



General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave under s.653 of the *Fair Work Act 2009* (Cth)

2015–2018

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The contents of this paper are the responsibility of the author and the research has been conducted without the involvement of members of the Fair Work Commission.

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Abbreviations list

ACTU	Australian Council of Trade Unions
Commission	Fair Work Commission
Explanatory Memorandum	<i>Fair Work Bill 2008</i> (Cth) Explanatory Memorandum
Fair Work Act	<i>Fair Work Act 2009</i> (Cth)
FFWH	Family Friendly Working Hours
IFA	Individual flexibility arrangement
NES	National Employment Standards

Executive summary

The General Manager of the Fair Work Commission (the Commission) is required every three years under section 653(1) of the *Fair Work Act 2009* (Cth) (Fair Work Act) to:

- review the developments in making enterprise agreements in Australia;
- conduct research into the extent to which individual flexibility arrangements (IFAs) under modern awards and enterprise agreements are being agreed to, and the content of those arrangements; and
- conduct research into the operation of the provisions of the National Employment Standards (NES) relating to employee requests made under ss.65(1) and 76(1) of the Fair Work Act.

This report presents findings for the 26 May 2015–25 May 2018 reporting period from the research conducted relating to employee requests made under ss.65(1) and 76(1). Pursuant to s.653(3) this report is due to the Minister for Jobs and Industrial Relations within six months from the end of the reporting period, i.e., by 25 November 2018.

Section 653(1)(c) requires the General Manager to conduct research into the operation of the provisions of the NES relating to:

- (i) requests for flexible working arrangements under s.65(1); and
- (ii) requests for extensions of unpaid parental leave under s.76(1).

Section 653(1)(d) requires that the research relating to requests for flexible working arrangements and extensions of unpaid parental leave also examine:

- (i) the circumstances in which employees make such requests; and
- (ii) the outcome of such requests; and
- (iii) the circumstances in which such requests are refused.

The findings in this report are drawn from qualitative research conducted for the Commission by EY Sweeney. The qualitative research involved 20 discussions with employees and 8 discussions with employers of their experiences in dealing with requests in relation to flexible working arrangements and/or extensions of unpaid parental leave.

1 Introduction

The Fair Work Commission (the Commission) is the national workplace relations tribunal. It is established by the *Fair Work Act 2009* (Cth) (Fair Work Act). The Commission carries out a range of functions including maintaining a safety net of modern award minimum wages and conditions; facilitating enterprise bargaining and approving enterprise agreements; administering the taking of protected industrial action and settling industrial disputes; and granting remedies for unfair dismissal.

The Commission is comprised of Members who are appointed by the Governor-General under statute, headed by a President.¹ The President is assisted by a General Manager,² also a statutory appointee, who oversees the administration of Commission staff.

Under section 653(1) of the Fair Work Act, the General Manager must:

- review the developments in making enterprise agreements in Australia;
- conduct research into the extent to which individual flexibility arrangements (IFAs) under modern awards and enterprise agreements are being agreed to, and the content of those arrangements; and
- conduct research into the operation of the provisions of the National Employment Standards (NES) relating to employee requests for flexible working arrangements and extensions to unpaid parental leave.

The review and research must also consider the effect that these matters have had on the employment (including wages and conditions of employment) of the following persons:

- women;
- part-time employees;
- persons from a non-English speaking background;
- mature age persons;
- young persons; and
- any other persons prescribed by the regulations.³

The Fair Work Act specifies that the research must be conducted in relation to the first three years following the commencement of the section 653 and each subsequent three-year period.⁴ A written report of the review and research must be provided to the Minister within six months after the end of the relevant reporting period.⁵

¹ Fair Work Act, ss.575 and 626.

² Fair Work Act, s.657.

³ Fair Work Act, s.653(2). The regulations do not prescribe any other persons.

⁴ Fair Work Act, s.653(1A).

⁵ Fair Work Act, s.653(3).

This report presents findings for the 26 May 2015–25 May 2018 period from the research conducted on the operation of the provisions of the NES relating to employee requests.⁶

Specifically, this report responds to the requirements in sub-sections 653(1)(c) and (d), that the General Manager of the Commission must:

- conduct research into the operation of the provisions of the NES relating to:
 - requests for flexible working arrangements under s.65(1);
 - requests for extensions of unpaid parental leave under s.76(1);
- conduct research into:
 - the circumstances in which employees make such requests;
 - the outcomes of such requests; and
 - the circumstances in which such requests are refused.⁷

Pursuant to s.653(3) this report is due to the Minister for Jobs and Industrial Relations within six months from the end of the reporting period, i.e. by 25 November 2018.⁸

Earlier reports conducted by the General Manager are published on the Commission's [website](#).

⁶ Section 653(1A) of the Fair Work Act provides that the General Manager is required to review and undertake research for the three-year period from commencement of the provision and each later three-year period. Section 653 commenced operation on 26 May 2009 (see s.2 of the Fair Work Act). The initial reporting period concluded 25 May 2012.

⁷ Fair Work Act, s.653(1).

⁸ Section 653(1A) of the Fair Work Act provides that the General Manager is required to review and undertake research for the three-year period from commencement of the provision and each later three-year period. Section 653 commenced operation on 26 May 2009 (see s.2 of the Fair Work Act). The initial reporting period concluded 25 May 2012. The initial General Manager's report presented results which included data up to 30 June 2012 as a result of data collection periods. A subsequent report was for the period through to 25 May 2015, although the data went to 30 June 2015.

2 Report outline

This report presents research undertaken into the operation of the NES relating to employee requests for the 2015–2018 reporting period.

Section 3 provides an overview of the relevant legislation. For a detailed explanation of the governing legislation pertaining to NES request provisions, refer to the 2009–2012 reports, which can be found on the Commission [website](#). Relevantly, there have been no substantive changes to the legislation or case law in the reporting period.

Research undertaken for this report is the qualitative study conducted by EY Sweeney which examines flexible working arrangements.⁹ The report covers flexible working arrangements arising from requests under sections 65 and 76 as well as IFAs, which are the subject of a separate report.¹⁰ The research methodology is discussed in Section 4.

As there had been no substantive changes to the legislation or case law in the reporting period, a large cross-sectional survey was not warranted. As noted in the report released in 2015, the Commission found it exceedingly difficult to successfully conduct large cross-sectional surveys where the object was to obtain data relating to persons who had made requests for flexible working arrangements or extensions of unpaid parental leave. This was due to the very low numbers of respondents that had accessed either section 65 or 76.

Quantitative studies whose target population is very small are very difficult and costly to administer as broad cross-sectional survey instruments. As a result, the Commission has not relied upon quantitative studies to obtain data for the purposes of this report, although it may be appropriate to revisit the methodology in future reports.¹¹

In addition to the difficulties of finding employees in the designated target groups, there is a further difficulty associated with the reliability of data in cross-sectional surveys. The Commission does not have access to documents or a registry which relate to requests under sections 65 or 76 made by employees. Therefore, the research conducted by the Commission relies upon employees and employers correctly identifying their requests as being pursuant to the Fair Work Act. This makes the reliability of the data less than perfect, given that many employers and employees may be incorrectly identifying the sources of their entitlements.

The findings of the qualitative research are found in Section 5. The results discuss how employees approach employers in relation to applications under sections 65 or 76, the reasons why employees seek to utilise those provisions, the reasoning of employers when considering the applications made by their employees and the processes for approving or rejecting applications.

⁹ EY Sweeney (2018), *Qualitative research for s.653 reports on individual flexibility arrangements and National Employment Standards rights to request provisions under the Fair Work Act 2009*, Final report, 15 October.

¹⁰ See O'Neill B (2018), *General Manager's report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements: 2015–2018*, Fair Work Commission, November.

¹¹ As an example of the difficulty in obtaining data that relates directly to s.65 requests, the 2014 AWRS study had more than 3050 employers complete the employee relations questionnaire, and 1393 of these had received a request from one or more employees for a flexible working arrangement. However, following further screening questions, just 84 of these employers received a request consistent with the provisions of the NES for a flexible working arrangement. Thus, less than 3 per cent of those surveyed ultimately were in the target population. This provides an indication of the vast amount of effort and resources which can be expended to reach the target population when it is small and difficult to identify. See O'Neill B (2012), [General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave: 2009–2012](#), Fair Work Commission, November, p. 17.

3 Legislative overview

The right to request flexible working arrangements¹² and the right to request extensions to unpaid parental leave¹³ are provided for in Part 2-2 of the Fair Work Act, which deals with the NES. The NES are 'minimum standards that apply to the employment of employees which cannot be displaced' even if an enterprise agreement includes terms that have the same (or substantially the same) effect as provisions of the NES.¹⁴ Further detail concerning the right to request entitlements in the NES can be found in the General Manager's report for the 2009–2012 period,¹⁵ while detail on amendments made to the provisions in 2013 are set out in the General Manager's report for the 2012–2015 period.¹⁶

The NES relate to a range of matters but the two critical provisions relevant to this report are:

- Section 65, which governs requests for flexible working arrangements; and
- Section 76, which governs extending the period of unpaid parental leave for a period of up to 12 months.

3.1 Operation of section 65 – requests for flexible working arrangements

3.1.1 Eligibility

Section 65 of the Fair Work Act prescribes the method for making and responding to requests for flexible working arrangements. An employee may make a request if the employee:

- has completed at least 12 months of continuous service with the employer immediately before making the request; or
- is a long term casual employee of the employer immediately before making the request and has a reasonable expectation of continuing employment on a regular and systematic basis.¹⁷

3.1.2 Making a request

Section 65 of the Fair Work Act requires that:

- the request must be in writing and set out the details of the change sought and the reasons for the change;¹⁸
- the employer must respond to the employee's request in writing within 21 days, stating whether or not the request is granted;¹⁹ and

¹² Fair Work Act, s.65.

¹³ Fair Work Act, s.76.

¹⁴ Fair Work Act, s.61(1) and s.55(5).

¹⁵ O'Neill B (2012), [General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave: 2009–2012](#), Fair Work Commission, November.

¹⁶ O'Neill B (2015), [General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave: 2012–2015](#), Fair Work Commission, November.

¹⁷ Fair Work Act, s.65(2).

¹⁸ Fair Work Act, s.65(3).

¹⁹ Fair Work Act, s.65(4).

- an employer may refuse the request only on reasonable business grounds,²⁰ and if the employer refuses the request, must provide written details of the reasons for the refusal.²¹

Section 65(5A), introduced by the *Fair Work Amendment Act 2013* (Cth), provides that 'reasonable business grounds' include:

- (a) that the new working arrangements requested by the employee would be too costly for the employer;
- (b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
- (c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
- (d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
- (e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

3.1.3 Family Friendly Working Arrangements Decision

As part of the 4 yearly review of modern awards, the Australian Council of Trade Unions (ACTU) made a claim to include entitlements to family friendly working arrangements in modern awards. In the 4 yearly review of modern awards, the Commission has a discretion to decide an application to vary a modern award in the terms it is applied for or on such other terms it considers appropriate.²² The ACTU claim proposed to supplement the NES entitlements in s.65 by creating a right for an employee to:

- vary their working hours (Family Friendly Working Hours or FFWH) to accommodate their parenting and/or caring responsibilities if they had completed at least six months' continuous service with the employer;
- revert to their former working hours up until the child was of school age (or later, by agreement); and
- an employee with caring responsibilities would have a right to revert for a period not exceeding two years from the date of commencement of their FFWH (or later, by agreement).²³

A Full Bench issued a decision on 26 March 2018 rejecting the ACTU claim, however, it noted that there was 'a significant *unmet* employee need for flexible working arrangements',²⁴ and expressed the 'provisional' view that modern awards should be varied to incorporate a model term to facilitate flexible working arrangements.²⁵ The Full Bench proposed a provisional model term to supplement the NES in the following ways:²⁶

²⁰ Fair Work Act, s.65(5).

²¹ Fair Work Act, s.65(6).

²² Fair Work Act, s.599.

²³ [2018] FWCFB 1692 at [10], citing ACTU, [Submission – Party's draft determination](#), 18 May 2017.

²⁴ [2018] FWCFB 1692 at [420].

²⁵ [2018] FWCFB 1692 at [417], see also [2018] FWCFB 5753 at [6].

²⁶ [2018] FWCFB 1692 at [425].

- the group of employees eligible to request a change in working arrangements relating to parental or caring responsibilities, was to be expanded to include ongoing and casual employees with at least six months' service but less than 12 months' service;
- before refusing an employee's request, the employer would be required to seek to confer with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances;
- if the employer refused the request, the employer's written response to the request will be required to include a more comprehensive explanation of the reasons for the refusal. The written response would also be required to include the details of any change in working arrangements that was agreed when the employer and employee conferred, or, if no change was agreed, the details of any changes in working arrangements that the employer can offer to the employee; and
- a note would be included to draw attention to the Commission's (limited) capacity to deal with disputes.

The model term was provisional, and subject to further consideration by the Commission. This occurred subsequent to the reporting period. The Full Bench issued a final version of the Family Friendly Working Arrangements model term on 25 September 2018. This changed the provisional term.²⁷ In particular, the Commission noted that 'an inadvertent consequence of clause X.7 of the *provisional* model term and ss.45 and 545 of the Act is that it would enable an employee to challenge an employer's decision to refuse a request, on reasonable business grounds.'²⁸ The Commission varied the provisional term to ensure that the model term was consistent with the Fair Work Act's approach.

The Full Bench proposes to review the model term in June 2021 and to consider whether any changes to the term are necessary.²⁹

3.2 Operation of section 76 – extending period of unpaid parental leave – extending for up to 12 months beyond available parental leave period

3.2.1 Eligibility

To be eligible for unpaid parental leave (and thereby eligible to request an extension of unpaid parental leave) the employee must have completed 12 months of continuous service at the relevant date³⁰ or be a long term casual employee of the employer immediately before the relevant date and have a reasonable expectation of continuing employment with the employer on a regular and systematic basis.³¹ An employee who takes unpaid parental leave may request his or her employer to agree to an extension of unpaid parental leave for a further period of up to 12 months

²⁷ [2018] FWCFB 5753 at [64].

²⁸ [2018] FWCFB 5753 at [23].

²⁹ [2018] FWCFB 5753 at [88].

³⁰ Fair Work Act, s.67(1). The date an employee must have completed 12 months of continuous service is set out in section 67(3) of the Fair Work Act.

³¹ Fair Work Act, s.67(2).

immediately following the end of the available parental leave period.³² The available parental leave period is 12 months (less any periods of particular kinds which are set out in the Act).³³

The employee is not entitled to extend the period of unpaid parental leave beyond 24 months after the date of birth or day of placement of the child.³⁴

3.2.2 Making a request

Requests for extended unpaid parental leave must be made in writing and must be given to the employer at least four weeks before the end of the available parental leave period.³⁵

The employer must respond to the employee in writing as soon as practicable, and not later than 21 days after the request is made, informing them of whether or not the request is granted. The employer may refuse the request only on reasonable business grounds and must provide written details of the reasons for the refusal.³⁶

What constitutes 'reasonable business grounds' is not defined in the Fair Work Act. However, the Explanatory Memorandum notes that 'a bare refusal (i.e., without reasons) is insufficient'³⁷ and provides the following further guidance:³⁸

Reasonable business grounds may include, for example:

- the effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service;
- the inability to organise work among existing staff; or
- the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request.

The *Fair Work Amendment Act 2015* (Cth) inserted a new requirement that the employer must not refuse the request unless the employer has given the employee a reasonable opportunity to discuss the request.³⁹ What constitutes a reasonable opportunity to discuss the request is not defined, however, the Explanatory Memorandum states 'it is intended that a discussion by telephone or other electronic means such as digital video conferencing will satisfy the requirements', whereas email and SMS will not.⁴⁰

³² Fair Work Act, s.76(1).

³³ Fair Work Act, s75(2).

³⁴ Fair Work Act, s.76(7).

³⁵ Fair Work Act, s.76(2).

³⁶ Fair Work Act, ss.76(3)–(5).

³⁷ *Fair Work Bill* (Cth), Explanatory Memorandum 2008, p. 44, item 265.

³⁸ *Fair Work Bill* (Cth), Explanatory Memorandum 2008, p. 44, item 267.

³⁹ Fair Work Act, s.76(5A).

⁴⁰ *Fair Work Amendment Bill* (Cth), Explanatory Memorandum 2014, p.2, item 8.

3.3 Scope and coverage of s.76 parental leave extension entitlement

Part 6-3 of the Fair Work Act extends the coverage of certain NES entitlements to non-national system employees, including the parental leave provisions contained in Part 2-2. This includes extending the right under s.76 to request extended unpaid parental leave to all employees through the use of the external affairs power.⁴¹

3.4 Disputes

Section 44(1) of the Fair Work Act provides that an employer must not contravene a provision of the NES. An employer who does so may be liable to a civil remedy order, such as a pecuniary penalty order.⁴²

However, s.44(2) of the Fair Work Act specifically provides that an order cannot be made in relation to the refusal of a request under s.65(5) or s.76(4) on reasonable business grounds. This means that an employer's decision to refuse a request on reasonable business grounds cannot be subject to court challenge.

In addition, the Commission may only deal with a dispute about whether an employer had reasonable business grounds to refuse a request for flexible working arrangements under s.65(5) or a request for an extension of unpaid parental leave under s.76(4) if the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the Commission dealing with the matter.⁴³

Table 3.1 shows the number of applications to the Commission made under s.739 during the period 1 July 2015 to 30 June 2018 to deal with a dispute relating to a request for flexible working arrangements under s.65.

Table 3.1: Number of applications to deal with a dispute in relation to requests for flexible working arrangements made under s.739 of the Fair Work Act

Financial year	Number of applications
1 July 2015–30 June 2016	32
1 July 2016–30 June 2017	52
1 July 2017–30 June 2018	41

Source: Fair Work Commission, *Annual Report 2015–16*; Fair Work Commission, *Annual Report 2016–17*; Fair Work Commission, *Annual Report 2017–18*.

Chart 3.1 and Table 3.2 below analyse administrative data directly from the Commission's Case Management System (CMS plus) and are not published in the Commission's annual reports.

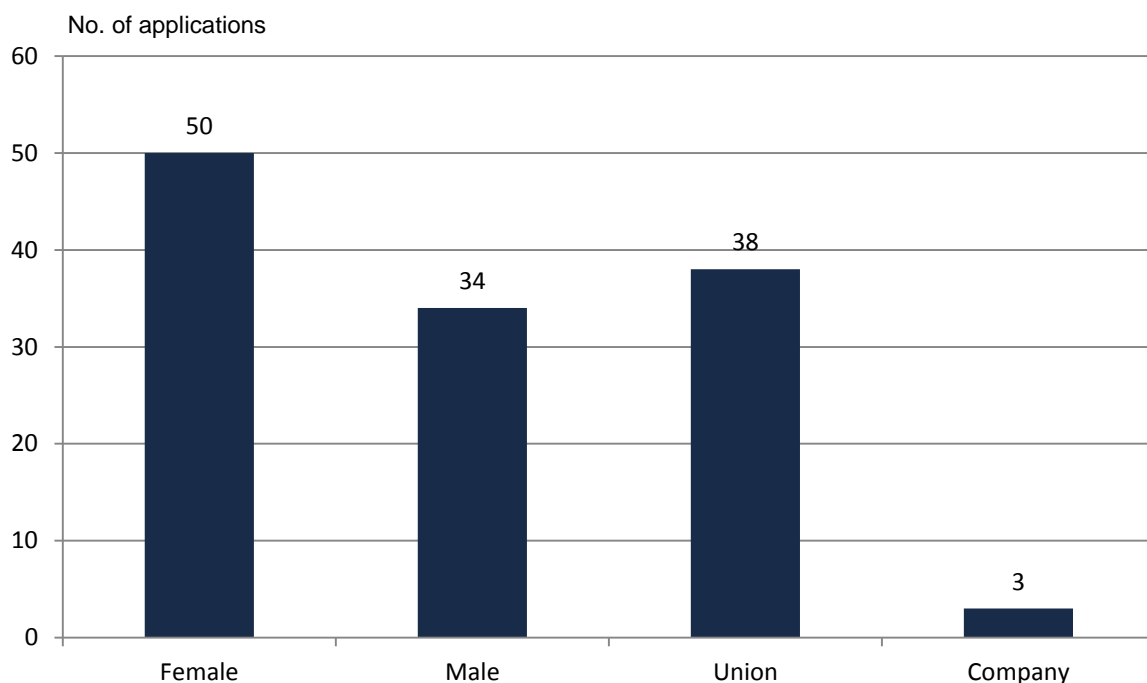
Chart 3.1 presents administrative data on the number of s.739 applications lodged over the reporting period by the type of applicant. Most applications were lodged by individuals and primarily by females. Fifty applications were lodged by females compared to 34 by males. Another 38 applications were lodged by an employee organisation on behalf of an individual and only 3 applications were lodged by an employer.

⁴¹ *Australian Constitution*, s.51(xxix).

⁴² Fair Work Act, s.546(1).

⁴³ Fair Work Act, s.739(2)(a). The Commission may also deal with a matter if a determination under the *Public Service Act 1999* authorises the Commission to deal with the matter (s739(2)(b)).

Chart 3.1: Number of applications to deal with a dispute in relation to requests for flexible working arrangements made under s.739 of the Fair Work Act, by type of applicant, 1 July 2015 to 30 June 2018



Source: Fair Work Commission, *CMS plus*.

Table 3.2 uses administrative data held in CMS plus to show the number of applications by industry to the Commission made under s.739 over the reporting period. State and territory Government administration (20 applications) and Health and welfare services (18 applications) had the highest number of applications over the reporting period.

As previously noted, an order cannot be made in relation to contraventions of section 65(5) or 76(4), concerning refusals of requests on reasonable business grounds. The Commission does not record the outcomes of conciliation conferences relating to disputes concerning flexible working arrangements pursuant to s.739.

Table 3.2: Number of applications to deal with a dispute in relation to requests for flexible working arrangements made under s.739 of the Fair Work Act, by industry. 1 July 2015 to 30 June 2018

	Number of applications
Aged care industry	4
Airline operations	6
Airport operations	1
Australian Capital Territory	5
Banking finance and insurance industry	3
Building, metal and civil construction industries	1
Cement and concrete products	1
Clerical industry	7
Coal industry	1
Commonwealth employment	5
Educational services	4
Electrical power industry	2
Food, beverages and tobacco manufacturing industry	2
Graphic Arts	2
Hair and Beauty	1
Health and welfare services	18
Hospitality industry	1
Local government administration	3
Manufacturing and associated industries	3
Mining industry	1
Miscellaneous	1
Oil and gas industry	3
Pharmacy operations	1
Postal services	1
Rail industry	2
Restaurants	1
Retail industry	3
Road transport industry	3
Scientific services	1
Social, community, home care and disability services	4
State and Territory Government administration	20
Stevedoring industry	4
Storage services	6
Tasmania	1
Telecommunications services	2
Vehicle industry	1

Source: Fair Work Commission, *CMS plus*.

4 Research methodology

This report relates specifically to sections 65 and 76 of the Fair Work Act. It is not a report on the flexible working arrangements generally available to employers and employees when dealing with family responsibilities. For example, arrangements that support employees with family responsibilities arising from formal human resources policies, enterprise agreements or even informal discussions at the workplace do not fall within the scope of this report.

As NES requests and/or their outcomes are not lodged with the Commission, or any agency, no administrative data source exists from which to report on the operation of these provisions. There are also no pre-existing data sets in Australia that would inform the General Manager with respect to the requirements of s.653 of the Fair Work Act.

This creates a level of difficulty when conducting research about provisions such as ss.65 and 76. To accurately research the operation of these sections, it is necessary to exclude from the research any flexible working arrangements that are not derived entirely by operation of the NES.

As the NES are legislated minima, in the sense that it is not possible to make an agreement to provide less than the relevant NES, any alternative arrangement which provides better arrangements is not a request pursuant to the NES. This means that many flexible working arrangements do not fall within the scope of this report.

Large scale cross-sectional surveys are extremely inefficient as the vehicle for obtaining data on small sub-populations. Additionally, analysing small populations can lead to inaccurate estimates or estimates with high standard errors meaning that the data needs to be interpreted with caution as they are unlikely to be representative of the broader population.

Combined with the absence of any substantive legislative or policy changes, the Commission concluded that it would be appropriate to pursue research methods other than a quantitative approach for this report. The Commission adopted a qualitative research method for this report utilising in-depth interviews.

4.1 Qualitative methodology

4.1.1 Research method

The Commission contracted EY Sweeney to obtain qualitative research on matters relating to s.65 and s.76 of the Fair Work Act.⁴⁴ The Commission proposed that EY Sweeney conduct in-depth interviews with employees and employers which would focus on the content and negotiations with employees who utilised or sought to utilise the NES provisions at sections 65 and 76 of the Act.

The in-depth research approach was chosen because, as EY Sweeney noted in their report, this enabled employees and employers to provide:

- richer detail—a one-on-one discussion allowed for detailed explanations from the individual employee or employer;
- frank conversations—the use of in-depth interviews allowed for open conversations which would not be influenced by the loudest or most dominant voice as might exist in a focus group, and

⁴⁴ EY Sweeney report, pp. 10–11.

- flexibility—in-depth interviews provide for greater flexibility in the discussion which is particularly useful in elucidating more information and also assists researchers involved with a low incidence of respondents.⁴⁵

EY Sweeney undertook an extensive recruitment process to ensure that the research it conducted included persons who had actually made NES requests, rather than requests about flexible working arrangements more generally. EY Sweeney noted, for example, that due to a lack of knowledge about the actual formalities associated with making a request through the NES, they were forced to adopt a much more extensive screening process than they would normally adopt for qualitative research.⁴⁶

The process involved several stages. Due to the low incidence of persons who had made requests under sections 65 and/or 76 found in the previous reports by the General Manager, EY Sweeney made a significant effort to capture more detail in the initial contact.⁴⁷ This allowed the researchers to have much more detailed conversations with potential interviewees ensuring that less time was spent conducting detailed interviews with persons who were not in scope for the research questions.

EY Sweeney also broadened the potential pool of interviewees by adding an online panel of potential respondents rather than the standard qualitative recruitment panel.⁴⁸

Importantly, however, EY Sweeney then included a second screening process where a professional recruitment team member interviewed the employee or employer to gain further insight around the varying situations that requests had been made. This further screening process ensured that the key criteria had been met before the in-depth interview took place.⁴⁹

Following the recruitment process, employees and employers who met the criteria were invited to participate in an in-depth interview. Interviews were conducted following a semi-structured approach where separate discussion guides were created for both employers and employees. The discussion guides provided the interviewer with the key issues required to canvass with the respondent.

Each interview ranged from 30-45 minutes in duration, and in total fourteen (14) interviews were conducted with employees in relation to section 65 requests and five (5) interviews were conducted with employers.⁵⁰ With respect to section 76 applications for additional unpaid parental leave, six (6) interviews were conducted with employees and three (3) with employers. The interviews addressed a range of questions relating to, and the issues faced by, employees and employers when making such arrangements.

The process to ensure that the respondents were in scope was complex. The difficulty in conducting this research was observed by EY Sweeney who noted that '[a] very small portion of Australian's [sic] qualified for this research, reflecting the portion of Australian's [sic] who have requested an IFA/NES since 2015.'⁵¹

⁴⁵ EY Sweeney report, p. 7.

⁴⁶ EY Sweeney report, p. 13.

⁴⁷ EY Sweeney report, p. 13.

⁴⁸ EY Sweeney report, p. 13.

⁴⁹ EY Sweeney report, p. 7.

⁵⁰ EY Sweeney report, p. 7.

⁵¹ EY Sweeney report, p. 13.

Finally EY Sweeney noted that they recruited participants from those listed in s.653(2) of the Fair Work Act. They noted that these respondents 'had similar views and experiences as the wider Australian population.' They indicated that the report would identify where the results of sub-groups of the population departed from the broader results.⁵²

4.1.2 Scope of the qualitative research

The research considered matters from the perspectives of employers and employees separately. For employees, the key considerations were:

- their experience in making requests;
- their personal circumstances leading to them making requests; and
- the challenges associated with making the request, including the impact on them and their personal and working life, both before and after making the request.

For employers, the interviews examined considerations such as:

- the criteria used to determine the suitability of requests made;
- the decision-making processes; and
- the delivery of outcomes.⁵³

⁵² EY Sweeney report, p. 15.

⁵³ EY Sweeney report, p. 12.

5 Qualitative research into requests pursuant to sections 65 and 76 of the Fair Work Act

This section discusses the findings from the EY Sweeney qualitative research into requests for flexible working arrangements and extensions of unpaid parental leave under ss.65 and 76 of the Fair Work Act.⁵⁴

5.1 Barriers to employees making requests under the NES

EY Sweeney noted that there were a range of reasons as to why employees would be reluctant to bring an application for extended unpaid parental leave or flexible working arrangements upon their return to the workforce. These included:

- a belief that pursuing flexible working arrangements would be perceived by the employer that they are less driven and affect their ability to progress their career;
- a concern that different employment conditions in the workplace would create tensions among staff not eligible to apply for the same conditions;
- a concern that their employer would believe their passion for work and employment would be reduced as they became more focused on their family. This was particularly raised by younger and middle-aged employees, particularly females, seeking to advance their careers; and
- a lack of knowledge about their rights concerning parental leave and flexible working conditions after having children which prevents employees from fully benefitting from the provisions of sections 65 and 76.⁵⁵

Employees did not have a full awareness of the range of business reasons that a manager might address when considering applications under the NES. Employees tended to think that the employer's decision would be principally a question connected with the personal relationship between the employee and their supervisor.⁵⁶

5.2 Barriers to employers granting applications under the NES

Employers raised a number of reasons which might prevent them from agreeing to a request for flexible working arrangements under the NES. These included:

- the additional administrative burden associated with flexible working arrangements was a significant issue, and particularly so for smaller businesses;
- operational reasons around the hours of work and days the employee was nominating may amount to reasons for employers to refuse flexible working arrangements. If there were concerns about how flexible working arrangements could successfully co-exist with the business needs, an employer was less likely to support the request; and
- concerns that the granting of requests for employees would create tensions in the workplace reducing the level of engagement at work and the business's objectives.⁵⁷

⁵⁴ Relevantly, the EY Sweeney report discussed flexible working arrangements generally. The report addressed matters relating to individual flexibility arrangements as well as requests pursuant to sections 65 and 76.

⁵⁵ EY Sweeney report, p. 30.

⁵⁶ EY Sweeney report, p. 31.

⁵⁷ EY Sweeney report, p. 31.

5.3 Types of flexibility included in the flexible working arrangements

The most common elements included or sought to be included in NES requests in the EY Sweeney report were:

- a reduction in hours from full-time to part-time;
- changes to the start-finish times;
- changes to the days of work;
- changes to the time work is performed; and
- working from home during selected days of the week.⁵⁸

With respect to those employees who requested additional unpaid parental leave beyond the 12-month period, employees that did so requested only a nominal amount of additional time, usually three months or less. There were no employees who requested the entire additional 12 months of unpaid parental leave. Employers also noted that most requests for additional unpaid parental leave did not extend beyond a few months.⁵⁹

5.4 Reasons for requesting additional leave under section 76

Employees requested additional unpaid parental leave for several reasons. These were:

- a desire to spend additional time with their child. Although many employees believed that they were going to return within the initial 12-month period, the lived experience of being home with their child often led to the employee wishing to take a longer period of leave;⁶⁰
- the importance of the employee's mental state. As employees approached the end of their leave period they often expressed the view that they were struggling to get their mindset right for life in a working environment. This was a key factor especially for first time mothers. This required that they take a few additional months leave to be mentally prepared;
- childcare challenges were also a significant reason for employees seeking additional leave periods. Employees stressed the challenges of finding childcare places, while others preferred caring for their child in their own home. Additional periods of leave were essential to source and plan future childcare arrangements,⁶¹ and
- financial security. When transitioning back to the workplace after a period of unpaid parental leave employees found that having arrangements set in place for their return to work provided a sense of job security.⁶²

5.5 Why do employees request section 65 flexible working arrangements

Employees who had returned to work after parental leave generally sought to commence on a part-time basis. None were found to have used the full 12 months and most did not extend beyond a few months.⁶³ The main reasons for seeking part-time work were:

⁵⁸ EY Sweeney report, p. 19.

⁵⁹ EY Sweeney report, p. 24.

⁶⁰ EY Sweeney report, p. 23.

⁶¹ EY Sweeney report, p. 23.

⁶² EY Sweeney report, p. 35.

- a desire to ease back into working life. Employees often felt there was a significant change in their life associated with becoming a parent and needed to gradually build up to full-time work;
- difficulty in obtaining full-time childcare. Employees who relied on full-time professional childcare would often return on fewer hours than employees who were relying on family and friends;
- a desire to ensure the best care for their child. This was seen to occur when the parent themselves felt they provided the best care and would take on more caring responsibilities at the expense of more hours of work.⁶⁴

5.6 Why do employers approve requests for flexible working conditions under the NES

Employers believe that there are benefits to their business by approving requests for flexible working conditions or longer periods of parental leave. The benefits include:

- an increased ability to attract and retain staff. Employers are focussing on a range of practices to attract and retain valued staff. For employers, there is an attraction in being seen as an employer of choice as it encourages new employees to choose the business while reducing staff turnover;⁶⁵
- being a powerful tool for increasing employee morale.⁶⁶ Employers who agreed to requests for flexible working arrangements or extended periods of unpaid parental leave believed that their relationship with their employees was positive and the employees were more committed to the business's objectives;⁶⁷ and
- greater productivity and efficiency. Employers felt that if an employee's request was granted, the employee was less likely to be distracted and was more efficient.⁶⁸

5.7 The process of making a request under the NES

Employees believed that there were some key elements in any request process which needed to occur for a request to be approved. These were:

- to be open and honest—employees believed that employers would appreciate the request and the reasons for the request if they explained honestly why the request was important to them;
- to be specific and direct—employees needed to ask for arrangements that were actually sought; and
- to plan ahead—making the request early gave the employer more time to consider the issues appropriately.⁶⁹

⁶³ EY Sweeney report, p. 24.

⁶⁴ EY Sweeney report, p. 24.

⁶⁵ EY Sweeney report, p. 21.

⁶⁶ EY Sweeney report, p. 21.

⁶⁷ EY Sweeney report, p. 34.

⁶⁸ EY Sweeney report, p. 34.

⁶⁹ EY Sweeney report, p. 25.

5.8 The approval process for NES requests

The EY Sweeney report noted four key criteria which employers used to determine whether requests for additional unpaid parental leave or flexible working arrangements would be approved. These were:

- the needs of the employee. The needs of employees provided the overall structure for the negotiations between employee and employer over the flexible working arrangements, as it was the employee's request which was being reacted to by the employer;
- the needs of the business. If the original request was manageable the employer usually requested that the employee formalise the request. However, if the original request could not be met given the needs of the business, it was either denied or negotiations commenced;
- the needs of clients of the business. Employers would need to assess how the request would impact on the relationship the business had with its clients. If, for example, the requesting employee was key to ensuring the business retained its clients or delivered services to the clients, the employer was unlikely to agree to requests which would damage this relationship. Again, this often then led to discussions about how the request might be altered but still provide the desired outcome; and
- past performance of an employee. Employers indicated that the decision to approve a request was a lot easier if the employee had an excellent work ethic and the employer had the belief that the quality of their work would not diminish.⁷⁰

Employers noted that a small number of requests had been denied in the past as they did not meet the operational need of the business.⁷¹

5.9 Formalisation of NES requests

Employees who were applying for flexible working arrangements under the NES were more likely to formalise the process as they were aware of the requirement to do so. This was the case for the requirements of both employees and employers. However, this very much required that the employer and employee fully understood the legal requirements which were part of a NES request. EY Sweeney noted that employees and employers who were less informed struggled to complete the necessary elements associated with NES requests.⁷²

5.10 Knowledge of the legislation providing for NES benefits

The EY Sweeney report noted that there was a limited level of knowledge amongst employees of the legislative entitlements for extended unpaid parental leave or flexible working arrangements. The limited level of knowledge has meant that there is significant difficulty for employees and employers when accessing these provisions, as well as for the Commission when seeking to review them.

⁷⁰ EY Sweeney report, p. 27.

⁷¹ EY Sweeney report, p. 27.

⁷² EY Sweeney report, p. 29.