



Fair Work
Commission

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 section 653 of the *Fair Work Act 2009*

2018–2021

Murray Furlong, General Manager

November 2021

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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List of abbreviations

Commission	Fair Work Commission
Explanatory Memorandum	Fair Work Bill 2008 (Cth) Explanatory Memorandum
Fair Work Act	<i>Fair Work Act 2009</i> (Cth)
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.

The General Manager must also 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.

This report presents findings for the 26 May 2018 to 25 May 2021 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 the Attorney-General's Department within six months from the end of the reporting period, i.e., by 25 November 2021.

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.

As the General Manager has noted in previous reports, there are no sources of administrative data in relation to these requests. This makes research in this area both difficult to conduct and difficult to interpret.

This report includes a summary of matters relating to such request during the period. Information is also sourced from a report compiled by researchers from The University of Sydney. The report is based on a small scale quantitative and qualitative study of a range of organisations representing stakeholders in the Australian workplace relations system

Key findings

- Legislative developments included:
 - *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth)
 - *Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020* (Cth)
 - family and domestic violence leave.

- The formal right to request flexible working arrangements is extensively used in almost all industries reported on (except for some male-dominated industries such as maritime).
- More women than men sought to make changes to their work arrangements and requests were mainly made by employees who are parents or carers of a child who is school age or younger.
- The most common requests referred to by interviewees was a reduction in work hours, often by full-time workers looking to work part-time hours, and a change in location.
- Requests were generally agreed by employers or agreed following negotiations, while refusals were rare.
- Females were overwhelmingly more likely to make requests for an extension to unpaid parental leave.
- Most respondents reported that requests were granted, while refusing such requests was not reported as widespread.
- There was an increase in flexible working arrangements during COVID-19, with the most common requests for a change in location, a change in start times and a change in finish times.

1 Introduction

The Fair Work Commission (the Commission) is the national workplace relations tribunal and was 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. Commission staff are engaged to provide support to the tribunal and its Members.

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 period from 26 May 2018 to 25 May 2021 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 the Attorney-General's Department within six months from the end of the reporting period, i.e. by 25 November 2021.⁸

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.

2 Report outline

This report presents research undertaken into the operation of the NES relating to employee requests for the 2018–2021 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.

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.⁹ The research undertaken for both reports was prepared by researchers from The University of Sydney.¹⁰ The research methodology and findings are discussed in Sections 4 and 5, respectively.

As noted in the previous sets of reports released in 2015 and 2018, undertaking large cross-sectional surveys where the object is to obtain data relating to persons who had made requests for flexible working arrangements or extensions of unpaid parental leave has been exceedingly difficult. This is due to the very low numbers of respondents that have accessed either sections 65 or 76.¹¹

The General Manager noted in the 2018 reports that '[i]n addition to the difficulties of finding employees in the designated target groups, there is a further difficulty associated with the reliability of data ... 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.'¹²

Given the inherent difficulties associated in capturing this information, the commissioned research undertaken by The University of Sydney obtains findings from a purposive sample which specifically targets individuals for their knowledge and expertise in sections 65 or 76 requests for flexibility.

3 Legislative overview

The right to request flexible working arrangements¹³ and the right to request extensions to unpaid parental leave¹⁴ 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

⁹ See Furlong M (2021), *General Manager's report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements: 2018–2021*, Fair Work Commission, November.

¹⁰ Baird M, Williams A, Heron A and Cooper R (2021), *Formal flexibility under the Fair Work Act*, A report prepared for the General Manager of the Fair Work Commission, September.

¹¹ 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, pp. 12–13; O'Neill B (2018), *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: 2015–2018*, Fair Work Commission, November, p. 3.

¹² O'Neill B (2018), *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: 2015–2018*, Fair Work Commission, November, p. 8.

¹³ Fair Work Act, s.65.

¹⁴ Fair Work Act, s.76.

agreement includes terms that have the same (or substantially the same) effect as provisions of the NES.¹⁵ Further detail concerning the right to request entitlements in the NES, and an overview of previous amendments relating to flexible working arrangements can be found in previous reports by the General Manager.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 Legislative developments

The following is an overview of amendments made to the Fair Work Act during the 26 May 2018–25 May 2021 reporting period that relate to requests for flexible working arrangements and extensions of unpaid parental leave.

3.1.1 *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)*

On 27 March 2021 the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)* introduced a new definition of casual employee into the Fair Work Act and inserted a new Division 4A ('Offers and requests for casual conversion') into the NES.

Division 4A requires employers, other than 'small business employers',¹⁷ to offer eligible 'casual employees' (as defined in section 15A of the Act) conversion to full-time or part-time employment unless there are reasonable grounds not to make such an offer.¹⁸ The division also enables eligible casual employees (including employees of small business employers) to request conversion to full-time or part-time employment.¹⁹

Division 4A does not require a casual employee to convert to full-time or part-time employment, or permit an employer to require an employee to do so.²⁰

The amendment also repealed the definition of 'long term casual employee', inserting a new definition of 'regular casual employee' throughout the Fair Work Act. The definition of 'regular casual employee' is

¹⁵ Fair Work Act, s.61(1) and s.55(5).

¹⁶ 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; 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 under s.653 of the Fair Work Act 2009 \(Cth\): 2012–2015](#), Fair Work Commission, November; O'Neill B (2018), [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](#), Fair Work Commission, November.

¹⁷ Fair Work Act, s.66AA.

¹⁸ Fair Work Act, ss.66B–66E.

¹⁹ Fair Work Act, ss.66F–66J.

²⁰ Fair Work Act, s.66L(2)(a)–(b).

intended to incorporate the criterion of employment on a 'regular and systematic basis' contained in the definition of 'long term casual employee', but without including any timeframe.²¹ To make a request under section 65 for flexible working arrangements, and to be entitled to parental leave under Division 5 of the NES (and therefore entitled to request an extension to unpaid parental leave under section 76), a casual employee must be a 'regular casual employee' employed on that basis for at least 12 months.²²

The amendment also inserted into the NES a requirement for employers to provide their casual employees with a Casual Employment Information Statement, prepared by the Fair Work Ombudsman, containing information about casual employment and offers and requests for casual conversion.²³

3.1.2 Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020 (Cth)

On 27 November 2020, the *Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020 (Cth)* amended the Fair Work Act to increase unpaid parental leave entitlements under the NES for employees who have experienced the premature birth, stillbirth or death of a child under 24 months of age.

The amendment includes provisions that ensure that parents of a stillborn child are entitled to the same unpaid birth-related parental leave as if the child had been born alive,²⁴ that employees on unpaid parental leave are able to take compassionate leave following a stillbirth or the death of a child²⁵ and are able to return to work or cancel any upcoming planned period of unpaid parental leave if they wish.²⁶

3.1.3 Family and domestic violence leave

On 6 July 2018, as part of the 4 yearly review of modern awards, the Commission varied 123 modern awards to include an entitlement to 5 days' unpaid leave for employees dealing with family and domestic violence. The variations took effect from 1 August 2018.²⁷

Commencing on 12 December 2018, the *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018 (Cth)* amended the Fair Work Act to include an entitlement to unpaid family and domestic violence leave in the NES, in substantially the same terms as included into modern awards by the Commission.

The Commission is currently undertaking a review of family and domestic violence leave terms in modern awards and related matters.²⁸

²¹ *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth)*, Revised Explanatory Memorandum, Schedule 1, p. 22, paragraph 113.

²² Fair Work Act, ss.65(2)(b) & 67(2)(a).

²³ Fair Work Act, s.125A–125B.

²⁴ Fair Work Act, s.77A(1).

²⁵ Fair Work Act, s.79(2).

²⁶ Fair Work Act, s.77A(4).

²⁷ [2018] FWCFB 3936.

²⁸ [2021] FWCFB 2047.

3.2 Operation of section 65 – requests for flexible working arrangements

3.2.1 Eligibility

Section 65 of the Fair Work Act prescribes the method for making and responding to requests for flexible working arrangements. An employee may only 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 regular casual employee of the employer who, immediately before making the request, has been employed on that basis for a sequence of periods of employment during a period of at least 12 months and has a reasonable expectation of continuing employment on a regular and systematic basis.²⁹

Employees can make a request for flexible working arrangements if any of the circumstances listed under section 65(1A) apply to them, namely if the employee:

- is the parent, or has responsibility for the care, of a child who is school age or younger;
- is a carer (within the meaning of the *Carers Recognition Act 2010 (Cth)*);
- has a disability;
- is 55 or older;
- is experiencing violence from a member of the employee's family; or
- provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.³⁰

3.2.2 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;³¹
- an employer must respond to the employee's request in writing within 21 days, stating whether or not the request is granted;³² and
- an employer may refuse the request only on reasonable business grounds,³³ and if the employer refuses the request, must provide written details of the reasons for the refusal.³⁴

²⁹ Fair Work Act, s.65(2).

³⁰ Prior to the *Fair Work Amendment Act 2013 (Cth)* these circumstances only extended employees that were a parent or carer of a child under school age, or a child under 18 with a disability.

³¹ Fair Work Act, s.65(3).

³² Fair Work Act, s.65(4).

³³ Fair Work Act, s.65(5).

Section 65(5A)³⁵ 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.

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

3.3.1 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 date;³⁶ or
- be a regular casual employee of the employer who, immediately before the relevant date, has been employed on that basis for a sequence of periods of employment during a period of at least 12 months and who has a reasonable expectation of continuing employment with the employer on a regular and systematic basis.³⁷

An employee who takes unpaid parental leave for his or her available parental leave period (12 months less any periods of particular kinds set out in the Act)³⁸ may request his or her employer to agree to an extension of unpaid parental leave for a further period of up to 12 months.³⁹ The period of extension is reduced by any unpaid parental leave, other than flexible unpaid parental leave, that the employee's partner has taken, or will have taken, in relation to the child.⁴⁰

³⁴ Fair Work Act, s.65(6).

³⁵ Inserted by the *Fair Work Amendment Act 2013* (Cth).

³⁶ 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.

³⁷ Fair Work Act, s.67(2). The requirement that the employee have a reasonable expectation of continuing employment on a regular and systematic basis is subject to the exceptions set out in s.67(2)(b).

³⁸ Fair Work Act, s75(2).

³⁹ Fair Work Act, s.76(1).

⁴⁰ Fair Work Act, s.76(6).

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.⁴¹

3.3.2 Making a request

Requests to extend unpaid parental leave must be made in writing and must be given to the employer at least 4 weeks before the end of the available parental leave period.⁴²

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.⁴³

Unlike requests for flexible working arrangements under section 65, what constitutes 'reasonable business grounds' for the purposes of refusing a request to extend unpaid parental leave is not defined in the Fair Work Act. However, the Explanatory Memorandum notes that 'a bare refusal (i.e. without reasons) is insufficient'⁴⁴ and provides the following further guidance:⁴⁵

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 employer must not refuse the request unless they have given the employee a reasonable opportunity to discuss the request.⁴⁶ What constitutes a reasonable opportunity to discuss the request is not defined, however the Explanatory Memorandum to the *Fair Work Amendment Act 2015* (Cth), which inserted this requirement, 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.⁴⁷

3.4 Scope and coverage of section 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

⁴¹ Fair Work Act, s.76(7).

⁴² Fair Work Act, s.76(2).

⁴³ Fair Work Act, ss.76(3)–(5).

⁴⁴ Fair Work Bill (Cth), Explanatory Memorandum 2008, p.54, item 331.

⁴⁵ Fair Work Bill (Cth), Explanatory Memorandum 2008, p.54, item 332.

⁴⁶ Fair Work Act, s.76(5A).

⁴⁷ Fair Work Amendment Bill 2014 (Cth), Explanatory Memorandum, Schedule 1, p.2, item 8.

under s.76 to request extended unpaid parental leave to all employees through the use of the external affairs power.⁴⁸

3.5 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.⁴⁹

However, section 44(2) of the Fair Work Act specifically provides that an order cannot be made in relation to the refusal of a request under section 65(5) or section 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 section 65(5) or a request for an extension of unpaid parental leave under section 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.⁵⁰

3.5.1 Decisions in disputes involving requests under section 65

During the reporting period, one decision involving a request under section 65 was issued by the Commission.

The Police Federation of Australia (Victoria Police Branch) T/A The Police Association of Victoria v Victoria Police [2018] FWC 5695

The Police Federation of Australia applied under section 739 of the Fair Work Act for the Commission to resolve a dispute in accordance with the settlement procedure of the *Victoria Police (Police Officers (excluding Commanders), Protective Services Officers, Police Reservists and Police Recruits) Enterprise Agreement 2015*. The dispute concerned a refusal by Victoria Police to approve a flexible working arrangement request made under a clause of the agreement which, for the purposes of assessing the request, deferred to section 65. Victoria Police alleged the request was refused on reasonable business grounds as under section 65. The Commission was not prevented from assessing the basis of Victoria Police's refusal as the enterprise agreement allowed for the Commission to deal with the matter.⁵¹

The employee concerned, aged 57 years, had requested a change from ten 8-hour shifts per fortnight to eight 10-hour shifts, to provide him with two additional days off per fortnight to assist his transition to retirement.⁵² At the time, Victoria Police refused the request on the basis that it raised occupational health

⁴⁸ *Australian Constitution*, s.51(xxix).

⁴⁹ Fair Work Act, s.546(1).

⁵⁰ 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 (s.739(2)(b)). [2018] FWC 5695 is an example of the Commission dealing with the subject of reasonable business grounds under s.65(5) relating to an enterprise agreement.

⁵¹ [\[2018\] FWC 5695](#), at [10].

⁵² *Ibid*, at [7].

and safety risks associated with fatigue and would impose an unreasonable financial burden on them.⁵³ Victoria Police later relied on a number of further bases for refusal.

Commissioner Wilson, drawing on an earlier decision by the Commission involving flexible working arrangements,⁵⁴ found that the basis of Victoria Police's refusal did not amount to reasonable business grounds and that the request instead be approved. The Commissioner found that only one of the five bases advanced by Victoria Police as grounds for refusal of the request in the proceeding had grounding in objective fact.⁵⁵

3.5.2 Decisions in disputes involving requests under section 76

During the reporting period, the Commission did not deal with any disputes involving requests under section 76 of the Fair Work Act. A decision involving a purported request under section 76 was however, issued by the Federal Circuit Court. The case is summarised below.

Saad v Evans Chambers Pty Ltd & Anor [2018] FCCA 1832

An application was brought by an employee against her former employer alleging numerous breaches of the Fair Work Act including contraventions of the National Employment Standards under section 44, a modern award under section 45 and adverse action under section 340. The applicant had also alleged to have made a request under section 76 for extension of parental leave.

The court found that the correspondence from the applicant did not meet the requirements of a request under section 76, in part because it was not provided to the employer at least 4 weeks before the end of the available parental leave period, as required by section 76(2).⁵⁶ As a result no extension of paid parental leave under section 76 occurred.

3.5.3 Number of disputes

The data in this section are sourced from administrative data held by the Commission. Table 3.1 shows that there were 113 applications to the Commission made under s.739 during the period 1 July 2018 to 30 June 2021 to deal with a dispute relating to a request for flexible working arrangements under s.65. There were 125 applications in the previous reporting period.

⁵³ *Ibid*, at [13].

⁵⁴ *Australian Municipal, Administrative, Clerical and Services Union v Brimbank City Council* [2013] FWC 5.

⁵⁵ [2018] FWC 5695, at [98].

⁵⁶ [2018] FCCA 1832, at [107].

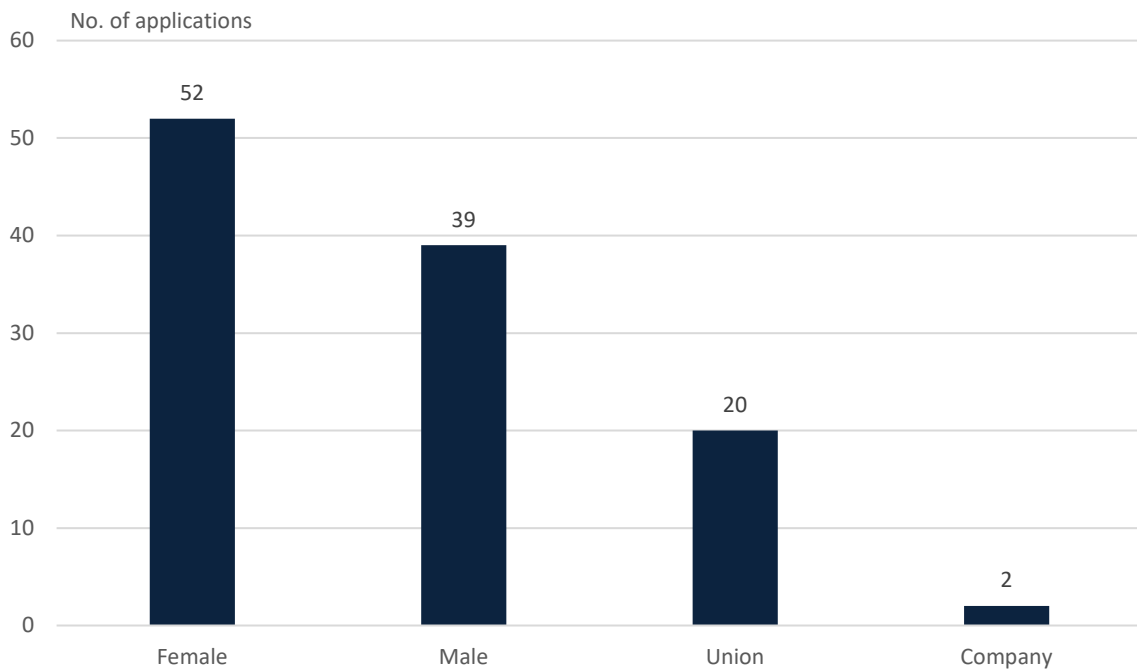
Table 3.1: Number of applications to deal with a dispute in relation to requests for flexible working arrangements made under s.739 of the Fair Work Act

Financial year	Number of applications
1 July 2018–30 June 2019	35
1 July 2019–30 June 2020	29
1 July 2020–30 June 2021	49

Source: Fair Work Commission.

Chart 3.1 presents the number of s.739 applications lodged over the reporting period by the type of applicant. Most applications were lodged by individuals, with 52 applications lodged by females compared to 39 by males. Another 20 applications were lodged by an employee organisation on behalf of an individual and 2 applications were lodged by an employer.

Chart 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 2018 to 30 June 2021



Source: Fair Work Commission.

Table 3.2 shows the number of applications made to the Commission under s.739 over the reporting period by industry. Health and welfare services had the highest number of applications (13) over the reporting period.

As previously noted, an order cannot be made in relation to contraventions of sections 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 2018 to 30 June 2021

Industry	Number of applications
Aged care industry	5
Airline operations	3
Airport operations	2
Australian Capital Territory	2
Building, metal and civil construction industries	1
Cement and concrete products	1
Children's services	3
Clerical industry	7
Clothing industry	1
Commercial sales	1
Commonwealth employment	9
Contract call centre industry	2
Educational services	7
Electrical power industry	3
Fire fighting services	1
Food, beverages and tobacco manufacturing industry	2
Gardening services	1
Health and welfare services	13
Hospitality industry	4
Indigenous organisations and services	1
Local government administration	2
Mining industry	1
Pharmacy operations	1
Postal services	2
Rail industry	4
Real estate industry	1
Retail industry	7
Road transport industry	2
Security services	1
Social, community, home care and disability services	1
State and Territory government administration	8
Stevedoring industry	1
Storage services	1
Tasmania	2
Telecommunications services	4
Vehicle industry	3
Water, sewerage and drainage services	2

Source: Fair Work Commission.

3.6 Other developments

An overview of other developments relating to flexible working arrangements during the 26 May 2018–25 May 2021 reporting period are set out below. In this reporting period, a number of additional forms of flexibility were introduced into modern awards that may have had some impact on the numbers of requests under sections 65 and 76 that were received. Some of these developments were in response to the COVID-19 pandemic.

3.6.1 Family Friendly Work Arrangements

As detailed in the General Manager's report for the 2015–2018 period,⁵⁷ in March 2018 a Full Bench of the Commission rejected a claim by the Australian Council of Trade Unions to include employee entitlements to 'family friendly' working arrangements in modern awards.⁵⁸ However, at that time the Full Bench noted a 'significant *unmet* employee need for flexible working arrangements.'⁵⁹ The Full Bench proposed a provisional model term facilitating family friendly working arrangements to supplement the NES.

On 25 September 2018, the Full Bench issued a final version of the model term and expressed the 'provisional' view that modern awards should be varied to incorporate the model term.⁶⁰

The model term was inserted into all modern awards as part of the 4 yearly review, and was operative from 1 December 2018.⁶¹ The term, titled 'Requests for flexible working arrangements', applies when an employee has made a request for a change in working arrangements under section 65. The model term places additional obligations on employers, including:

- requiring employers to discuss the request with the employee and genuinely try to reach agreement on a change to working arrangements that will reasonably accommodate the employee's circumstances;
- if the employer refuses the request, their written response to the request under section 65(4), in addition to including details of the reasons for the refusal mandated by section 65(6), must include details of the business grounds for the refusal and how they apply, must state whether there are any changes in working arrangements that the employer can offer the employee to better accommodate their circumstances and if so, set out those changes; and
- if the employer and employee reach an agreement that differs from that initially requested, the employer must provide a written response to the request setting out the agreed changes in working arrangements.

⁵⁷ O'Neill B (2018), [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 \(Cth\)](#), Fair Work Commission, November, p. 5.

⁵⁸ [2018] FWCFB 1692

⁵⁹ [2018] FWCFB 1692 at [420]

⁶⁰ [2018] FWCFB 5753 at [87]

⁶¹ [2018] FWCFB 6863

The model term also contains a clause noting that disputes about whether the employer has discussed the request with the employee and responded in the way required by the term can be dealt with under the dispute resolution procedure contained in the award.⁶²

3.6.2 Schedule X – Additional measures during the COVID-19 pandemic

On 8 April 2020, on its own initiative, the Commission inserted a new schedule, 'Schedule X—Additional measures during the COVID-19 pandemic', into 99 modern awards.⁶³ Schedule X provides an entitlement to unpaid 'pandemic leave' and the flexibility to take twice the amount of annual leave at half pay.

Schedule X was initially due to operate until 30 June 2020, however following applications from interested parties, the Commission made extensions to the operative dates of the schedules in many awards. The schedules are currently due to operate until 31 December 2021 in 72 awards.

The Commission also inserted several other temporary COVID-19 related schedules into modern awards that allow for greater workplace flexibility in the health sector, restaurant industry and others.⁶⁴

4 Research methodology

This report relates specifically to sections 65 and 76 of the Fair Work Act. 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 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.

Further, NES requests and/or their outcomes are not lodged with the Commission, or any agency. As such, no administrative data source exists from which to report on the operation of these provisions and this creates a level of difficulty when conducting research about provisions such as sections 65 and 76.

As mentioned earlier, undertaking large cross-sectional surveys where the object is to obtain data relating to persons who had made requests for flexible working arrangements or extensions of unpaid parental leave has been exceedingly difficult due to the very low numbers of respondents that have accessed either sections 65 or 76.⁶⁵

⁶² Modern award dispute resolution clauses refer disputes to the Commission to resolve. However, s.739(2)(a) of the Fair Work Act states that the Commission cannot deal with a dispute about whether the employer had reasonable business grounds under s.65(5) or 76(4) unless the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the Commission dealing with the matter, or a determination under the *Public Services Act 1999* authorises the Commission to deal with the matter.

⁶³ [2020] FWCFB 1837.

⁶⁴ [2021] FWCFB 1622, [2021] FWCFB 1741. See <https://www.fwc.gov.au/cases-decisions-and-orders/major-cases> for a list of COVID-19 related major cases.

⁶⁵ 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, pp. 12–13; O'Neill B (2018), *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: 2015–2018*, Fair Work Commission, November, p. 3.

Given these difficulties, the commissioned research undertaken by The University of Sydney adopts a mixed method approach and obtains findings from a purposive sample which specifically targets individuals for their knowledge and expertise in flexible working arrangements arising from sections 65 and 76. Although the sample of respondents is small and not representative of the population, the research methodology was designed to gather the best possible information on requests for flexible working arrangements from a small sample of stakeholders in the Australian workplace relations system.

Although it is necessary to exclude any flexible working arrangements that are not derived entirely by operation of the NES to accurately research the operation of these sections, The University of Sydney also examined the impact of the COVID-19 pandemic on the flexibilities in the workplace relations system more broadly.

In the absence of any legislative and/or policy changes designed to alter the use of flexible working arrangements arising from sections 65 and 76 between 2018 and 2021, it is suggestive that there is unlikely to have been significant change in the access of these sections during the current reference period in comparison to the previous periods.

4.1 Research by The University of Sydney

Information on the operation of the NES provisions relating to employee requests for flexible working arrangements and extensions to unpaid parental leave was collected using a mixed method research approach that draws on qualitative case studies and an online survey. The approach was developed by researchers from The University of Sydney and sponsored by the Commission. The research also provides information for the General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act.⁶⁶

The online survey was conducted during July and August 2021 and collected information from key stakeholders in the Australian workplace relations system, such as employers, unions, employer associations and legal practitioners.⁶⁷ The researchers used a purposive sampling method to survey individuals for their knowledge and expertise in IFAs and flexible working arrangements arising from sections 65 and 76. Analysis based on the online survey is from 78 partially or fully completed surveys, of which 53 respondents reported direct experience with IFAs, flexible working arrangements and/or parental leave requests⁶⁸; 46 respondents had been involved in a formal application for flexible working arrangements;⁶⁹ and 35 respondents had been involved in a formal request to extend unpaid parental leave.⁷⁰ Of these respondents, over one-third were HR managers, over one-quarter were from unions and around one in six were from law firms practising in employment law.

Contact persons were asked to:

- participate in an online survey, and/or

⁶⁶ See Furlong M (2021), *General Manager's reports into individual flexibility arrangements under s.653: 2018–2021*, Fair Work Commission, November.

⁶⁷ Baird, Williams, Heron & Cooper. p. 96.

⁶⁸ Baird, Williams, Heron & Cooper. p. 5

⁶⁹ Baird, Williams, Heron & Cooper. p. 34.

⁷⁰ Baird, Williams, Heron & Cooper. p. 47.

- participate in an interview, during which an invitation to complete the survey was made, and/or
- distribute by email a link to the survey to colleagues who might more appropriately fit the criteria to participate.

Following this, the research team conducted 32 in-depth interviews with individuals from a range of organisations representing stakeholders in the Australian workplace relations system, such as law firms, consultants, corporate organisations, not for profits, employer associations and unions. The interviews lasted between 30 and 80 minutes and interviewees were able to elaborate on other topics outside of the interview questions. The report provided to the Commission from The University of Sydney collated and summarised the themes from these interviews.⁷¹

As noted by the researchers, the findings in their report do not represent the experiences of all stakeholders in Australia. Participation was voluntary and interviewees were self-selected. All corporate organisations that participated were large employers. However, members from other groups all commented on the experiences of small employers.

Interviewees were from the following industries:

- Finance
- Mining
- Ports
- Manufacturing
- Transport and logistics
- Energy
- Hospitality
- Federal and state governments
- Tourism and amusement
- Aged care
- Disability care
- Security.

5 Findings

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

5.1 Section 65 requests for flexible working arrangements

As noted in the report by The University of Sydney researchers, there is a need to distinguish between formal requests as per s.65 and informal requests for changes to work arrangements—as both were

⁷¹ Baird, Williams, Heron & Cooper. pp. 61–62.

frequently referred to in interviews.⁷² While informal arrangements were reported as very common by many interviewees, the report focuses on formal changes to work arrangements.

5.1.1 Knowledge and extent of requests

Knowledge of the formal right to request was widespread, though less by employee representatives. The formal right to request flexible working arrangements is extensively used in almost all industries reported on (except for some male-dominated industries such as maritime). A number of interviewees commented on the growing need for, and expectations of, flexible working arrangements by employees over recent years. However, views were mixed on whether formal requests had increased over the three-year period. Some interviewees from public-facing industries reported a fall in formal requests while others responded that requests had grown. Commenting on a 'roster-driven' sector adversely affected by the COVID-19 pandemic, one interviewee noted a dramatic decline in formal requests.⁷³

5.1.2 Who makes requests?

Across all industries, more women than men sought to make changes to their work arrangements. The main reasons were due to childcare, with work hours often sought to be reduced when returning from parental leave. This was the case for 18 of 20 interviewees. However, a few legal advisors and employers interviewed noted that men were just as likely as women to use the right to request provision for family or care reasons, while a union representative commented that men were not aware that they could make such a formal request. Usage of the formal right to request was viewed to be particularly low in male-dominated sectors that comprised predominantly full-time workers.⁷⁴

Requests made by mature-aged workers were reported among 14 of 20 interviewees and requests made by employees with disability was reported among 12 of 20 interviewees. One interviewee discussed how employers found it more difficult to accommodate employees with disability, while they were better set up to cater for childcare arrangements. Few interviewees reported experience with formal requests on behalf of someone from a non-English speaking background and for young people.⁷⁵

Analysis of the quantitative survey shows a similar pattern (Table 5.1). The results found that females were more likely to have made formal requests,⁷⁶ while both full-time and part-time employees made formal requests. This was followed by formal requests made by mature age persons (aged 55 years and over) and salaried employees. Formal requests made from persons from a non-English speaking background were less common and only a very small proportion were made by young persons.⁷⁷

While the online survey found a higher proportion of respondents identifying that formal requests for flexible working arrangements were mostly made by full-time employees,⁷⁸ the report summarised that the nature of employment patterns (for example, working time arrangements and whether the industry was

⁷² Baird, Williams, Heron & Cooper, p. 34.

⁷³ Baird, Williams, Heron & Cooper, p. 35

⁷⁴ Baird, Williams, Heron & Cooper, p. 35.

⁷⁵ Baird, Williams, Heron & Cooper, p. 36.

⁷⁶ Baird, Williams, Heron & Cooper, p. 76, Table C3.

⁷⁷ Baird, Williams, Heron & Cooper, p. 35.

⁷⁸ Baird, Williams, Heron & Cooper, p. 37, Table 21.

male or female-dominated) influenced whether it was part-time or full-time workers making formal requests for a change in working arrangements.⁷⁹

Table 5.1: During the period 26 May 2018 to 25 May 2021 are you aware of employees from the following groups making formal requests (i.e. in writing) for flexible working arrangements?

	Frequency	Per cent
Males	21	70.00
Females	27	90.00
Part-time employees	22	73.33
Persons from a non-English speaking background	8	26.67
Mature age persons (i.e. aged 55+)	18	60.00
Young persons (i.e. aged under 18)	1	3.33
Shift workers	10	33.33
Salaried employees	18	60.00

Note: Based on 30 responses.

Source: Baird, Williams, Heron & Cooper, p. 75, Table C2.

Little information was provided on casual employees. Some interviewees speculated that formal requests were not made by casual employees because they did not feel entitled to seek the flexibility or because they did not require the flexibility. Findings from the online survey suggest that only a small proportion of respondents were aware of formal requests being made by long-term casual employees.⁸⁰

5.1.3 Reasons for making requests

Requests for flexible working arrangements were mainly made by employees who are parents or carers of a child who is of school age or younger according to interviewee responses.⁸¹

Many interviewees also discussed ‘occasional requests’ made by mature-age persons. Reasons for the requests included transitioning to retirement, with older workers also using this to improve their work/life balance, although caring for spouses, elder care and care by grandparents were also mentioned. Examples of the reasons as to why men requested flexible working arrangements was to provide support during the second year after a child’s birth and to fit in with custody arrangements. Some interviewees noted that these may also be dealt with under specific procedures set out in enterprise agreements. Some also made requests for mental health reasons. Employees experiencing domestic violence or providing care or support to a member of their immediate family or household affected by domestic violence was also observed.⁸²

⁷⁹ Baird, Williams, Heron & Cooper, p. 36.

⁸⁰ Baird, Williams, Heron & Cooper, p. 37.

⁸¹ Baird, Williams, Heron & Cooper, p. 38.

⁸² Baird, Williams, Heron & Cooper, p. 38.

Responses to the online survey were broadly in line with the interviews, with the predominant reason for formally requesting flexible working arrangements being childcare.⁸³

5.1.4 What flexibilities were requested

The most common type of request referred to by interviewees was a reduction in work hours, often by full-time workers looking to work part-time hours (15 of the 19 interviewees). Other common requests were changes to the pattern of hours or days worked which can take varying forms (such as changes to start and finish times) and changes to roster arrangements (such as the times and lengths of shifts).⁸⁴ While, working from home had become more common since the onset of the COVID-19 pandemic, some respondents mentioned that these were dealt with informally using company policy arrangements.⁸⁵

The quantitative survey found similar results to the in-depth interviews, with some of the more common responses being a reduction in the number of days worked, change in location (e.g., working from home), changes to start/finish times and change in days worked (Table 5.2).

Table 5.2: Types of flexible working arrangements that were observed being formally requested (i.e. in writing) during the period 26 May 2018 to 25 May 2021

	Frequency	Per cent
Reduction in number of days worked	23	79.31
Change in location, e.g. work from home	23	79.31
Change in days worked	20	68.97
Change in start times	22	75.86
Change in finish times	22	75.86
Change in shifts	7	24.14
Maintain constant shifts/constant rostering	9	31.03
Change in averaging of hours	3	10.34
Reduce hours	20	68.97
Increase hours	5	17.24
Change from full-time to part-time	19	65.52
Other	2	6.90

Note: Based on 29 responses.

Source: Baird, Williams, Heron & Cooper, p. 77, Table C8.

Some respondents reported observing requests for certainty in hours (such as constant shifts or rosters) with slightly fewer seeing requests for a change in shifts. Much less common were observations of requests for increases in hours and changes in averaging of hours.⁸⁶

⁸³ Baird, Williams, Heron & Cooper, p. 38.

⁸⁴ Baird, Williams, Heron & Cooper, p. 39.

⁸⁵ Baird, Williams, Heron & Cooper, p. 39.

⁸⁶ Baird, Williams, Heron & Cooper, p. 39.

5.1.5 Granting and refusing requests

Most interviewees that responded commented that requests were agreed by employers or agreed following negotiations.⁸⁷ Refusals were rare, particularly among employers who provide greater access to flexibility than the statutory provisions.⁸⁸

Requests were refused when there were rostering difficulties, the need for staff availability at opening hours or when the business welcomed clients, as finding staff to cover particular hours or days could be difficult, with some employers preferring not to have too many individual alterations to rosters.⁸⁹

Some interviewees mentioned that employers resisted requests to work from home prior to the pandemic because employees were not set up to work remotely and/or were concerned about supervision. Others referred to concerns about performance as a basis for refusal, although in one instance this was dealt with as a separate performance issue which was not reasonable grounds for refusal.⁹⁰

In accordance with the interviews, the quantitative survey found that requests were refused when there was either no capacity of, or it was impractical to, change to working arrangements of other employees to accommodate the request. Other reasons included impact on customer service, significant loss of efficiency/productivity if the changes were implemented and that the requested arrangements could not be accommodated within an existing shift.⁹¹

5.1.6 Role of the formal procedure

The benefit for formal requests mentioned by some interviewees was that it encouraged employers to approach requests with appropriate thoroughness in order to comply with the Fair Work Act and encouraged them to develop their internal policies and procedures so that they complied with the procedural requirements. From an employee representative's perspective, the formal procedure provides protection for the employee if circumstances change, such as reporting to a new manager.⁹²

5.2 Section 76 requests for an extension to unpaid parental leave

The report by The University of Sydney found that knowledge of the right to request an extension to unpaid parental leave was widespread among interviewees.⁹³

The majority of employers had parental leave policies dealing with requests for the extension of unpaid parental leave, and in some instances the right to 104 weeks of leave was in the enterprise agreement.⁹⁴

⁸⁷ Baird, Williams, Heron & Cooper, pp. 39, 41.

⁸⁸ Baird, Williams, Heron & Cooper, p. 40.

⁸⁹ Baird, Williams, Heron & Cooper, p. 40.

⁹⁰ Baird, Williams, Heron & Cooper, p. 40.

⁹¹ Baird, Williams, Heron & Cooper, p. 41.

⁹² Baird, Williams, Heron & Cooper, p. 44.

⁹³ Baird, Williams, Heron & Cooper, p. 47.

⁹⁴ Baird, Williams, Heron & Cooper, p. 52.

5.2.1 Use

Females were overwhelmingly more likely to make these requests. This was reflected in both the in-depth interviews and the online survey.⁹⁵ On some occasions, the request was made because of the unavailability or cost of childcare.⁹⁶ Males generally made use of unpaid parental leave and some reported a growing incidence of males taking the second year as unpaid parental leave.⁹⁷

Requests were made by both full-time and part-time workers. Results from the online survey indicated there was no difference between full-time and part-time employees. Often it depended on the employment practice in the industry or whether the woman has other children. According to these interviews, few requests are made by casuals and those from a non-English speaking background.⁹⁸

Reasons for employees not to request an extension to unpaid parental leave were due to the casual nature of the work, that employees were fearful of losing their jobs and informal arrangements were being used instead of the formal arrangements.⁹⁹

5.2.2 Granting requests

Most respondents reported that requests were granted much more often than they were refused. The longer-term nature of the absence made it easier to manage and the arrangements were easier to approve as an arrangement was already in place, therefore it amounted to only an extension of the current situation. The duration of extension requested by employees was generally between 6 and 12 months.¹⁰⁰

5.2.3 Refusing requests

Refusing such requests was not reported as widespread in either the online survey and in-depth interviews. Examples of the reasons for requests being refused were complex relationships with external clients, instances where the role had been filled inappropriately so that the employer wanted the employee to return, or because an employee would have otherwise been made redundant on their return to work.¹⁰¹

For some of these instances where the request was initially refused, concerns were generally resolved following discussions with human resource management. Issues tend to be in relation to the timing of the employee returning to work and the difficulty in the employer finding a suitable replacement. Often this is when the request is made close to the initial return date, making it difficult for the employer to organise a replacement.¹⁰² Some union representatives commented that it was more common to see refusals of

⁹⁵ Baird, Williams, Heron & Cooper, p. 47.

⁹⁶ Baird, Williams, Heron & Cooper, p. 49.

⁹⁷ Baird, Williams, Heron & Cooper, p. 48.

⁹⁸ Baird, Williams, Heron & Cooper, pp. 50–51.

⁹⁹ Baird, Williams, Heron & Cooper, p. 51.

¹⁰⁰ Baird, Williams, Heron & Cooper, p. 48.

¹⁰¹ Baird, Williams, Heron & Cooper, pp. 48–49.

¹⁰² Baird, Williams, Heron & Cooper, p. 49.

requests to return to work early, as this tended to be due to difficulties with managing the 'replacement person'.¹⁰³

5.3 Effects of COVID-19 on flexible working arrangements

There was an increase in flexible working arrangements during COVID-19, however, there were few reports of formal requests. Where formal requests were made, reasons other than COVID-19 were also provided.¹⁰⁴

The most common flexible working arrangements reported during COVID-19 were a change in location, a change in start times and a change in finish times.¹⁰⁵

Respondents also observed flexibility using the temporary award provisions and JobKeeper enabling provision in the Fair Work Act, such as stand down provisions, changes to the span of hours, reduction in hours and use of leave (i.e. employees being directed to use annual leave).¹⁰⁶

Some interviewees reported that there have been fewer formal requests for flexibility since COVID-19, while there was evidence of employees seeking to formalise flexible working arrangements obtained during the period of lockdowns.¹⁰⁷ Other interviewees discussed that it is more difficult for employers to resist requests for flexible working arrangements since COVID-19 and to claim reasonable business grounds for refusals.¹⁰⁸

At the time of the survey, many employees had returned to pre-COVID-19 working arrangements.¹⁰⁹

¹⁰³ Baird, Williams, Heron & Cooper, p. 50.

¹⁰⁴ Baird, Williams, Heron & Cooper, p. 56.

¹⁰⁵ Baird, Williams, Heron & Cooper, p. 56.

¹⁰⁶ Baird, Williams, Heron & Cooper, p. 55.

¹⁰⁷ Baird, Williams, Heron & Cooper, p. 57.

¹⁰⁸ Baird, Williams, Heron & Cooper, p. 58.

¹⁰⁹ Baird, Williams, Heron & Cooper, p. 58.