment order. Matters can be dealt with by a court where the dispute has not been resolved by the FWC. The FWC can dismiss applications where they are made more than two years after the contravention.
84. Where an application is made for stop sexual harassment orders, and the FWC is satisfied the worker has been sexually harassed and there is a risk they will continue to be sexually harassed, the FWC can make any order it considers appropriate (other than payment of compensation) to prevent further sexual harassment occurring. The FWC must start to deal with an application for a stop order within 14 days. Breach of a stop order is a civil penalty provision.
85. The FWC must deal with sexual harassment disputes that do not solely consist of an application for a stop order, including by way of conciliation, making a recommendation or expressing an opinion. Where all reasonable attempts have been made to resolve the dispute, the FWC can also arbitrate where agreed to by the parties, and can make orders for compensation and lost remuneration, orders requiring certain things be done, and can express opinions in relation to certain matters.
86. Workers can seek both a stop sexual harassment order and a remedy for past harm (either in the court or by consent arbitration).
87. Employers can be held vicariously liable for sexual harassment perpetrated by other employees, unless they have taken all reasonable steps to prevent it. The Fair Work Ombudsman (FWO) will also be able to investigate and exercise compliance functions in relation to sexual harassment matters, sending a strong message that sexual harassment at work is unacceptable.
88. Workers will now have the option of initiating action in relation to workplace sexual harassment in the FWC, in a state tribunal or court, or in the Australian Human Rights Commission (AHRC).

Flexible Working Arrangements

89. There are only two NES entitlements that are currently not enforceable under the FW Act, and they both disproportionately have an impact on women - the right to request flexible working arrangements and to request to extend unpaid parental leave. Currently, if an employer refuses a request for flexible working arrangements on 'reasonable business grounds', there is no ability for a worker to challenge or appeal this decision.
90. The Bill amends the FW Act to require employers to genuinely try to reach agreement at the workplace level with employees who request flexible working arrangements, including by having discussions with an employee, and making efforts to identify alternative arrangements when an employee's request cannot be accommodated.
91. The Bill empowers the FWC to resolve disputes regarding flexible work. Where the dispute relates to an employer's refusal to grant or respond to a request for flexible work, the FWC is empowered to resolve the dispute first by means other than arbitration, unless there are exceptional circumstances, and then by arbitration. The FWC can deal with the dispute as it considers appropriate, including by way of conciliation, making recommendations, expressing opinions, arbitration and making orders. Contravention of an order is a civil remedy provision. The FWC must not make an order that would be inconsistent with the term of the Act or a fair work instrument.
92. The Bill also expands the circumstances in which an employee may request flexible work arrangements to include situations where an employee, or a member of their immediate family or household, experiences family and domestic violence, as well as if the employee is pregnant.

Unpaid Parental Leave

93. The Bill also makes the right to request an extension of unpaid parental leave enforceable. The FWC may make an order granting the request if the employer has refused the request, particularly on grounds it considers not to be reasonable business grounds.

Paid Family and Domestic Violence

94. The Bill includes a Senate amendment to require employers not to include information on pay slips that might identify that an employee has taken paid family and domestic violence leave.

Tackling Wage Theft

Small Claims Process

95. The Bill makes two key changes to the FW Act's small claims jurisdiction:[29]
    - Section 548(2)(a) is amended to raise the amount that can be awarded by a court in a small claims proceeding from $20,000 to $100,000 (excluding interest); and
    - Successful applicants will now be able to recover their small claims filing fees.

Sub-Minimum Wage Job Ads

96. The Bill will insert Part 3-6 Division 4 into the FW Act, which regulates the advertising of jobs at wage rates which fall below either the National Minimum Wage or the relevant minimum wage in a modern award, enterprise agreement or workplace determination.[30]
97. An employer will be liable for a civil penalty (subject to the existence of any "reasonable excuse") if they advertise (or cause to be advertised) employment at a rate of pay which, if the employment were to occur, would contravene either the FW Act (for example by being below the National Minimum Wage) or a Fair Work Instrument.[31]
98. An employer must also advertise any periodic rate of pay that a worker is entitled to where employment as a pieceworker is advertised.[32]

Positive Regulatory Culture

The Registered Organisations Commission

99. The Bill amends *the Fair Work (Registered Organisations) Act 2009 (Cth)* to abolish the Registered Organisations Commission and the role of Registered Organisations Commissioner, which were established by the Coalition Government in 2016.[33] All current functions of the ROC and the RO Commissioner will be transferred to the FWC and its General Manager.[34] In addition to this, the FWC will be given powers to issue infringement notices and enter into enforceable undertakings pursuant to *the Regulatory Powers (Standard Provisions) Act 2014*.[35]

The Australian Building and Construction Commission

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[29] Bill Sch 1 Part 24
[30] Bill Sch 1 Part 25
[31] Proposed s 536AA(1); See s 536AA(3) in relation to "reasonable excuse").
[32] Proposed s 536AA(2)
[33] Bill Sch 1 Part 1; See Fair Work (Registered Organisations) Amendment Bill 2016
[34] Bill Sch 1 Part 1
[35] Bill Sch 1 Part 2

100. The Bill will also abolish the Australian Building and Construction Commission, which traces its lineage back to the Howard era in 2005.[36]

101. The Bill renames *the Building and Construction Industry (Improving Productivity) Act 2016* to be *the Federal Safety Commissioner Act 2022* and redefines its objects to include promoting WHS in the building industry.[37] The role of "authorised officer" is replaced by "Federal Safety Officer".[38] The ABC Commissioner retains a limited role of informing and assisting the FWO in relation to its powers relating to the building industry for a two-month period of transition before being abolished.[39]

National Construction Industry Forum

102. A new National Construction Industry Forum is created to advise the Government in relation to work in the building and construction industry, including in relation to workplace relations, skills and safety. The Forum includes senior Ministers, including the Minister for Workplace Relation and employer and employee representatives in equal number, appointed by the Minister.

Review

103. A review of The FW Act Amendments made by the Bill must be commenced within 2 years of 6 December 2022. The Review must be conducted within 6 months and the Report tabled in Parliament.

Appendix 1: Operative dates of Parts of the Bill.

ITEM	**OPERATIONAL DATE**
Abolition of the ROC	Proclamation or 6 months from 6 Dec 2022
Abolition of the ABCC	2 months from 6 Dec 2022
Objects of the Act	6 Dec 2022
Equal Remuneration	6 Dec 2022
Expert Panels	On proclamation or 3 months from 6 Dec 2022
Prohibiting Pay Secrecy	6 Dec 2022
Prohibiting Sexual Harassment at Work	3 months from 6 Dec 2022
Anti-discrimination and special measures	6 Dec 2022
Fixed Term contracts	Proclamation or 12 months from 6 Dec 2022
Flexible Work	6 months from 6 Dec 2022
Termination of Agreements	6 Dec 2022
Sunsetting Zombies	6 Dec 2022
Enterprise Agreement approval	Proclamation or 6 months from 6 Dec 2022
Initiating Bargaining within 5 years of nominal expiry date of an agreement	6 Dec 2022
BOOT	Proclamation or 6 months from 6 Dec 2022
Dealing with errors in Enterprise Agreements	6 Dec 2022
Bargaining generally	Proclamation or 6 months after 6 Dec 2022
Industrial Action	Proclamation or 6 months after 6 Dec 2022
Small Claims	1 July 2023
Prohibition on Job ads that contravene the Act	6 Dec 2022
Amendment to the SRC Act	6 Dec 2022

[36] Bill Sch 1 Part 3

[37] Bill Sch 3 Part 3 cls 178, 308; note, the role of Federal Safety Commissioner is provided for in section 37 of the current *Building and Construction Industry (Improving Productivity) Act 2016*

[38] Bill Sch 3 Part 3

[39] Bill Sch 3 Part 3 cl 200, and EM, paragraph 205

Establishment of National Construction Industry Forum	1 July 2023
Unpaid Parental Leave	6 Dec 2022
Paid FDV Leave (Pay slip changes)	1 February 2023