**INFORMATION SHEET**

**Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022**

On 2 December 2022, the Federal Government passed the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Bill).

On 6 December 2022, the Bill received royal assent and became the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Act).

The passage of this Act marks the most extensive industrial relations reform seen since the introduction of the Fair Work Act some 13 years ago.

**Abolition of the Registered Organisations Commission (ROC)**

Part 1 of the Act abolishes the ROC as the independent regulator of unions and employer organisations, and the role of Registered Organisations Commissioner. The ROC’s regulatory functions will be transferred to the General Manager of the FWC, including its management, compliance, and monitoring functions. All staff and funding will be transferred to the FWC.

*This will occur on a day to be fixed by proclamation, or otherwise the day after 6 months from the date the Act received royal assent.*

**Abolition of the Australian Building and Construction Commission (ABCC)**

Part 3 of the Act abolishes the ABCC, and provides workers in the building and construction industry the same rights as workers in other industries in relation to enforcement of the FWA, and removes the higher penalties and broader circumstances for penalties that have applied to industry participants.

All of the ABCC's functions not repealed by the Act, and any regulatory responsibilities and existing ABCC matters, will be transferred to the Fair Work Ombudsman (**FWO**).

*This abolition of the ABCC will occur on a day to be fixed by proclamation, or otherwise the day after 2 months from the date of royal assent.*

**Objects**

Part 4 of the Act seeks to amend the Act's objects to include promoting job security and gender equity, and the objectives of modern awards to include the need to improve access to secure work across the economy, and the need to achieve gender equity, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps. Similar objectives will be inserted into the minimum wage objectives in s284 of the FWA.

Those principles would need to be taken into account by the FWC in exercising its functions, including when making decisions on pay and conditions.

*This will occur on the day after royal assent.*

**Equal remuneration**

Part 5 would amend section 157 and Part 2-7 of the FW Act to guide the way the FWC

considers equal remuneration and work value cases. The amendments to section 157

will require the FWC’s consideration of work value reasons be free of

assumptions based on gender, and include consideration of whether there has been

historical gender-based undervaluation of the work under consideration.

The amendments to Part 2-7 of the FW Act will provide examples of matters the

FWC may take into account when deciding whether there is equal remuneration

for work of equal or comparable value, and clarify that evidence of a ‘male comparator’

is not required for the Commission to grant an equal remuneration order (ERO). The

amendments would also allow the FWC to make an ERO on its own initiative as

well as on application, and would confirm that the FWC is not required to find

discrimination on the basis of gender in order to grant an ERO.

*This will occur on the day after royal assent.*

**Expert panels**

Part 6 of the Act introduces the Expert Panels for pay equity, the Care and Community Sector and pay equity in the Care and Community Sector. These Expert Panels must be constituted with a majority of members who have knowledge of, or experience in, gender pay equity or anti-discrimination (Expert Panel for pay equity), or the Care and Community Sector (Expert Panel for the Care and Community Sector).

The provisions relating to the new Expert Panels require that decisions involving substantive gender pay equity matters, making an equal remuneration orders, and varying modern awards are made by Expert Panels appropriately constituted for that purpose.

*This will occur on a day to be fixed by proclamation, or otherwise the day after 3 months after the date the Act received royal assent.*

**Prohibiting pay secrecy**

Part 7 of the Act introduces provisions intended to promote pay transparency by prohibiting pay secrecy. Employees will now have a workplace right to disclose their remuneration or any terms and conditions of their employment that are reasonably necessary to determine remuneration outcomes. Employees will also be free to ask other employees about that information.

Any terms of contracts of employment which are inconsistent with the new workplace rights will have no effect, and an employer who enters a contract of employment which contains a provision inconsistent with the new workplace rights after the provisions come into effect will contravene the Act.

*This will occur on the day after royal assent.*

**Sexual harassment**

Part 8 of the Act 2022 has a number of key amendments that respond to the recommendation in the Australian Human Rights Commission’s Respect@Work report that the Fair Work Act 2009 expressly prohibit sexual harassment.

The Act introduces an express prohibition for a person to sexually harass another person in connection with work, essentially prohibiting sexual harassment in the workplace. The prohibition extends to all “workers”, including employees, contractors, subcontractors, outworkers, apprentices, trainees, students and/or volunteers, as well as prospective workers and third parties such as clients and customers. Workers, prospective workers, and persons conducting a business or undertaking will each be able to seek remedies under the Fair Work Act.

The Act allows for the FWC to deal with sexual harassment by:

1. continuing to provide for mechanisms for workers to seek a “stop sexual harassment order” to prevent future harassment (this process generally requires the FWC to deal with the dispute within 14 days of the application being made); and
2. dealing with a dispute through mediation and conciliation. If the matter remains unresolved, the parties can consent to arbitration in the FWC, or the worker(s) or their union can proceed to the Federal Court or the Federal Circuit and Family Court of Australia within 60 days of the FWC issuing a certificate confirming that the matter remains unresolved.

The FWC will be provided with the discretion to dismiss an application made more than 24 months after the relevant contravention (or the last of the contraventions) is alleged to have occurred, consistent with the limitation period under the Sex Discrimination Act 1984 (**SDA**).

Central to these changes is the ability for applications to be made jointly by multiple aggrieved persons, as well as by a union, as opposed to a single individual. This will enable the FWC to deal with multiple parties together if it is appropriate to do so – for example, where there is a common perpetrator or principal or work location of where the sexual harassment has occurred, from a practical perspective.

The amendments are also accompanied by a vicarious liability provision (modelled on the vicarious liability provisions in the SDA, ensuring a coherent federal framework in the differing jurisdictions) – which means that an aggrieved person can seek remedy from their employer in addition to the individual perpetrator for a breach of the prohibition, where the employer did not take all reasonable steps to prevent the relevant sexual harassment.

The Act also clarifies that the sexual harassment provisions will operate concurrently with State and territory law.

*This will occur the day after 3 months from the date the Act received royal assent.*

**Anti-discrimination and special measures**

Part 9 of the Act introduces “Breastfeeding”, “gender identity” and “intersex status” definitions which will be included into the anti-discrimination provisions of the Fair Work Act, allowing for the harmonisation of defined terms with other Commonwealth anti-discrimination laws, including the SDA.

Part 9 also amends the Act to confirm that ‘special measures to achieve equality’ are matters pertaining to the employment relationship and therefore matters about which an enterprise agreement may be made. This Part would also clarify that ‘special measures Statement of Compatibility with Human Rights to achieve equality’ are not discriminatory terms and therefore not unlawful terms in an enterprise agreement.

*This will occur the day after the Act receives royal assent.*

**Fixed term contracts**

Part 10 of the Act prohibits an employer from entering into a fixed term contract with an employee (other than a casual employee) that:

* Operates for a period greater than two years;
* Could operate and be extended or renewed for a period greater than two years in total; or
* The contract provides for an option or right to extend or renew the contract more than once.

The Act will also prohibit an employer entering into consecutive fixed term contracts to perform the same (or substantially similar) work, where there is substantial continuity of the employment relationship and the contract terms exceed 2 years in aggregate or any of those contracts contain an option for renewal or extension.

The Act sets out a number of exceptions to the prohibition, such as where an employee is engaged:

* to perform only a distinct and identifiable task involving specialised skills;
* in relation to a training arrangement;
* to perform essential work during a peak demand period, emergency, or a temporary absence of another employee;
* the employee earns above the high-income threshold for the year in which the contract is entered into (currently $162,000pa);
* it is appointment to a governance position that is time limited under the governing rules of a corporation or association;
* it is wholly or partly government-funded (as prescribed) for more than two years and "there is no reasonable prospect that the funding will be renewed at the end of that period";
* a modern award permits the use of fixed-term contracts in those circumstances and permits the term of the contract.

The effect of these changes will be that non-ongoing employees, including those under existing contractual arrangements, can only be employed on maximum or fixed term contracts for a period of up to two years. If an employee is engaged in contravention of these requirements, the term of the contract that provides for the contract to terminate at the end of an identifiable period will be of no effect (but the remainder of the contract will remain valid).

Additionally, the Fair Work Ombudsman will be required to prepare a Fixed Term Contract Information Statement that employers must supply to certain existing and prospective employees.

Employers are now required to provide employees with a fixed-term contract information statement before or as soon as practicable after the contract is entered into. The FWC has also been empowered to create additional exceptions in modern awards.

Employers who wish to rely on an exception will bear an evidential burden to demonstrate the exception applies. A mere assertion that the exception is met or if you get it wrong will see the employment contract deemed continuing and constitute a breach of the Act.

*This will occur on a day to be fixed by proclamation, or otherwise the day after 12 months from the date the Act received royal assent.*

**Flexible work**

Part 11 of the Act builds on the existing rights to request flexible working arrangements under section 65(1A) of the Fair Work Act 2009 (Cth) by expanding 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 defined in section 106B(2) of the Act, or is pregnant.

The Act also inserts a new section 65A, which requires an employer who receives a request for flexible working arrangements to respond in writing within 21 days and to:

* meet with an employee to discuss their flexible work request; and
* where the employer initially intends to refuse the flexible work request, seek to agree upon alternative changes to the employee’s working arrangements and note the agreed changes in the employer's written response (if possible); or
* if the employer still intends to refuse the request, outline the employer's reasonable business grounds for refusal and address the following:
	+ changes to the employee's working arrangement that would accommodate (to any extent) the employee's circumstances and that the employer would be willing to make; or
	+ that there are no such changes the employer could make to accommodate the employee's circumstances.

importantly, the Act defines “reasonable business grounds” to include (without limitation):

* when the request is too costly for the employer;
* when there is no capacity to change the working arrangements;
* when the changes would be impractical by requiring changes to work arrangements of existing employees or the hiring of new employees;
* when the change would likely result in significant loss in efficiency or productivity; and
* when the changes would likely have a significant negative impact on customer service.

The Act specifies that the nature and size of the enterprise carried on by the employer is relevant to determining whether the employer has “reasonable business grounds” to refuse a request.

For the first time the Act introduces a dispute resolution mechanism for circumstances where an employer has:

* refused a flexible work request; or
* not provided a written response to a flexible request within 21 days; and
* the parties are unable to resolve the dispute through discussion at the workplace level.

The Act stipulates that, where a flexible working arrangement dispute arises, the parties to the dispute must attempt to resolve the dispute by discussion.

If that doesn’t work, then a party can refer the matter to the FWC.

The FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances. If that fails, or there are exceptional circumstances, the FWC will have the power to deal with the dispute through mandatory arbitration, in accordance with new section 65C (Arbitration Clause), under which the FWC can make binding decisions, including:

* an order that an employer be taken to have refused a flexible work request, where the employer has not responded within the prescribed 21 days; or
* where the employer has refused the request, an order that it would be appropriate for the grounds on which the employer refused the request to be taken, or not to be taken, as reasonable business grounds; or
* an order that the employer provide the employee with a written response to their flexible work request under s 65A of the Act; or
* an order the employer grant the request or make specified changes (other than the requested changes) in the employees .

Orders under the new section 65C cannot be inconsistent with the FWA, or a term of a fair work instrument (other than another FWC order of the same kind).

*This will occur the day after 6 months from the date the Act received royal assent.*

**Termination of EA’s after nominal expiry date**

Part 12 of the Act provides a significant change to the process for unilaterally terminating an enterprise agreement which has passed its nominal expiry date. Previously, the FWC need only be satisfied that terminating an agreement which has passed its nominal expiry date is “not contrary to the public interest” and take into account the views of the parties to the agreement. The Act changes this, requiring the FWC to instead be satisfied of one of the following before terminating an existing agreement:

* the continued operation of the agreement would be unfair to the employees it covers;
* the agreement does not and is not likely to cover any employees; or
* the continued operation of the agreement would pose a significant threat to the viability of the business; terminating the agreement would reduce the risk of terminations; and the employer gives a guarantee that it will preserve termination entitlements under the agreement.

The Act requires the FWC to only terminate the agreement if one of the above criteria is met and if the FWC is satisfied that it is appropriate in all the circumstances to terminate it.

The new considerations make it much more difficult to employers to terminate out-of-date agreements.

If any of the employers, employees, or employee organisations oppose termination, then the matter must be heard by a Full Bench of the FWC (except in limited defined circumstances).

*This will occur the day after the Act receives royal assent.*

**Zombie agreements**

Part 13 provides for the sunsetting of ‘zombie’ agreements - The Act provides for an automatic sunset period, following which Pre-FW Act and FW Act bridging period individual and collective agreements will terminate.

The sunset period will be 12 months post commencement of Part 13 of Schedule 1 to the

Act, or a further period if extended (extensions must be applied for by employers or employees covered by the agreement, or industrial associations entitled to represent the industrial interests of employees, and cannot exceed 4 years).

Employers are required to give written notice to employees of the impending termination within 6 months of Part 13 of Schedule 1 to the Act commencing – the day after royal assent.

Until now, these ‘zombie’ agreements (any operative individual or collective agreements that were made under the Workplace Relations Act (before the FW Act coming into operation in July 2009) or during the ‘bridging period’ under the FW Act between 1 July 2009 to 31 December 2009) have allowed some employers to pay wages under the agreement that are lower than would be required to be paid if the award applied (for example, if the agreement did not require payment of penalties or loadings).

Employers who are covered by these agreements will need to compare their agreement with the relevant modern award, and assess whether it would help to apply to extend the sunset period for that agreement. The relevant modern award will then apply from the end of the sunset period.

*This will occur the day after the Act receives royal assent.*

**Procedural requirements**

Part 14 of the Act provides for certain changes to procedural requirements for approving enterprise agreements.

The Act replaces some of the current prescriptive pre-approval requirements for agreements – such as issuing a notice of employee representational rights and strict timeframes for key steps in the voting process – replaced by a broader requirement that the FWC be satisfied the employees “genuinely agreed” to the agreement.

For example, the requirement to issue a Notice of Employee Representational Rights (NERR) will remain as it presently operates under the FW Act, but only in the case of a proposed single enterprise agreement. This includes the requirement to wait until at least 21 days after the last notice is given before requesting employees vote for the agreement.

The Act retains an overarching requirement that an EA be “genuinely agreed to” by employees. Instead of prescriptive pre-approval requirements, the Act provides that the FWC must take into account the FWC’s Statement of Principles (which will be developed by the FWC) in deciding whether the EA has been “genuinely agreed to” by employees. This Statement of Principles will include principles around informing employees of bargaining and their rights to be represented, providing them a reasonable opportunity to consider the EA, explaining the terms of the EA and their effect to employees, providing employees with a reasonable opportunity to vote in a free and informed manner, and any other matter the FWC considers relevant. Further, the Act provides that the FWC cannot be satisfied that a multi-enterprise agreement has been genuinely agreed to unless the approval of each employee organisation bargaining representative has been obtained prior to putting the EA to vote, or the vote was otherwise approved by a FWC voting request order (see section above relating to multi-enterprise bargaining).

As is presently the case, minor technical or procedural errors in relation to the issuing of the NERR that do not disadvantage employees will not prevent an enterprise agreement from being approved.

*This will occur on a day to be fixed by proclamation, or otherwise the day after 6 months from the date the Act received royal assent.*

**Initiating bargaining**

Part 15 of the Act provides changes to initiating bargaining for single EAs. Currently, bargaining only commences when an employer agrees to bargain or initiates bargaining or where a majority support determination or a scope order is made by the FWC. Under the Act, for Single-EAs, employee bargaining representatives will have the power to initiate bargaining by giving written notice to the employer where the proposed EA replaces a single EA that has nominally expired, no more than 5 years has passed since its expiry, and the proposed EA will cover the same or substantially the same group of employees, and a single-interest employer authorisation did not cease to be in operation because of the making of the earlier EA. This notification would then trigger the good faith bargaining.

*This will occur on the day after the date the Act received royal assent.*

**Better off overall test (BOOT)**

Part 16 deals with BOOT.

BOOT at approval stage

The BOOT has been simplified, and it will now be easier for agreements to pass the BOOT, particularly where the application is supported by all parties. Under the Act, the term ‘prospective award covered employee’ is replaced with the term ‘reasonably foreseeable employee’. The Act also clarifies that the FWC must undertake a global assessment (not a line-by-line assessment) of whether each employee is better off having regard to the more beneficial and less beneficial terms of the EA as compared with the relevant award.

The FWC must also now give consideration to any views of the employer, employees and bargaining representatives. Where the common view of the employer and employee bargaining representatives is that the EA passes the BOOT, this must be given primary consideration by the FWC. The FWC may also only have regard to reasonably foreseeable patterns or kinds of work or types of employment (rather than hypothetical kinds of work that are not foreseeable).

In considering what is reasonably foreseeable, the FWC must have regard to the nature of the enterprise to which the agreement relates (and must determine whether a particular pattern or kind of work, or type of employment, is reasonably foreseeable if a view about the matter is expressed by the relevant employers, employees, or bargaining representatives). The assumption that employees are better off overall if a class to which they belong would be better off overall has also been retained.

FWC can amend the EA during the approval process

Instead of an undertaking, if the FWC has a concern that the EA (or any variation to the EA) does not meet the BOOT, then the FWC has the power to directly amend or excise terms in approving the EA (or varying an EA) if the FWC is satisfied that an amendment is necessary to address their concern. Where the FWC intends to amend an EA, it must seek the views of the employer or employees covered and the bargaining representatives.

BOOT during the life of the EA

New provisions have been added to allow employers, employees, or unions covered by the agreement to apply to the FWC for a reconsideration of the BOOT where the employees covered by an approved EA work other patterns or kinds of work or other types of employment that were not previously considered by the FWC at approval stage.

The same BOOT process is then undertaken by the FWC and the relevant Award and EA are assessed as they were at the approval stage (unless a variation to an EA has been made, in which case the award and EA are assessed at the time for approval of the variation). If the FWC considers that the BOOT is not met, then undertakings can be accepted, or the same FWC amendment process discussed above applies (whereby the FWC can amend the agreement if it is satisfied that an amendment is necessary to address concerns). The amendments will operate 7 days after the amendment, or a date specified in the amendment, which may be a day before the amendment is made (the FWC must specify a day before the amendment is made if the FWC considers that it is necessary to address the concern to which the amendment relates). If such an amendment is made to an agreement and the amendment has a retrospective effect, the Act specifies that there is no liability to pay a pecuniary penalty for past conduct.

*This will occur on a day to be fixed by proclamation, or otherwise the day after 6 months from the date the Act received royal assent.*

**Dealing with errors in enterprise agreements**

Part 17 of the Act will simplify the process for correcting any obvious errors, defects or

irregularities in EAs (including instances where the wrong version was submitted to, and

approved by, the FWC). The FWC will have the discretion to vary an EA to correct an obvious

defect or omission, or to vary an approval decision so that it applies to the correct version

of an EA.

*This will occur on the day after the date the Act received royal assent.*

**Bargaining disputes**

Part 18 introduces enhanced bargaining dispute powers for the FWC.

The Act removes the concept of bargaining related workplace determinations (which allowed the FWC to arbitrate a workplace determination in certain circumstances where there had been a “serious and sustained breach” of the good faith bargaining requirements and it issued a “serious breach declaration”). In its place are new provisions enabling the FWC to make “intractable bargaining declarations”, and make “intractable bargaining workplace determinations”. In other words, the FWC will have a new and much broader power to arbitrate enterprise agreements where bargaining has been protracted and there is no reasonable prospect of reaching agreement.

The Act will enable the FWC to make an intractable bargaining declaration where:

- An application has been made by a bargaining representative;

- The application does not relate to a proposed multi-enterprise agreement (unless a supported bargaining authorisation or a single interest employer authorisation is in operation);

- The FWC is satisfied that the FWC has dealt with the dispute as part of an application under s. 240 (an existing provision enabling the FWC to assist in resolving bargaining disputes), there is no reasonable prospect of agreement being reached if the FWC does not make the declaration, and it is reasonable to make the declaration taking into account the views of all bargaining representatives; and

- It is after the end of the minimum bargaining period, being the later of:

* 9 months post the latest nominal expiry date of any existing EA that applies to any of the employees that will be covered by the proposed agreement (if applicable); or
* 9 months after the day bargaining starts (which is the notification time for the proposed agreement, or if a supported bargaining authorisation or single interest employer authorisation is in operation, the date the authorisation comes into operation).

The FWC must then make an “intractable bargaining workplace determination” as quickly

as possible after making the declaration, or after the end of any negotiating period

specified in the declaration.

Importantly, the Act also adds a new factor to the list of factors that the FWC must take into

account in deciding upon the terms of a workplace determination (whether that be an

intractable bargaining workplace determination, or industrial action related workplace

determination), being “the significance, to those employers and employees, of any

arrangements or benefits in an enterprise agreement that, immediately before the

determination is made, applies to any of the employers in respect of any of the employees”.

This could make it more difficult to argue that any particular terms and conditions that are

contained in any current enterprise agreement should not be included in the workplace

determination.

*This will occur a day to be fixed by proclamation, or the day after 6 months from the date of Royal Assent.*

**Industrial action**

Part 19 relates to industrial action.

The Act, for the first time, permits protected industrial action to be taken in relation to multi-enterprise agreements, except for “cooperative workplace agreements”. Protected action ballot applications made in the context of multi-enterprise bargaining will be treated as separate applications for each employer and voting will be assessed on an employer-by-employer basis.

An extended notice period for protected industrial action of 120 hours applies in relation to multi-enterprise agreements, for other agreements, 3 working days.

There is also a new requirement that when making a protected action ballot order, the FWC must also make orders directing the bargaining representatives for the agreement to attend a conference/mediation conducted by a FWC member or a delegate of the FWC. Protected industrial action will not be available to any party who contravenes that order (e.g., if an employee’s bargaining representative breaches the order, then the employee cannot take protected industrial action. If an employer breaches the order, then the employer cannot take protected industrial action).

This will occur a day to be fixed by proclamation, or the day after 6 months from the date of Royal Assent.

**Bargaining**

The Act significantly expands the concept of multi-enterprise bargaining and provides employees and unions with greater powers to force employers to bargain for agreements that cover multiple employers (including, potentially, competitors, external companies within supply chains, or internal group companies, among others). This represents a substantial shift away from the long-held bipartisan focus on bargaining at the enterprise-level.

**Supported Bargaining**

Part 20 of the Act does not introduce new streams of multi-employer bargaining, but reduces barriers to access the existing multi-employer bargaining streams.

See more in attached Information Sheet.

*This will occur a day to be fixed by proclamation, or the day after 6 months from the date of royal assent.*

**Single interest employer authorisations**

Part 21 of the Act makes significant changes to the single interest employer authorisation scheme.

See more in attached Information Sheet.

*This will occur a day to be fixed by proclamation, or the day after 6 months from the date of royal assent.*

**Varying EA’s to remove employers and employees**

Part 22 of the Act allows an employer and affected employees to jointly vary a multi-enterprise agreement to remove themselves as parties covered by the agreement. The variation is made when the majority of employees affected vote to approve the variation. The vote can be conducted by a ballot or by an electronic method. The variation has no effect unless it is approved by the FWC.

The FWC must approve a variation where:

* the employer complied with the specified process requirements prior to the employee vote;
* a majority of affected employees cast a valid vote to approve the variation;
* there are no reasonable grounds for believing that a majority of the affected employees did not approve the variation; and
* each employee organisation covered by the multi-enterprise agreement agrees to the variation.

*This will occur a day to be fixed by proclamation, or the day after 6 months from the date of royal assent.*

**Cooperative workplaces**

Part 23 provides that the existing multi-enterprise agreement regime (which employees cannot be compelled to participate in, and which does not permit the taking of protected industrial action), is now known as the cooperative workplace agreement stream.

*This will occur a day to be fixed by proclamation, or the day after 6 months from the date of royal assent.*

**Small claims**

Part 24 enhances the small claims process - the Act will increase the compensation cap for

small claims proceedings under the FW Act from $20,000 to $100,000. An unsuccessful

party may be liable for the other party’s costs including filing fees paid to the court.

Small claims proceedings are an important aspect of the judicial system as they allow for a

more informal determination as the court is not bound by rules of evidence. The increase in

compensation cap will expand the scope of disputes that can be heard through this process.

*The later of (a) the day after the Act receives royal assent; and (b) 1 July 2023.*

**Employment advertisements**

Part 25 of the Act amends the FW Act to prohibit employers from advertising employment at a rate of pay that would contravene the FW Act or a Fair Work Instrument. This amendment principally seeks to protect migrant workers who are frequently targeted by job advertisements below minimum rates.

Before advertising for a position, employers should ensure that the rate of pay, and other

workplace conditions, offered comply with the FW Act or other fair work instruments

(including Modern Awards and Enterprise Agreements). Employers will not contravene

this provision if they have a “reasonable excuse” for non-compliance.

*This will occur the day after this Act receives royal assent.*

**Unpaid parental leave**

Part 25B of the Act provides that an employee may request an employer to agree to an extension of unpaid parental leave for a further period of up to 12 months following the end of available parental leave.

Much like the changes to flexible work requests, the Act establishes the process of responding to such a request (including requiring a written response within 21 days, discussion of the request with the employee, and a genuine attempt to reach agreement in relation to the request) and a mechanism for disputes relating to requests for an extension of unpaid parental leave to be resolved through the FWC.

Requests can only be refused on reasonable business grounds (with the grounds of refusal to be explained to the employee). Crucially, the Act defines “reasonable business grounds” to include (without limitation):

* when the request is too costly for the employer;
* when there is no capacity to change the working arrangements of other employees to accommodate;
* when the changes would be practical by requiring changes to work arrangements of other employees or the hiring of new employees;
* when the extension would likely result in significant loss in efficiency or productivity; and
* when the extension would likely have a significant negative impact on customer service.

Finally, the Act provides for new mechanisms to dispute a refusal to grant the extension. An

employee can access this new jurisdiction if the employer does not grant the request or does not respond in 21 days with a written explanation for the refusal. The parties must attempt to resolve the dispute at the workplace level and if not resolved there, a party can apply to the FWC to assist with resolving the dispute.

The FWC will be given powers to first (unless there are exceptional circumstances) deal with

the dispute by means other than arbitration, including conciliation and mediation. After

mediation or conciliation (or where there are exceptional circumstances), the FWC may then arbitrate a dispute and issue orders relating to a refusal where there is no reasonable prospect of the parties resolving the dispute themselves, taking into account fairness between the employer and the employee before making any order. The Act specifically provides that a FWC order cannot be inconsistent with the FW Act or a term of a fair work instrument that applies to the employer or employee. Civil penalties are also introduced for breaching an order of the FWC.

*This will occur on the day after the Act receives royal assent.*