

## Right to flexible work and extended unpaid parental leave

14 February 2023, **BN7**

### Introduction

The National Employment Standards (**NES**) in the *Fair Work Act 2009 (Cth)* (**FW Act**) contain two entitlements that are not currently enforceable – the right to request flexible working arrangements and to request to extend unpaid parental leave. If an employer refuses a request on ‘reasonable business grounds’, there is no ability for a worker to challenge or appeal this decision (unless a term of an industrial instrument gives them that right<sup>1</sup>). The current provisions also contain minimal guidance on how an employer needs to respond to a request. This gap in the safety net discriminates against workers with family responsibilities and disproportionately impacts women who still shoulder the lion’s share of caring responsibilities and take the majority of parental leave. A significant proportion of requests for flexible work are refused, either in whole or part, and a significant proportion of employees who need flexibility do not ask at all (including many men).<sup>2</sup>

Juggling work and care falls heaviest on women, limiting the hours they can take on, the money they can earn and their career progression. It also increases the stress in their lives. After the age of 35, women are more than twice as likely to work part time than men,<sup>3</sup> demonstrating the need for stronger rights to flexible working arrangements in order to encourage a fairer sharing of caring responsibilities by men, and to prevent women being forced into insecure work at the crucial moment when they take on caring responsibilities.

The recently enacted *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (SJBPA Act)* amends the FW Act to impose new requirements on employers relating to requests for flexible work and extended unpaid parental leave, and to give employees a right of review in the Fair Work Commission (**FWC**) and the courts. The SJBPA Act also introduces civil penalties for a contravention of orders the FWC makes. These reforms will strengthen the right to flexible work and extended unpaid parental leave by transforming them from merely ‘rights to request’ to substantive rights to a change in working arrangements akin to a reasonable adjustment scheme under anti-discrimination laws.

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<sup>1</sup> FW Act s739 (2)

<sup>2</sup> Professor Jill Murray, Family Friendly Provisions: Report to the Fair Work Commission, 4 May 2017

<sup>3</sup> Australian Government Ibid. Page 5

## Commencement Date

These changes become operative on 7 June 2023. The new provisions apply to requests made under s65(1) and s76(1) on or after 7 June 2023.<sup>4</sup>

## New Flexible Work Provisions

### Context and current provisions

Under current provisions in the FW Act, employees can request flexible working arrangements (such as a change to hours of work, patterns of work, and location of work) in particular circumstances, including if they have caring responsibilities for children or others, have a disability, are 55 or older, are experiencing violence from a family member, are providing care or support to a member of their family or household who is experiencing violence from their family, or where they are returning to work after the birth or adoption of a child.<sup>5</sup> In order to make a request, an employee has to have at least 12 months continuous service with an employer.<sup>6</sup> An employer must provide a written response to the request within 21 days stating whether they grant or refuse the request.<sup>7</sup> An employer can refuse the request on 'reasonable business grounds'.<sup>8</sup> If an employer refuses an employee's request on reasonable business grounds, there is currently nothing more the worker can do – they cannot challenge that decision (unless there was a failure in the process<sup>9</sup>). The reasonable business grounds 'defence' is unable to be scrutinised by the FWC or the courts, giving workers juggling care and work no meaningful right to require their employer to help them balance those responsibilities.

The new provisions do three key things: they give employees a substantive right to a change in working arrangements (subject to the reasonable business grounds 'defence'), they give employees a right to a process with the employer, and they give employees a right of review (both of the substantive and process rights) through the FWC, or for contravention of either right in the courts.

The provisions also expand the circumstances in which an employee may request flexible work.

### Expansion of circumstances in which employees can request flexible work – s65A (1A)

The SJPB Act expands the circumstances in which an employee may request flexible work arrangements to include the following situations:

- where the employee is pregnant;<sup>10</sup>
- where the employee is experiencing family and domestic violence<sup>11</sup> (there is no longer a requirement that the violence is perpetrated by a member of the employee's family<sup>12</sup>); and
- where the employee provides care and support to a member of their immediate family or member of their household, and they require care or support because they are

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<sup>4</sup> FW Act Sch 1 Part 13 Div 9 cl 64; FW Act Sch 1 Part 13 Div 20 cl 85

<sup>5</sup> FW Act s65 (1), (1A), (1B)

<sup>6</sup> s65C (2)

<sup>7</sup> s65C (4)

<sup>8</sup> s65C (5)

<sup>9</sup> Stanley v Service to Youth Council Incorporated [2014] FCA 643 at 169-177; Poppy v Service to Youth Council Incorporated [2014] FCA 656 at 139-149.

<sup>10</sup> New s65 (1A) (aa)

<sup>11</sup> New s65 (1A) (e)

<sup>12</sup> Current s 65 (1A) (e)

experiencing family and domestic violence<sup>13</sup> (there is no longer a requirement that the violence is perpetrated by a member of the person's family<sup>14</sup>).

### **New requirements for employers when considering requests (process rights) – s65A (3)**

The changes in the SJPB Act impose new requirements on employers to genuinely try to reach agreement at the workplace level with employees who request flexible working arrangements, including by having discussions with them, and making efforts to identify alternative arrangements when an employee's request cannot be accommodated.

Employers may only refuse requests if they have:

- Discussed the request with the employee;<sup>15</sup> and
- Genuinely tried to reach an agreement with the employee about making changes to the employee's working arrangements to accommodate their circumstances;<sup>16</sup> and
- The employer and employee have not reached such an agreement;<sup>17</sup> and
- The employer has had regard to the consequences of the refusal for the employee;<sup>18</sup> and
- The refusal is on reasonable business grounds.<sup>19</sup>

These changes legislate the substance of the FWC's model flexible working arrangements modern award term.

Part of the process of trying to accommodate an employee's circumstances is consideration of alternative arrangements where an employee's original request is refused on reasonable business grounds. The employer's written response must include any alternative arrangements the employer is willing to make. The substantive right of the employee is to have their requested change made, unless there are reasonable business grounds for the refusal (it is not to have the requested change and/or other unidentified alternative arrangements). If there are such grounds, then their process rights include a consideration of the alternatives.

### **Reasonable Business Grounds – s65A (5)**

The provisions in the FW Act regarding what are reasonable business grounds for refusing a request for flexible working arrangements are unchanged in substance from current provisions in new s65A (5). The specific circumstances of the employer, including but not limited to the size and nature of the employer's enterprise, are relevant to whether an employer has reasonable business grounds to refuse a request.<sup>20</sup>

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<sup>13</sup> New s65 (1A) (f)

<sup>14</sup> Current s65 (1A) (f)

<sup>15</sup> New s65A (3) (a) (i)

<sup>16</sup> New s65A (3) (a) (ii)

<sup>17</sup> New s65A (3) (b)

<sup>18</sup> New s 65A (3) (c)

<sup>19</sup> New s65A (3) (d)

<sup>20</sup> Note to new s65A(5).

## New requirements for responding to requests (process rights) – s65A

Employers must still provide a written response to the request within 21 days.<sup>21</sup> Under the new entitlement, the response must:

- State that the employer grants the request;<sup>22</sup> or
- If, following discussion between the employer and employee, they agree to a change to the employee's working arrangements that differs from the original request – set out the agreed change;<sup>23</sup> or
- State that the employer refuses the request<sup>24</sup> and include the details of the reasons for the refusal,<sup>25</sup> set out the particular business grounds for refusing the request,<sup>26</sup> explain how those grounds apply to the request,<sup>27</sup> and either set out any changes that the employer is willing to make to accommodate the employee's request<sup>28</sup> or state that there are no such changes.<sup>29</sup>
- The response must also set out the effect of sections 65B and 65C<sup>30</sup> – i.e. the sections regarding the powers of the FWC in relation to disputes and arbitration.

Some of these changes legislate the substance of the FWC's model flexible working arrangements modern award term.

## Disputes about flexible work – right to a review

### Referral of disputes to FWC – s65B

The SJBPA Act empowers the FWC to resolve disputes regarding flexible work. Where the dispute relates to an employer's refusal to grant a request,<sup>31</sup> or provide a written response to a request within 21 days,<sup>32</sup> the FWC can deal with the dispute. Parties must first attempt to resolve the dispute at the workplace level.<sup>33</sup> If workplace discussions do not resolve the dispute, a party to the dispute can refer it to the FWC.<sup>34</sup>

If a dispute is referred, the FWC must first deal with the dispute by means other than arbitration (unless there are exceptional circumstances),<sup>35</sup> and then by arbitration.<sup>36</sup> Before arbitration, the FWC can deal with the dispute as it considers appropriate, including by way of conciliation, mediation, making recommendations, or expressing opinions.<sup>37</sup>

### Arbitration and orders – s65C

The FWC can deal with the dispute by arbitration by making any of the following orders:

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<sup>21</sup> New s65A (1)

<sup>22</sup> New s65A (2) (a)

<sup>23</sup> New s 65A (2) (b)

<sup>24</sup> New s 65A (2) (c)

<sup>25</sup> New s65A (6) (a)

<sup>26</sup> New s 65A (6) (b) (i)

<sup>27</sup> New s65A (6) (b) (ii)

<sup>28</sup> New s65A (6) (c) (i)

<sup>29</sup> New s65A (6) (c) (ii)

<sup>30</sup> New s65A (6) (d)

<sup>31</sup> New s65B (1) (b) (i)

<sup>32</sup> New s65B (1) (b) (ii)

<sup>33</sup> New s65B (2)

<sup>34</sup> New s65B (3)

<sup>35</sup> New s65B (4) (a)

<sup>36</sup> New s65B (4) (b)

<sup>37</sup> See note to new s65B(4)

- if the employer has not given the employee a written response to the request under section 65A—an order that the employer be taken to have refused the request – **s65C (1) (a)**;<sup>38</sup>
- if the employer refused the request:
  - an order that it would be appropriate for the grounds on which the employer refused the request to be taken to have been reasonable business grounds – **s65C (1) (b) (i)**;<sup>39</sup> or
  - an order that it would be appropriate for the grounds on which the employer refused the request to be taken not to have been reasonable business grounds – **s65C (1) (b) (ii)**;<sup>40</sup>
- if the FWC is satisfied that the employer has not responded, or has not responded adequately, to the request – an order that the employer takes such further steps as the FWC considers appropriate– **s65C (1) (e)**<sup>41</sup> (for example, require the employer to give a response, or further response, to the employee’s request, and could set out matters that must be included in the response or further response<sup>42</sup>);
- If the FWC is satisfied that there is no reasonable prospect of the dispute being resolved without the making of one of these orders<sup>43</sup>:
  - an order that the employer grant the request – **s65C (1) (f) (i)**;<sup>44</sup> or
  - an order that the employer make specified changes (other than the requested changes) in the employee’s working arrangements to accommodate, to any extent, the employee’s circumstances – **s65C (1) (f) (ii)**.<sup>45</sup>

In making an order, the FWC must take into account fairness between the employer and the employee.<sup>46</sup> The FWC must not make an order under s65C (1) (e) or (f) that would be inconsistent with a provision of the FW Act,<sup>47</sup> or a term of a fair work instrument that applies to the parties.<sup>48</sup>

Contravention of an order is a civil remedy provision.<sup>49</sup>

#### Representatives – s65B (5)

The employer or employee may appoint a person or industrial association to provide them with support or representation for the purposes of resolving the dispute, or the FWC dealing with the dispute.<sup>50</sup> S596 in relation to lawyers or paid agents only being able to appear in a matter before the FWC with the permission of the FWC continues to apply.<sup>51</sup>

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<sup>38</sup> New s65C (1) (a)

<sup>39</sup> New s65C (1) (b) (i)

<sup>40</sup> New s65C (1) (b) (ii)

<sup>41</sup> New s65C (1) (e)

<sup>42</sup> Note to New s65C (1)

<sup>43</sup> New s65C (3)

<sup>44</sup> New s65C (1) (f) (i)

<sup>45</sup> New s65C (1) (f) (ii)

<sup>46</sup> New s65C (2)

<sup>47</sup> New s65C(1) (2A) (a)

<sup>48</sup> New s65C(1) (2A) (b)

<sup>49</sup> New s65C (6), including note.

<sup>50</sup> New s65B (5)

<sup>51</sup> See note to New s65B.

## New Extended unpaid Parental Leave Provisions

### Context and current provisions

Under current provisions in the FW Act, employees who take unpaid parental leave can request an extension of unpaid parental leave for a further period of up to 12 months, unless their partner has already taken 12 months of leave.<sup>52</sup> An employer must provide a written response to the request within 21 days stating whether they grant or refuse the request.<sup>53</sup> An employer may only refuse the request on 'reasonable business grounds' (currently not listed)<sup>54</sup> and must include details of the reasons for refusal in their response.<sup>55</sup> The employer must not refuse a request unless they have given the employee a reasonable opportunity to discuss the request.<sup>56</sup> If an employer refuses an employee's request, whether reasonably or unreasonably, there is nothing more the worker can do.

Discrimination against women in relation to pregnancy, parental and caring responsibilities is pervasive and widespread and despite decades of legislation making it illegal, the level of discrimination remains relatively unchanged. It is common for women to suffer adverse action on the basis of taking parental leave or making requests to extend parental leave. There is no way of knowing how many refusals are unreasonable given there is no right of review.

The new provisions do three key things: they give employees a substantive right to extended unpaid parental leave (subject to the reasonable business grounds 'defence'), they give employees a right to a process with the employer, and they give employees a right of review (both of the substantive and process rights) through the FWC, or for contravention of either right in the courts.

### New requirements for employers when considering requests (process rights) – s76A (3)

The changes in the SJPB Act impose new requirements on employers to genuinely try to reach agreement at the workplace level with employees who request extensions to unpaid parental leave, including by having discussions with them, and making efforts to identify alternative arrangements when an employee's request cannot be accommodated.

Employers may only refuse requests if they have:

- Discussed the request with the employee;<sup>57</sup> and
- Genuinely tried to reach an agreement with the employee about an extension of the period of unpaid parental leave;<sup>58</sup> and
- The employer and employee have not reached such an agreement;<sup>59</sup> and
- The employer has had regard to the consequences of the refusal for the employee;<sup>60</sup> and
- The refusal is on reasonable business grounds.<sup>61</sup>

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<sup>52</sup> Current s76 (1) and s76 (6)

<sup>53</sup> Current s76 (3)

<sup>54</sup> Current s76 (4)

<sup>55</sup> Current s76 (5)

<sup>56</sup> Current s76 (5A)

<sup>57</sup> New s76A (3) (a) (i)

<sup>58</sup> New s76A (3) (a) (ii)

<sup>59</sup> New s76A (3) (b)

<sup>60</sup> New s 76A (3) (c)

<sup>61</sup> New s76A (3) (d)

## Reasonable Business Grounds – s76A (5)

The threshold of “reasonable business grounds” for refusing a request has not changed. However, the SJPB Act provides additional guidance on what constitutes reasonable business grounds, consistent with those listed in the flexible work provisions. These are included in new 76A (5). The specific circumstances of the employer, including but not limited to the size and nature of the employer’s enterprise, are relevant to whether an employer has reasonable business grounds to refuse a request.<sup>62</sup>

## New requirements for responding to requests (process rights) s76A

Employers must provide a written response to the request within 21 days.<sup>63</sup> The response must now:

- State that the employer grants the request;<sup>64</sup> or
- If, following discussion between the employer and employee, they agree to an extension of unpaid parental leave for a period that differs from the period requested– set out the agreed extended period,<sup>65</sup> or
- State that the employer refuses the request<sup>66</sup> and include the details of the reasons for the refusal,<sup>67</sup> set out the particular business grounds for refusing the request,<sup>68</sup> explain how those grounds apply to the request,<sup>69</sup> and either set out the extension of unpaid parental leave that the employer is willing to agree to<sup>70</sup> or state that there is no extension the employer is willing to agree to.<sup>71</sup> The response must also set out the effect of sections 76B and 76C<sup>72</sup> – i.e. the sections regarding the powers of the FWC in relation to disputes and arbitration.

## Disputes about extension of period of unpaid parental leave – right to a review

### Referral of disputes to FWC – s76B

The SJPB Act empowers the FWC to resolve disputes regarding extensions of unpaid parental leave. Where the dispute relates to an employer’s refusal to grant a request,<sup>73</sup> or provide a written response to a request within 21 days,<sup>74</sup> the FWC can deal with the dispute. In the first instance, parties to the dispute must attempt to resolve it at the workplace level through discussions.<sup>75</sup> If these workplace discussions do not resolve the dispute, a party to the dispute can refer it to the FWC.<sup>76</sup>

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<sup>62</sup> Note to new s76A(5).

<sup>63</sup> New s76A (1)

<sup>64</sup> New s76A (2) (a)

<sup>65</sup> New s 76A (2) (b)

<sup>66</sup> New s 76A (2) (c)

<sup>67</sup> New s76A (6) (a)

<sup>68</sup> New s 76A (6) (b) (i)

<sup>69</sup> New s76A (6) (b) (ii)

<sup>70</sup> New s76A (6) (c) (i)

<sup>71</sup> New s76A (6) (c) (ii)

<sup>72</sup> New s76A (6) (d)

<sup>73</sup> New s76B (1) (a)

<sup>74</sup> New s76B (1) (b)

<sup>75</sup> New s76B (2)

<sup>76</sup> New s76B (3)

If a dispute is referred, the FWC must first deal with the dispute by means other than arbitration (unless there are exceptional circumstances),<sup>77</sup> and then by arbitration.<sup>78</sup> Before arbitration, the FWC can deal with the dispute as it considers appropriate, including by way of conciliation, mediation, making recommendations, or expressing opinions.<sup>79</sup>

#### Arbitration and orders – s76C

The FWC can deal with the dispute by arbitration by making any of the following orders:

- if the employer has not given the employee a written response to the request under section 76A—an order that the employer be taken to have refused the request – **s76C (1) (a)**,<sup>80</sup>
- if the employer refused the request:
  - an order that it would be appropriate for the grounds on which the employer refused the request to be taken to have been reasonable business grounds – **s76C (1) (b) (i)**,<sup>81</sup> or
  - an order that it would be appropriate for the grounds on which the employer refused the request to be taken not to have been reasonable business grounds – **s76C (1) (b) (ii)**,<sup>82</sup>
- if the FWC is satisfied that the employer has not responded, or has not responded adequately, to the request – an order that the employer take such further steps as the FWC considers appropriate– **s76C (1) (c)**<sup>83</sup> (for example, require the employer to give a response, or further response, to the employee’s request, and could set out matters that must be included in the response or further response<sup>84</sup>);
- If the FWC is satisfied that there is no reasonable prospect of the dispute being resolved without the making of one of these orders<sup>85</sup>:
  - an order that the employer grant the request – **s76C (1) (d) (i)**,<sup>86</sup> or
  - an order that the employer agree to an extension of unpaid parental leave for a further period of up to 12 months (other than the period requested by the employee)– **s76C (1) (d) (ii)**.<sup>87</sup>

In making an order, the FWC must take into account fairness between the employer and the employee.<sup>88</sup> The FWC must not make an order under s76C (1) (c) or (d) that would be inconsistent with a provision of the FW Act,<sup>89</sup> or a term of a fair work instrument that applies to the parties.<sup>90</sup>

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<sup>77</sup> New s76B (4) (a)

<sup>78</sup> New s76B (4) (b)

<sup>79</sup> See note to new s76B(4)

<sup>80</sup> New s76C (1) (a)

<sup>81</sup> New s76C (1) (b) (i)

<sup>82</sup> New s76C (1) (b) (ii)

<sup>83</sup> New s76C (1) (c)

<sup>84</sup> Note to New s76C (1)

<sup>85</sup> New s76C (4)

<sup>86</sup> New s76C (1) (d) (i)

<sup>87</sup> New s76C (1) (d) (ii)

<sup>88</sup> New s76C (2)

<sup>89</sup> New s76C(1) (3) (a)

<sup>90</sup> New s76C(1) (3) (b)

Contravention of an order is a civil remedy provision.<sup>91</sup>

### Representatives – s76B (5)

The employer or employee may appoint a person or industrial association to provide them with support or representation for the purposes of resolving the dispute, or the FWC dealing with the dispute.<sup>92</sup> S596 in relation to lawyers or paid agents only being able to appear in a matter before the FWC with the permission of the FWC continues to apply.<sup>93</sup>

## **Considerations when representing members**

### **Details to include in a request**

An employee has a right to request a specific change because of an attribute they have (such as being a parent). There must be a nexus between the attribute and the requested change – i.e. the change is requested because the employee is a parent (not just that the employee wants the change and also happens to be a parent).

A failure in a request to specify the reasons for the change will not be fatal.<sup>94</sup> An employee could include multiple alternative changes to working arrangements in the request that would accommodate their circumstances (for example, if I was allowed to either start and finish work earlier, or work from home, that would enable me to pick up my child from school).

It will be helpful for employees to identify the consequences of refusal of their request, as it will be hard to prove a contravention of new s65A (3) (c) if there are unidentified consequences that are not obvious.

### **Reasonable business grounds**

Whether reasonable business grounds exist is a fact to be determined by the FWC or a court. It is not the state of mind of the employer, and whether they believe there are reasonable business grounds – but an objective assessment by the FWC or a court about whether those grounds exist.

The difficulty in challenging the employer's assertion that there are reasonable business grounds will lie in a lack of access to information. It will be important for unions to obtain particular details from the employer during the course of a dispute or proceeding about the reasons for refusal – for example, what will granting the request cost, have they done estimates of the cost, what are those estimates based on, has this kind of request worked elsewhere for other employees. Unions will not be in a position to challenge some of the financial assertions without access to this kind of information.

### **No jurisdiction for FWC to make orders inconsistent with FW Act or industrial instruments**

The FWC must not make orders that the employer takes such further steps as the FWC considers appropriate, orders that the employer grant the request, or orders that the employer make specified changes (other than the requested changes) to the employee's working arrangements or grant a specified period of leave, that would be inconsistent with a provision of the FW Act or a term of a fair work instrument such as an award or enterprise agreement that applies to the parties.

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<sup>91</sup> New s76C (7), including note.

<sup>92</sup> New s76B (5)

<sup>93</sup> See note to New s76B (5)

<sup>94</sup> *Poppy v Service to Youth Council Incorporated* [2014] FCA 656 at [144]-[147]

Terms in enterprise agreements and awards that indirectly discriminate against certain groups of employees are not considered to be discriminatory terms (and therefore unlawful). In order to be a discriminatory term, it is not enough that the term is capable of indirectly discriminating, a term must actually do so.<sup>95</sup> Therefore, terms in industrial instruments that indirectly discriminate against a group of employees (for example, employees with caring responsibilities) will override the ability of the FWC to make the kinds of orders under s65C (1) (e) and (f), and will mean the FWC has no effective jurisdiction in these matters.

For example, if an enterprise agreement contains terms providing for how work is to be organised and performed (such as clauses dealing with rostering, span of hours, breaks etc) that indirectly discriminates against workers with caring responsibilities, employees adversely affected by that term will have no effective recourse. The FWC will not be able to make any orders it considers appropriate to ensure compliance by the employer with s65A, and will not be able to make orders that the employer grants the request or makes specified changes to accommodate the employee's circumstances. This leaves employees in this situation with effectively no ability to access flexible working arrangements.

This will limit the scope of orders the FWC can make in a similar way to s739 (5). It is likely that this provision will create arguments about what orders the FWC can make and whether inconsistencies arise and similar arguments and considerations may apply.

Ways around this limitation that unions could explore are:

- Getting creative with the orders sought to frame them in such a way that they are not inconsistent;
- Seeking to accommodate the workers arrangements as part of an individual flexibility arrangement (noting the risks inherent in doing so);
- Where an employee is covered by an enterprise agreement, seeking a collective solution by including a claim for special measures in bargaining that would allow certain groups of people (such as parents, carers) to work different rosters, hours, etc. Given that special measures are designed for a class of people with a particular attribute, this would be less responsive to the circumstances of individual employees, but would offer some level of protection and rights for all employees in that class.

## **Interpretation of new flexible work and extended unpaid parental leave provisions**

The true application of the new flexible work and extended unpaid parental leave provisions will not be fully determined until they have been tested by the FWC. It is therefore very important that the union movement selects and runs cases which support our preferred interpretation of the legislation and defend against cases which do not. Making sure that we run the best "test cases" to make sure the laws are operating for working people will require careful coordination and information sharing across the union movement.

Some of the key questions of interpretation that will be tested in early cases include:

- What employers are required to do to show they 'genuinely tried to reach an agreement' with an employee about making changes to the employee's working

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<sup>95</sup> Application by Metropolitan Fire and Emergency Services Board [2019] FWC 106 (Gostencnik DP, 15 January 2019) at [176]; Shop, Distributive and Allied Employees' Association v National Retail Association (No 2) [2012] FCA 480

arrangements to accommodate their circumstances, or about an extension of the period of unpaid parental leave

- What employers are required to do to demonstrate that they 'had regard to the consequences of the refusal for the employee
- the interpretation and operation of the two limitations placed on the FWC's powers, namely:
  - Not allowing the FWC to make orders inconsistent with the FW Act or an industrial instrument
  - The meaning of 'no reasonable prospect of the dispute being resolved' as a prerequisite to the FWC being able to make orders that the employer grant the request or make specified changes to an employee's working arrangements or agree to an extension of unpaid parental leave for a further specified period
- The meaning of 'fairness between the employer and the employee' as something the FWC must take into account
- The meaning of 'exceptional circumstances' (undefined) where a matter may proceed to arbitration without the need for other steps first such as conciliation
- The interpretation of the phrase reasonable business grounds (and the non-exhaustive list of what may constitute reasonable business grounds in new s65A (5)) about which there have been a limited number of cases where industrial instruments have allowed the FWC to determine disputes. This will include the meaning of key phrases such as 'too costly'; 'no capacity'; 'impractical'; 'significant loss'; 'significant negative impact.' These phrases suggest a reasonably high bar to be met by employers. The recent decision of Commissioner Johns in *Natasha Fyfe v Ambulance Victoria* [2023] FWC 49 contains a discussion of the interpretation of reasonable business grounds and a good summary of relevant case law.<sup>i</sup>

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<sup>i</sup> *The information in this document does not constitute legal advice and should not be taken to include all requirements or obligations relevant to the entitlement(s).*