



President's statement

Requests for flexible working arrangements and extending unpaid parental leave

Justice Hatcher, President

Sydney, 9 May 2023

[1] The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Secure Jobs Better Pay Act) amends the *Fair Work Act 2009* (FW Act), effective from 6 June 2023, to strengthen the right to request:

- flexible working arrangements, and
- an extension of unpaid parental leave.

[2] Both of these request types are currently included in the National Employment Standards (NES) at ss 65 and 76 respectively. However, the FW Act presently does not provide an avenue for employees to challenge the refusal of a request for flexible working arrangements or a request for an extension of unpaid parental leave that is said to be on reasonable business grounds, unless the parties have agreed to this in an employment contract, enterprise agreement or other written agreement or a public service determination authorises this.

[3] Two amendments are made so that the same rights of enforcement and dispute resolution which generally apply to the other NES entitlements are extended to requests for flexible working arrangements or an extension of unpaid parental leave:

- s 44 ('Contravening the National Employment Standards') is amended to the effect that civil remedy proceedings can be pursued (under Pt 4-1) where an employer contravenes new s 65A or 76A, and
- s 739 ('Disputes dealt with by the FWC') and s 740 ('Dispute dealt with by persons other than the FWC') are amended so that the Commission (or another person authorised to deal with a dispute) can deal with a dispute about whether an employer had reasonable business grounds to refuse a request for flexible working arrangements or an extension of unpaid parental pursuant to a dispute resolution term in a modern award, enterprise agreement, employment contract or other written agreement or a public service determination. However, the Commission will only be able to arbitrate a dispute about the reasonableness of the refusal of a request if the parties to the dispute have agreed to this (s 739(4)).

[4] In addition, the Commission will also be able to deal with disputes about requests for flexible working arrangements and extensions of unpaid parental leave under new ss 65B, 65C, 76B and 76C. The Commission will be able to deal with disputes under these new provisions as it considers appropriate, including by arbitration in certain circumstances.

[5] An overview of the new NES provisions is set out in **Attachment A**.

Implementation of the amendments

[6] As earlier stated, the new provisions come into effect on 6 June 2023.

[7] The Commission website will be updated to provide information on the new provisions and eligibility requirements for those wishing to make an application to the Commission to deal with a dispute.

[8] Two new forms have been developed which will be published in the coming weeks:

- A new Form F10C—*Application for a dispute about flexible working arrangements*, is to be used to request that the Commission deal with a dispute about a refusal of a request for flexible working arrangements under s 65B(4). It provides information about eligibility requirements and will ask applicants to indicate the reasons for making the request.
- A new Form F10B—*Application for a dispute about extension of a period of unpaid parental leave*, is to be used to request that the Commission deal with a dispute about a refusal of a request to extend unpaid parental leave under s 76B(3).

[9] A response form has not been developed for these new dispute types. This is consistent with the process for s 739 disputes, where the Commission does not seek an initial written response from the responding party. A basic case management flow chart for the new dispute types is at **Attachment B**.

[10] The Commission’s procedural rules relating to these forms will also be amended to deal with service requirements. Draft rules amendments will be published for consultation.

[11] Subscribers to the announcements subscriber list will be notified once the new forms and rules are available.

Modern award model terms

[12] Most modern awards include model terms relating to flexible working arrangements and dispute resolution which may need to be reviewed in light of these changes.

[13] During the 4 yearly review of modern awards, a model ‘Requests for flexible working arrangements’ term was inserted into most modern awards. There are 122 modern awards that contain the flexible work model term as follows:

- all 121 industry/occupational modern awards - during the 4 yearly review the model term was inserted into all industry/occupational modern awards, taking effect on 1 December 2018, and

- one state reference public sector modern award - the *Victorian Local Government Award 2015* (MA000132) contains the model flexible work term at clause 22A, as the result of an application by the Australian Services Union – Victorian & Tasmanian Authorities and Services Branch in 2021 to incorporate standard clauses from the 4 yearly review under s 158 (see AM2021/69).

[14] The model term is set out at **Attachment C**.

[15] In addition, s 146(b) of the FW Act requires modern awards to include a term that provides a procedure for settling disputes in relation to the NES. The terms of a model dispute resolution clause were determined during the award modernisation process¹ and then amended during the 4 yearly review by the plain language Full Bench. The model term was included in all industry and occupational modern awards.² The model dispute resolution term is set out at **Attachment D**.

[16] A Full Bench comprising myself, and Vice Presidents Catanzariti and Asbury, will shortly commence a matter on the Commission's own motion to consider the interaction between these model award terms and the new NES provisions (ss 65B, 65C, 76B and 76C) concerning the resolution of disputes about refusals of requests for flexible working arrangements or extensions of unpaid parental leave. The Full Bench will issue a statement about this shortly.

PRESIDENT

¹ [2008] AIRCFB 1000

² [2018] FWCFB 4704

Attachment A - Overview of the amendments

Requests for flexible working arrangements

[1] The amendments described below will come into effect on 6 June 2023.

[2] The Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* describes the purpose of the amendments as follows:

Division 4 of the NES deals with an employee's right to request changes to their working arrangements (flexible working arrangements). This Part would amend Division 4 of the NES to:

- expand the circumstances in which an employee may request a flexible working arrangement where they, or a member of their immediate family or household, experiences family or domestic violence, to align the coverage of family violence with the entitlement to family and domestic violence leave,
- support employee access to flexible working arrangements by strengthening employer obligations when considering an employee's request, based on the model award term developed by the FWC, and
- introduce dispute resolution provisions enabling the FWC to make orders where an employer refused an employee's request or did not respond to the request within 21 days, including consideration of whether the employer has reasonable business grounds to refuse a request.³

[3] Section 65 is amended to expand the circumstances in which an employee may make a request for flexible working arrangements to include where:

- the employee is pregnant, or
- the employee is experiencing 'family or domestic violence' or the employee provides care or support to a member of their immediate family or household who is experiencing 'family or domestic violence'.⁴

[4] Three new provisions are inserted into Division 4 of the NES as follows:

- s 65A—Responding to requests for flexible working arrangements
- s 65B—Disputes about the operation of this Division, and
- s 65C—Arbitration.

Section 65A—Responding to requests for flexible working arrangements

[5] New s 65A(1) requires an employer to give a written response to a request for flexible working arrangements within 21 days and ss 65A(2)-(6) specify what must be included in the response and the circumstances in which the request may be refused.

³ Revised Explanatory Memorandum, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, [609].

⁴ FW Act, ss 65(1A)(aa), (e) and (f).

[6] Section 65A(3) sets out the steps employers must take before refusing a request, including discussing the request with the employee and genuinely trying to reach agreement about making changes to the employee's working arrangements to accommodate the employee's circumstances.

[7] An employer may only refuse a request on reasonable business grounds, and must have had regard to the consequences of the refusal for the employee.

[8] What constitutes 'reasonable business grounds' for refusing a request in new s 65A(5) is substantively the same as the present provision, but contains a new note which states that '[t]he specific circumstances of the employer, including the nature and size of the enterprise carried on by the employer, are relevant to whether the employer has reasonable business grounds to refuse a request ...'

Section 65B—Disputes about the operation of this Division

[9] Where an employer has refused a request or failed to respond to a request in writing within 21 days, the Commission may deal with the dispute in certain circumstances.

[10] New s 65B(2) provides that the parties to a dispute must attempt to resolve the dispute at the workplace level in the first instance. If the dispute cannot be resolved at the workplace level, a party to the dispute may refer the dispute to the Commission.

[11] There is no time limit for referring a dispute to the Commission.

[12] New s 65B(4) empowers the Commission to arbitrate the dispute without the consent of the parties. However, the Commission must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances. This might include mediation or conciliation.

Section 65C—Arbitration

[13] New s 65C(1) specifies a range of orders the Commission may make if it deals with a dispute by arbitration. These include an order:

- if the employer has not given the employee a written response to the request under s 65A—an order that the employer be taken to have refused the request (s 65C(1)(a))
- if the employer refused the request—that it would be appropriate for the grounds on which the employer refused the request:
 - to be taken to have been reasonable business grounds (s 65C(1)(b)(i)), or
 - to be taken not to have been reasonable business grounds (s 65C(1)(b)(ii))
- that the employer take such further steps as the Commission considers appropriate, having regard to the matters in s 65A, if the Commission is satisfied

that the employer has not responded or has not responded adequately to the request, and

- that the employer grant the request or make specified changes (other than the requested changes) in the employee's working arrangements to accommodate, to any extent, the employee's circumstances. The Commission may only make such an order if the Commission is satisfied that there is no reasonable prospect of the dispute being resolved without the making of the order.

[14] In making an order the Commission is required to take into account fairness between the employer and the employee.

[15] A person must not contravene an order made under s 65C(1) and this is a civil remedy provision.

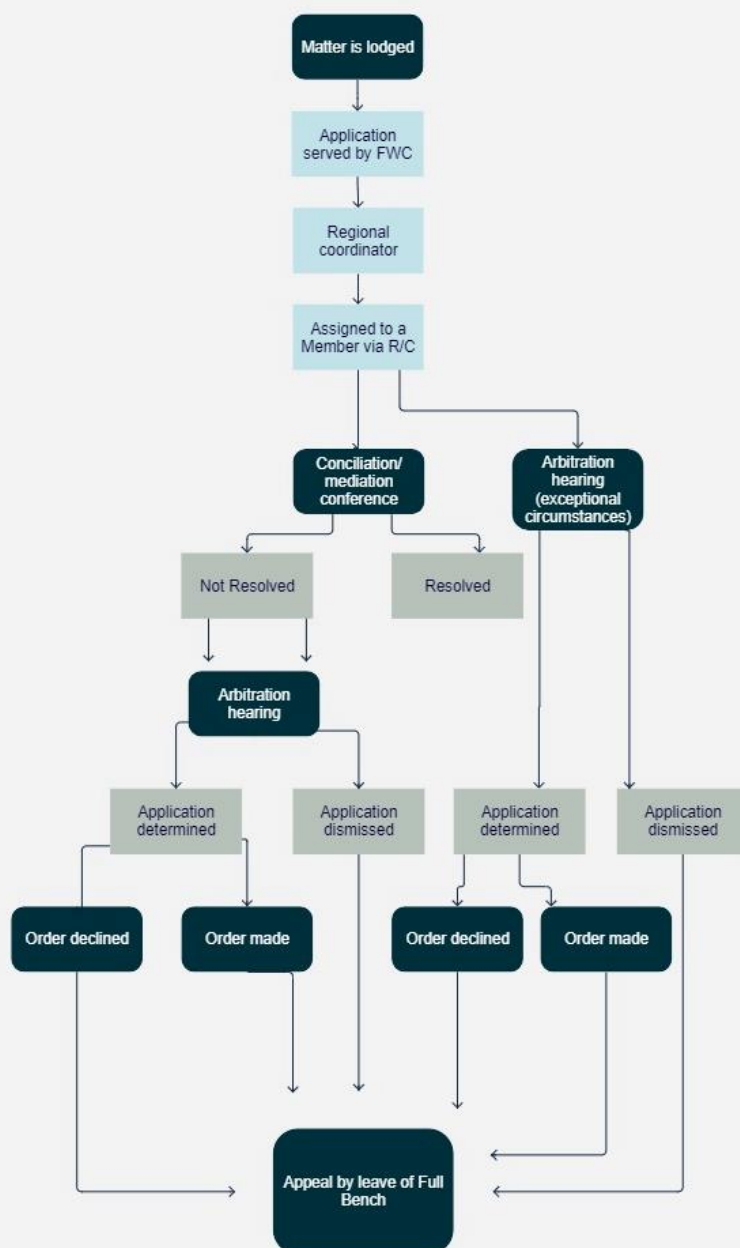
Requests to extend unpaid parental leave

[16] Part 25B of Schedule 1 to the Secure Jobs Better Pay Act deals with requests under s 76 of the FW Act to extend unpaid parental leave for a further period of up to 12 months. These new provisions parallel the amendments described above in relation to requests for flexible working arrangements, as follows:

- new s 76A deals with an employer's obligations when responding to a request to extend unpaid parental leave
- new s 76B provides for the Commission to deal with a dispute about an employer's refusal of a request to extend unpaid parental leave or failure to respond to a request in writing within 21 days. The Commission may arbitrate the dispute without the consent of the parties, however the Commission must first deal with the dispute by means other than arbitration unless there are exceptional circumstances, and
- new s 76C provides for the orders the Commission may make in arbitration (including an order that the employer grant the request or agree to a different extension period of up to 12 months, where the Commission is satisfied that there is no reasonable prospect of the dispute being resolved without the making of the order).

Attachment B–Case management flow chart

Flexible working arrangements/extension of unpaid parental leave disputes flowchart





Attachment C– Flexible working arrangements model term

XA. Requests for flexible working arrangements

XA.1 Employee may request change in working arrangements

Clause XA applies where an employee has made a request for a change in working arrangements under s.65 of the Act.

Note 1: Section 65 of the Act provides for certain employees to request a change in their working arrangements because of their circumstances, as set out in s.65(1A).

Note 2: An employer may only refuse a s.65 request for a change in working arrangements on ‘reasonable business grounds’ (see s.65(5) and (5A)).

Note 3: Clause XA is an addition to s.65.

XA.2 Responding to the request

Before responding to a request made under s.65, the employer must discuss the request with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee’s circumstances having regard to:

- (a) the needs of the employee arising from their circumstances;
- (b) the consequences for the employee if changes in working arrangements are not made; and
- (c) any reasonable business grounds for refusing the request.

Note 1: The employer must give the employee a written response to an employee’s s.65 request within 21 days, stating whether the employer grants or refuses the request (s.65(4)).

Note 2: If the employer refuses the request, the written response must include details of the reasons for the refusal (s.65(6)).

XA.3 What the written response must include if the employer refuses the request

Clause XA.3 applies if the employer refuses the request and has not reached an agreement with the employee under clause XA.2.

- (a) The written response under s.65(4) must include details of the reasons for the refusal, including the business ground or grounds for the refusal and how the ground or grounds apply.
- (b) If the employer and employee could not agree on a change in working arrangements under clause XA.2, the written response under s.65(4) must:
 - (i) state whether or not there are any changes in working arrangements that the employer can offer the employee so as to better accommodate the employee’s circumstances; and
 - (ii) if the employer can offer the employee such changes in working arrangements, set out those changes in working arrangements.

XA.4 What the written response must include if a different change in working arrangements is agreed

If the employer and the employee reached an agreement under clause XA.2 on a change in working arrangements that differs from that initially requested by the employee, the employer must provide the employee with a written response to their request setting out the agreed change(s) in working arrangements.

XA.5 Dispute resolution

Disputes about whether the employer has discussed the request with the employee and responded to the request in the way required by clause XA, can be dealt with under clause Y—Dispute Resolution.



Attachment D – Dispute resolution model award clause

X. Dispute resolution

- X.1 Clause X sets out the procedures to be followed if a dispute arises about a matter under this award or in relation to the NES.
- X.2 The parties to the dispute must first try to resolve the dispute at the workplace through discussion between the employee or employees concerned and the relevant supervisor.
- X.3 If the dispute is not resolved through discussion as mentioned in clause X.2, the parties to the dispute must then try to resolve it in a timely manner at the workplace through discussion between the employee or employees concerned and more senior levels of management, as appropriate.
- X.4 If the dispute is unable to be resolved at the workplace and all appropriate steps have been taken under clauses X.2 and X.3, a party to the dispute may refer it to the Fair Work Commission.
- X.5 The parties may agree on the process to be followed by the Fair Work Commission in dealing with the dispute, including mediation, conciliation and consent arbitration.
- X.6 If the dispute remains unresolved, the Fair Work Commission may use any method of dispute resolution that it is permitted by the Act to use and that it considers appropriate for resolving the dispute.
- X.7 A party to the dispute may appoint a person, organisation or association to support and/or represent them in any discussion or process under clause X.
- X.8 While procedures are being followed under clause X in relation to a dispute:
- (a) work must continue in accordance with this award and the Act; and
 - (b) an employee must not unreasonably fail to comply with any direction given by the employer about performing work, whether at the same or another workplace, that is safe and appropriate for the employee to perform.
- X.9 Clause X.8 is subject to any applicable work health and safety legislation.