



FAIR WORK
AUSTRALIA

Issues Paper 2/12

Making submissions to the General Manager's report into the operation of the first three years of the *Fair Work Act 2009* (Cth): Provisions of the National Employment Standards relating to flexible working arrangements and extensions of unpaid parental leave

Bernadette O'Neill, General Manager

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Abbreviations

Fair Work Act

Fair Work Act 2009 (Cth)

Transitional Act

*Fair Work (Transitional Provisions and Consequential Amendments)
Act 2009 (Cth)*

1 Introduction

Fair Work Australia is the national workplace relations tribunal established by the *Fair Work Act 2009* (Cth) (Fair Work Act). It is an independent body which performs a range of functions including maintaining a safety net of modern award wages and conditions, facilitating enterprise bargaining, supervising the taking of industrial action, approving enterprise agreements, settling industrial disputes, granting remedies for unfair dismissal, regulating industrial organisations and determining appeals.

Fair Work Australia is required by the Fair Work Act to perform its functions and exercise its powers in a manner that:

- is fair and just;
- is quick, informal and avoids unnecessary technicalities;
- is open and transparent; and
- promotes harmonious and cooperative workplace relations.¹

The tribunal consists of members of Fair Work Australia (all statutory appointees) and is headed by a President. The President is assisted by a General Manager, also a statutory appointee, who oversees the administration of Fair Work Australia staff. Fair Work Australia staff provides administrative support to the tribunal and its members. Together the General Manager and Fair Work Australia staff constitute a statutory agency with the General Manager as the head of the agency. Further information about Fair Work Australia's constitution and functions can be found on the Fair Work Australia website: www.fwa.gov.au.

1.1 General Manager's National Employment Standards provisions report and issues paper

Under s.653 of the Fair Work Act, the General Manager of Fair Work Australia must:

- conduct research into the operation of the provisions of the National Employment Standards relating to:
 - requests for flexible working arrangements²; and
 - requests for extensions of unpaid parental leave³; and
- conduct research into:
 - the circumstances in which employees make such requests;
 - the outcome of such requests; and
 - the circumstances in which such requests are refused.⁴

¹ Fair Work Act, s.577.

² Fair Work act, s.65(1).

³ Fair Work Act, s.76(1).

⁴ Fair Work Act, s.653(1).

Under the Fair Work Act, an employee who is a parent, or has responsibility for the care of a child, may request their employer for a change in working arrangements to assist the employee to care for a child if the child:

- (a) is under school age; or
- (b) is under 18 and has a disability.⁵

Under the Fair Work Act, an employee who takes unpaid parental leave for an initial 12 month period may request an extension of unpaid parental leave for a further period of up to 12 months.⁶

The Act requires the review to consider the effects of the National Employment Standard provisions on the employment, including wages and conditions of employment, of:

- (a) women;
- (b) part-time employees;
- (c) persons from a non-English speaking background;
- (d) mature age persons;
- (e) young persons;
- (f) any other persons prescribed by the regulations.⁷

The first review is of the three year period from May 2009 to May 2012.⁸ The National Employment Standard provisions commenced on 1 January 2010. The General Manager must give the Minister a written report of the review within six months following the review,⁹ and the Minister will then table the report in each House of Parliament.¹⁰

This review provides an opportunity for interested stakeholders and the public to provide their views and experiences of the operation of the right to request provisions under the National Employment Standards to inform this report. To assist submissions the issues paper provides questions and information on the Fair Work Act National Employment Standards provisions relating to requests for flexible working arrangements and requests for extensions of unpaid parental leave.

1.1.1 Guide to making a submission

Anyone can make a submission to Fair Work Australia, and the General Manager encourages submissions from a wide range of individuals and organisations with experience with requests made under the National Employment Standards in relation to flexible working arrangements and extensions of unpaid parental leave.

This issues paper provides a number of questions to assist in drafting submissions on the operation of the process since its commencement on 1 January 2010.

⁵ Fair Work Act, s.65(1).

⁶ Fair Work Act, s.76(1).

⁷ Fair Work Act, s.653(2).

⁸ Fair Work Act, s.653(1A). The first review must be of the three year period from when s.653 commenced. The National Employment Standard provisions commenced on 1 January 2010.

⁹ Fair Work Act, s.653(3).

¹⁰ Fair Work Act, s.653(4).

Submissions do not necessarily have to address all sections of this paper or respond to all questions and need not be lengthy. Submissions may contain facts, arguments and opinions. Where possible, submissions should provide evidence to support the views put forward.

The General Manager will publish all submissions, unless it contains information of a confidential or commercially sensitive nature.¹¹

1.1.2 Timetable

The timetable for making a submission to the General Manager on the operation of the unfair dismissal system is:

- Issue paper released: 9 March 2012
- Submissions open: 12 March 2012
- Submissions close: 12 April 2012.

All submissions must include a cover sheet available from the Fair Work Australia website: www.fwa.gov.au. Submissions must be sent to gmreport@fwa.gov.au.

2 Requests for flexible working arrangements to care for a child

The Fair Work Act states that one object of the Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by assisting employees to balance their work and family responsibilities by providing for flexible working arrangements.¹²

The Act provides for an employee who is a parent, or has responsibility for the care of a child, to request a change in working arrangements to assist the employee to care for the child if the child is under school age or is under 18 and has a disability.¹³

Examples of changes in working arrangements may include:

- changes in hours of work (e.g. a reduction in hours to part-time work arrangements);
- changes in patterns of work (e.g. a change to non-standard start or finish times, or the working of 'split shifts');
- changes in location of work (e.g. working from home); or
- other arrangements, such as job sharing.

1. Were you aware of the right under the National Employment Standards for an employee to request flexible working arrangements to assist the employee in caring for a child?
2. What changes to working arrangements to care for a child have been requested under the provision in the National Employment Standards?

¹¹ If a submission made by a person or body includes information that is claimed to be confidential or commercially sensitive, and the General Manager is satisfied that the information is confidential or commercially sensitive, the General Manager may decide not to publish the information.

¹² Fair Work Act, ss. 3 and 3(d).

¹³ Fair Work Act, s.65.

2.1 Requirements for employees making requests for flexible working arrangements

The employee is not entitled to make a request for flexible working arrangements unless¹⁴:

- if the employee is not a casual employee, the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or
- if the employee is a casual employee, the employee is a long term casual employee of the employer immediately before making the request; and has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

The request must be made in writing and set out details of the change sought and the reasons for the change.

3. What have been the reasons given for requests for flexible working arrangements?

2.2 Requirements for employers responding to requests for flexible working arrangements

The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request, or grants the request with variation.¹⁵

The employer may refuse the request only on reasonable business grounds, and if the employer does so, the written response must include details of the reasons for the refusal.¹⁶

4. What have been the outcomes of requests for flexible working arrangements – i.e. have they been granted, granted with variation or refused?

5. For any requests for flexible working arrangements that have been refused, what have been the reasons given for refusal?

6. What have the outcomes of requests for flexible working arrangements been? For firms? For employees?

3 Requests for extensions of unpaid parental leave beyond the initial 12 month parental leave period

The parental leave provisions of the Fair Work Act provide for an employee to take up to an initial 12 months unpaid parental leave if the leave is associated with:

- the birth of a child of the employee or the employee's spouse or de facto partner; or the placement of a child with the employee for adoption; and
- the employee has or will have responsibility for the care of the child.¹⁷

¹⁴ Fair Work Act, s.65.

¹⁵ Fair Work Act, s.65(4).

¹⁶ Fair Work Act, ss 65(5) and 65(6).

¹⁷ Note that, under s.70 of the Fair Work Act, entitlement to unpaid parental leave is affected by s.67 (which deals with length of the employee's service) and, for adoption, s.68 (which deals with the age etc. of the adopted child). Note also

Under the National Employment Standards an employee who takes unpaid parental leave for an initial 12 month period may request an extension of unpaid parental leave for a further period of up to 12 months.

7. Were you aware of the right under the National Employment Standards for an employee to request extensions to unpaid parental leave beyond the initial 12 month period?

8. What extensions to unpaid parental leave beyond the initial 12 month period have been requested under the provision in the National Employment Standards?

3.1 Requirements for employees making requests for extensions of unpaid parental leave beyond the initial parental leave period

The request must be made in writing and must be given to the employer at least four weeks before the end of the initial parental leave period.¹⁸

9. What have been the reasons given for requests for extensions to unpaid parental leave beyond the initial 12 month period?

3.2 Requirements for employers responding to requests for extensions of unpaid parental leave

The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request, or grants the request with variations. The response must be given as soon as practicable, and not later than 21 days after the request is made.¹⁹

The employer may refuse the request only on reasonable business grounds and if the employer does so, the written response must include details of the reasons for the refusal.²⁰

10. What have been the outcomes of requests for extensions of unpaid parental leave – i.e. have they been granted, granted with variation or refused?

11. For any requests for extensions of unpaid parental leave that have been refused, what have been the reasons given for refusal?

12. What have the outcomes of requests for extensions of unpaid parental leave been? For firms? For employees?

that, under s.70, the 12 months is reduced by the amount of any unpaid special maternity leave the employee has taken under s.80(7).

¹⁸ Fair Work Act, s.76(2).

¹⁹ Fair Work Act, s.76(3).

²⁰ Fair Work Act, ss. 76(3) and 76(4).

3.3 Requirements for employee couples

The request must specify any amount of unpaid parental leave and unpaid special maternity leave that the other member of the employee couple has taken, or will have taken, in relation to the child before the extension starts.

The period of the extension cannot exceed 12 months, less any period of unpaid parental leave or unpaid special maternity leave that the other member of the employee couple has taken before the extension starts.

4 Research on the rights to request under the National Employment Standards

As a result of consultation conducted to date, a research program is currently being undertaken in relation to the rights to request under the National Employment Standards.

The surveys of employers and employees are being conducted using a two-stage survey process. As information on the rights to request under the National Employment Standards is difficult to obtain, pilot surveys of employers and employees were conducted to assess the quality and nature of information that can be obtained through survey instruments. These surveys were undertaken between April and June 2011. The main set of surveys is scheduled to be conducted from April to May 2012.

Information on the surveys is available from the General Manager's reporting requirements section of the Fair Work Australia website.

<http://www.fwa.gov.au/index.cfm?pagename=adminmgmreporting#Researchprogram>

In finalising the report to the Minister Fair Work Australia will draw upon submissions that have been made to the Fair Work Act Review.

5 Consolidated list of questions

Flexible working arrangements to assist in caring for a child

1. Were you aware of the right under the National Employment Standards for an employee to request flexible working arrangements to assist the employee in caring for a child?
2. What changes to working arrangements to care for a child have been requested under the provision in the National Employment Standards?
3. What have been the reasons given for requests for flexible working arrangements?
4. What have been the outcomes of requests for flexible working arrangements – i.e. have they been granted, granted with variation or refused?
5. For any requests for flexible working arrangements that have been refused, what have been the reasons given for refusal?

6. What have the outcomes of requests for flexible working arrangements been? For firms? For employees?

Extensions to unpaid parental leave beyond the initial 12 month period

7. Were you aware of the right under the National Employment Standards for an employee to request extensions to unpaid parental leave beyond the initial 12 month period?

8. What extensions to unpaid parental leave beyond the initial 12 month period have been requested under the provision in the National Employment Standards?

9. What have been the reasons given for requests for extensions to unpaid parental leave beyond the initial 12 month period?

10. What have been the outcomes of requests for extensions of unpaid parental leave – i.e. have they been granted, granted with variation or refused?

11. For any requests for extensions of unpaid parental leave that have been refused, what have been the reasons given for refusal?

12. What have the outcomes of requests for extensions of unpaid parental leave been? For firms? For employees?