

Division 5—Parental leave and related entitlements

Subdivision A—General

67 General rule—employee must have completed at least 12 months of service

Employees other than casual employees

- (1) An employee, other than a casual employee, is not entitled to leave under this Division (other than unpaid pre-adoption leave or unpaid no safe job leave) unless the employee has, or will have, completed at least 12 months of continuous service with the employer immediately before the date that applies under subsection (3).
- (1A) For the purposes of applying subsection (1) in relation to an employee who has had their employment changed under Division 4A of Part 2-2, any period for which the employee was a regular casual employee of the employer is taken to be continuous service for the purposes of that subsection.

Casual employees

- (2) A casual employee, is not entitled to leave (other than unpaid pre-adoption leave or unpaid no safe job leave) under this Division unless:
 - (a) the employee is, or will be, immediately before the date that applies under subsection (3), a regular casual employee of the employer who has been employed on that basis for a sequence of periods of employment during a period of at least 12 months; and
 - (b) but for:
 - (i) the birth or expected birth of the child; or
 - (ii) the placement or the expected placement of the child; the employee would have a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Date at which employee must have completed 12 months of service

- (3) For the purposes of subsections (1) and (2), the date that applies is:
- (a) if the leave is:
 - (i) birth-related leave starting before the birth of the child;
or
 - (ii) unpaid special parental leave;
the expected date of birth of the child; or
 - (b) in any other case—the date on which the employee’s period of leave is to start.

Meaning of birth-related leave

- (4) **Birth-related leave** means leave of either of the following kinds:
- (a) unpaid parental leave taken in association with the birth of a child (see section 70);
 - (b) unpaid special parental leave (see section 80).

Meaning of adoption-related leave

- (5) **Adoption-related leave** means leave of either of the following kinds:
- (a) unpaid parental leave taken in association with the placement of a child for adoption (see section 70);
 - (b) unpaid pre-adoption leave (see section 85).

Meaning of day of placement

- (6) The **day of placement**, in relation to the adoption of a child by an employee, means the earlier of the following days:
- (a) the day on which the employee first takes custody of the child for the adoption;
 - (b) the day on which the employee starts any travel that is reasonably necessary to take custody of the child for the adoption.

Section 68

68 General rule for adoption-related leave—child must be under 16 etc.

An employee is not entitled to adoption-related leave unless the child that is, or is to be, placed with the employee for adoption:

- (a) is, or will be, under 16 as at the day of placement, or the expected day of placement, of the child; and
- (b) has not, or will not have, lived continuously with the employee for a period of 6 months or more as at the day of placement, or the expected day of placement, of the child; and
- (c) is not (otherwise than because of the adoption) a child of the employee or the employee's spouse or de facto partner.

69 Transfer of employment situations in which employee is entitled to continue on leave etc.

(1) If:

- (a) there is a transfer of employment in relation to an employee; and
- (b) the employee has already started a period of leave under this Division when the employee's employment with the first employer ends;

the employee is entitled to continue on that leave for the rest of that period.

(2) If:

- (a) there is a transfer of employment in relation to an employee; and
- (b) the employee has, in relation to the first employer, already taken a step that is required or permitted by a provision of this Division in relation to taking a period of leave;

the employee is taken to have taken the step in relation to the second employer.

Note: Steps covered by this subsection include (for example) complying with a notice or evidence requirement of section 74 in relation to the first employer.

Subdivision B—Parental leave

70 Entitlement to unpaid parental leave

An employee is entitled to 12 months of unpaid parental leave if:

- (a) the leave is associated with:
 - (i) the birth of a child of the employee or the employee's spouse or de facto partner; or
 - (ii) the placement of a child with the employee for adoption; and
- (b) the employee has or will have a responsibility for the care of the child.

Note: The employee's entitlement under this section may be affected by other provisions of this Division.

71 The period of leave

Application of this section

- (1) This section applies to an employee who intends to take unpaid parental leave.

Leave must be taken in single continuous period

- (2) The employee must take the leave in a single continuous period.

Note 1: An employee may take a form of paid leave at the same time as the employee is on unpaid parental leave (see section 79).

Note 2: For provisions affecting the rule in this subsection, see:

- (a) subsection 72A(11) (flexible unpaid parental leave); and
- (b) subsection 73(4) (pregnant employee may be required to take unpaid parental leave within 6 weeks before the birth); and
- (c) paragraph 78A(2)(b) (permitted work periods while child is hospitalised); and
- (d) subsection 79A(1) (keeping in touch days).

Section 71

When birth-related leave must start and end

- (3) If the leave is birth-related leave for an employee who is pregnant with, or gives birth to, the child, the period of leave may start:
- (a) up to 6 weeks before the expected date of birth of the child;
or
 - (b) earlier, if the employer and employee so agree; or
 - (c) during the 24-month period starting on the date of birth of the child;

but must end during the 24-month period starting on the date of birth of the child.

Note 1: If the employee is not fit for work, the employee may be entitled to:

- (a) paid personal leave under Subdivision A of Division 7; or
- (b) unpaid special parental leave under section 80.

Note 2: If it is inadvisable for the employee to continue in the employee's present position, the employee may be entitled:

- (a) to be transferred to an appropriate safe job under section 81; or
- (b) to paid no safe job leave under section 81A; or
- (c) to unpaid no safe job leave under section 82A.

Note 3: Section 344 prohibits the exertion of undue influence or undue pressure on the employee in relation to a decision by the employee whether to agree as mentioned in paragraph (3)(b) of this section.

- (4) If the leave is birth-related leave but subsection (3) does not apply, the period of leave must start and end during the 24-month period starting on the date of birth of the child.

When adoption-related leave must start and end

- (5) If the leave is adoption-related leave, the period of leave must start and end during the 24-month period starting on the day of placement of the child.

Limit on amount of leave

- (6) The employee may take unpaid parental leave under this section only if the period of leave is no longer than 12 months, less the employee's notional flexible period.

Note: An employee is entitled under section 76 to request an extension of the period of leave beyond the employee's available parental leave period. However, the period of leave may not be extended beyond 24 months after the date of birth or day of placement of the child (see subsection 76(7)).

72A Flexible unpaid parental leave

Taking leave during 24 months starting on date of birth or day of placement

- (1) An employee may take up to 100 days (or, if a higher number of days is prescribed by the regulations, that higher number of days) of unpaid parental leave (***flexible unpaid parental leave***) during the 24-month period starting on the date of birth or day of placement of the child if the requirements of this section are satisfied in relation to the leave.

Note 1: The flexible unpaid parental leave is unpaid parental leave and so comes out of the employee's entitlement to 12 months of unpaid parental leave under section 70.

Note 2: The number of days of flexible unpaid parental leave that the employee takes must not be more than the number of flexible days notified to the employer under subsection 74(3C) (subject to any agreement under subsection 74(3D)).

- (2) Flexible unpaid parental leave under subsection (1) is available in full to part-time and casual employees.

Taking leave that starts up to 6 weeks before the expected date of birth of the child

- (2A) A pregnant employee may take unpaid parental leave (***flexible unpaid parental leave***) during the period that starts 6 weeks before the expected date of birth of the child if the requirements of this section are satisfied in relation to the leave.

Note 1: The flexible unpaid parental leave is unpaid parental leave and so comes out of the employee's entitlement to 12 months of unpaid parental leave under section 70.

Note 2: The number of days of flexible unpaid parental leave that the employee takes must not be more than the number of flexible days

Section 72A

notified to the employer under subsection 74(3C) (subject to any agreement under subsection 74(3D)).

- (2B) Flexible unpaid parental leave under subsection (2A) is available in full to pregnant part-time employees and pregnant casual employees.
- (2C) The amount of flexible unpaid parental leave to which an employee is entitled under subsection (1) in relation to the child is reduced by the number of days of flexible unpaid parental leave taken by the employee under subsection (2A) in relation to the child.

How flexible unpaid parental leave may be taken

- (3) The employee must take the flexible unpaid parental leave as:
- (a) a single continuous period of one or more days; or
 - (b) separate periods of one or more days each.

Effect of taking unpaid parental leave under other provisions

- (4) The employee may take the flexible unpaid parental leave whether or not the employee has taken unpaid parental leave under another provision of this Division in relation to the child.
- (5) However, the employee may take flexible unpaid parental leave after taking one or more periods of unpaid parental leave under another provision of this Division only if the total of those periods (disregarding any extension under section 76A) is no longer than 12 months, less the employee's notional flexible period.

Meaning of notional flexible period

- (6) An employee's **notional flexible period** is the period during which the employee would be on flexible unpaid parental leave if the employee took leave for all the employee's flexible days in a single continuous period. For this purpose, the employee's flexible days are the flexible days notified to the employer under subsection 74(3C) (subject to any agreement under subsection 74(3D)).

- (7) For the purposes of subsection (6), assume that:
- (a) the employee ordinarily works each day that is not a Saturday or a Sunday; and
 - (b) there are no public holidays during the period.

Multiple births

- (10) An employee is not entitled to take flexible unpaid parental leave in relation to a child if:
- (a) the child and another child:
 - (i) are born during the same multiple birth; or
 - (ii) are both placed with the employee for adoption and have the same day of placement; and
 - (b) the employee takes flexible unpaid parental leave in relation to the other child.

Interaction with section 71

- (11) Flexible unpaid parental leave taken by an employee is an exception to the rules in section 71 about:
- (a) taking the employee's unpaid parental leave in a single continuous period; and
 - (b) when the employee's period of unpaid parental leave must start.
- (12) Despite anything in subsection (11), flexible unpaid parental leave cannot be used to break up a period of unpaid parental leave taken under section 71.

73 Pregnant employee may be required to take unpaid parental leave within 6 weeks before the birth

Employer may ask employee to provide a medical certificate

- (1) If a pregnant employee who is entitled to unpaid parental leave (whether or not the employee has complied with section 74) continues to work during the 6 week period before the expected date of birth of the child, the employer may ask the employee to

Section 73

give the employer a medical certificate containing the following statements (as applicable):

- (a) a statement of whether the employee is fit for work;
- (b) if the employee is fit for work—a statement of whether it is inadvisable for the employee to continue in the employee’s present position during a stated period because of:
 - (i) illness, or risks, arising out of the employee’s pregnancy; or
 - (ii) hazards connected with the position.

Note: Personal information given to an employer under this subsection may be regulated under the *Privacy Act 1988*.

Employer may require employee to take unpaid parental leave

- (2) The employer may require the employee to take a period of unpaid parental leave other than flexible unpaid parental leave (the ***period of leave***) as soon as practicable if:
 - (a) the employee does not give the employer the requested certificate within 7 days after the request; or
 - (b) within 7 days after the request, the employee gives the employer a medical certificate stating that the employee is not fit for work; or
 - (c) the following subparagraphs are satisfied:
 - (i) within 7 days after the request, the employee gives the employer a medical certificate stating that the employee is fit for work, but that it is inadvisable for the employee to continue in the employee’s present position for a stated period for a reason referred to in subparagraph (1)(b)(i) or (ii);
 - (ii) the employee has not complied with the notice and evidence requirements of section 74 for taking unpaid parental leave.

Note: If the medical certificate contains a statement as referred to in subparagraph (c)(i) and the employee has complied with the notice and evidence requirements of section 74, then the employee is entitled to be transferred to a safe job (see section 81) or to paid no safe job leave (see section 81A).

When the period of leave must end

- (3) The period of leave must not end later than the earlier of the following:
- (a) the end of the pregnancy;
 - (b) if the employee has given the employer notice of the taking of a period of leave connected with the birth of the child (whether it is unpaid parental leave or some other kind of leave)—the start date of that leave.

Special rules about the period of leave

- (4) The period of leave is an exception to the rules in section 71 about:
- (a) taking the employee's unpaid parental leave in a single continuous period; and
 - (b) when the employee's period of unpaid parental leave must start.

Note: The period of leave is unpaid parental leave and so comes out of the employee's entitlement to 12 months of unpaid parental leave under section 70.

- (5) The employee is not required to comply with section 74 in relation to the period of leave.

74 Notice and evidence requirements

General requirement to give notice of taking leave

- (1) An employee must give the employee's employer written notice of the taking of unpaid parental leave under section 71, or flexible unpaid parental leave, or both, by the employee.

Notice requirements

- (2) The employee must give the notice to the employer:
- (a) at least 10 weeks before starting any of the leave covered by the notice; or
 - (b) if that is not practicable, and:

Section 74

- (i) the first or only period of leave covered by the notice is leave to be taken under section 71; or
 - (ii) any of the leave covered by the notice starts before the child's date of birth or expected date of birth; as soon as practicable (which may be a time after any of the leave covered by the notice has started).
- (2A) However, if the first or only period of leave covered by the notice is leave to be taken under section 72A, the notice may be given at any later time if the employer agrees.
- (3) If any of the leave covered by the notice is to be taken under section 71, the notice must specify the intended start and end dates of the leave to be taken under section 71.
- (3C) If any of the leave covered by the notice is to be taken under section 72A, the notice must specify the total number of days (***flexible days***) of flexible unpaid parental leave that the employee intends to take in relation to the child.
- (3D) If the employer agrees, the employee may:
- (a) reduce the number of flexible days, including by reducing the number of flexible days to zero; or
 - (b) increase the number of flexible days, but not so as to increase the number of flexible days above 100 (or, if a higher number of days is prescribed by regulations made for the purposes of subsection 72A(1), that higher number).

Taking leave under section 71—confirming or changing intended start and end dates

- (4) If any of the leave covered by the notice is to be taken under section 71, then at least 4 weeks before the intended start date specified in the notice given under subsection (1), the employee must:
- (a) confirm the intended start and end dates of the leave to be taken under section 71; or
 - (b) advise the employer of any changes to the intended start and end dates of the leave to be taken under section 71;
-

unless it is not practicable to do so.

Taking flexible unpaid parental leave—notifying days on which employee will take leave

- (4B) The employee must give the employer written notice of a flexible day on which the employee will take flexible unpaid parental leave:
- (a) at least 4 weeks before that day; or
 - (b) if that is not practicable—as soon as practicable (which may be a time after the leave has started).

Note: Whether or not it is practicable for the employee to give notice at least 4 weeks before that day will depend on the employee's personal and family circumstances. For example, it may not be practicable for the employee to give notice at least 4 weeks before that day where the employee experiences a health issue, a pregnancy complication or an unexpected change in the employee's child care arrangements.

- (4C) If the employer agrees, the employee may change a day on which the employee takes flexible unpaid parental leave from a day specified in a notice under subsection (4B).

Evidence requirements

- (5) An employee who has given the employee's employer notice of the taking of unpaid parental leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person:
- (a) if the leave is birth-related leave:
 - (i) of the date of birth, or the expected date of birth, of the child; and
 - (ii) that paragraph 77A(1)(a) (which deals with the stillbirth of a child) applies in relation to the employee, if relevant; or
 - (b) if the leave is adoption-related leave:
 - (i) of the day of placement, or the expected day of placement, of the child; and

Section 75

- (ii) that the child is, or will be, under 16 as at the day of placement, or the expected day of placement, of the child.
- (6) Without limiting subsection (5), an employer may require the evidence referred to in paragraph (5)(a) to be a medical certificate.
- Example: If the application of paragraph 77A(1)(a) (which deals with the stillbirth of a child) is relevant—certification by a medical practitioner of the child as having been delivered.

Compliance

- (7) An employee is not entitled to take unpaid parental leave under section 71, or flexible unpaid parental leave, unless the employee complies with this section.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

75 Extending period of unpaid parental leave—extending to use more of available parental leave period

Application of this section

- (1) This section applies if:
- (a) an employee has, in accordance with section 74, given notice of the taking of a period of unpaid parental leave (the ***original leave period***) under section 71; and
 - (b) the original leave period is less than the employee's available parental leave period; and
 - (c) the original leave period has started.
- (2) The employee's ***available parental leave period*** is 12 months, less any periods of the following kinds:
- (b) a period of unpaid parental leave that the employee has been required to take under subsection 73(2) or 82(2);
 - (d) if the employee has given notice in accordance with subsection 74(2) or (2A) of the taking of flexible unpaid

parental leave—a period equal to the employee’s notional flexible period.

First extension by giving notice to employer

- (3) The employee may extend the period of unpaid parental leave taken under section 71 by giving the employee’s employer written notice of the extension at least 4 weeks before the end date of the original leave period. The notice must specify the new end date for the leave.
- (4) Only one extension is permitted under subsection (3).

Further extensions by agreement with employer

- (5) If the employer agrees, the employee may further extend the period of unpaid parental leave one or more times.

No entitlement to extension beyond available parental leave period

- (6) The employee is not entitled under this section to extend the period of unpaid parental leave beyond the employee’s available parental leave period.

76 Extending period of unpaid parental leave—extending for up to 12 months beyond available parental leave period

Employee may request further period of leave

- (1) An employee who takes unpaid parental leave under section 71 for the employee’s available parental leave period may request the employee’s employer to agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months immediately following the end of the available parental leave period.

Note: Extended periods of unpaid parental leave can include keeping in touch days on which an employee performs work (see section 79A).

Section 76A

Making the request

- (2) The request must be in writing, and must be given to the employer at least 4 weeks before the end of the available parental leave period.

Note: The request must be made when the employee is taking unpaid parental leave under section 71.

No extension beyond 24 months after birth or placement

- (7) Despite any other provision of this Division, 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.

76A Responding to requests for extension of unpaid parental leave

Responding to the request

- (1) If, under subsection 76(1), an employee requests an employer to agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months immediately following the end of the available parental leave period, the employer must give the employee a written response to the request within 21 days.
- (2) The response must:
- (a) state that the employer grants the request; or
 - (b) if, following discussion between the employer and the employee, the employer and the employee agree to an extension of unpaid parental leave for the employee for a period that differs from the period requested—set out the agreed extended period; or
 - (c) subject to subsection (3)—state that the employer refuses the request and include the matters required by subsection (6).
- (3) The employer may refuse the request only if:
- (a) the employer has:
 - (i) discussed the request with the employee; and

- (ii) genuinely tried to reach an agreement with the employee about an extension of the period of unpaid parental leave for the employee; and
- (b) the employer and the employee have not reached such an agreement; and
- (c) the employer has had regard to the consequences of the refusal for the employee; and
- (d) the refusal is on reasonable business grounds.

Note: An employer's grounds for refusing a request may be taken to be reasonable business grounds, or not to be reasonable business grounds, in certain circumstances (see subsection 76C(6)).

- (4) To avoid doubt, subparagraph (3)(a)(ii) does not require the employer to agree to an extension of the period of unpaid parental leave for the employee if the employer would have reasonable business grounds for refusing a request for the extension.

Reasonable business grounds for refusing requests

- (5) Without limiting what are reasonable business grounds for the purposes of paragraph (3)(d) and subsection (4), reasonable business grounds for refusing a request include the following:
 - (a) that the extension of the period of unpaid parental leave 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 extension of the period of unpaid parental leave 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 extension of the period of unpaid parental leave requested by the employee;
 - (d) that the extension of the period of unpaid parental leave requested by the employee would be likely to result in a significant loss in efficiency or productivity;

Section 76A

- (e) that the extension of the period of unpaid parental leave requested by the employee would be likely to have a significant negative impact on customer service.

Note: The specific circumstances of the employer, including the nature and size of the enterprise carried on by the employer, are relevant to whether the employer has reasonable business grounds for refusing a request for the purposes of paragraph (3)(d) and subsection (4). For example, if the employer has only a small number of employees, there may be no capacity to change the working arrangements of other employees to accommodate the request (see paragraph (5)(b)).

Employer must explain grounds for refusal

- (6) If the employer refuses the request, the written response under subsection (1) must:
- (a) include details of the reasons for the refusal; and
 - (b) without limiting paragraph (a) of this subsection:
 - (i) set out the employer's particular business grounds for refusing the request; and
 - (ii) explain how those grounds apply to the request; and
 - (c) either:
 - (i) set out the extension of the period of unpaid parental leave for the employee (other than the period requested by the employee) that the employer would be willing to agree to; or
 - (ii) state that there is no extension of the period that the employer would be willing to agree to; and
 - (d) set out the effect of sections 76B and 76C.

Genuinely trying to reach an agreement

- (7) This section does not affect, and is not affected by, the meaning of the expression "genuinely trying to reach an agreement", or any variant of the expression, as used elsewhere in this Act.

76B Disputes about extension of period of unpaid parental leave

Application of this section

- (1) This section applies to a dispute between an employer and an employee that relates to a request by the employee to the employer under subsection 76(1) to agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months immediately following the end of the available parental leave period if:
- (a) the employer has refused the request; or
 - (b) 21 days have passed since the employee made the request, and the employer has not given the employee a written response to the request under section 76A.

Note 1: Modern awards and enterprise agreements must include a term that provides a procedure for settling disputes in relation to the National Employment Standards (see paragraph 146(b) and subsection 186(6)).

Note 2: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards. However, a term of a modern award or an enterprise agreement has no effect to the extent it contravenes section 55 (see section 56).

Resolving disputes

- (2) In the first instance, the parties to the dispute must attempt to resolve the dispute at the workplace level, by discussions between the parties.

FWC may deal with disputes

- (3) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the dispute to the FWC.
- (4) If a dispute is referred under subsection (3):
- (a) the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances; and
 - (b) the FWC may deal with the dispute by arbitration in accordance with section 76C.

Section 76C

Note: For the purposes of paragraph (a), the FWC may deal with the dispute as it considers appropriate. The FWC commonly deals with disputes by conciliation. The FWC may also deal with the dispute by mediation, making a recommendation or expressing an opinion (see subsection 595(2)).

Representatives

- (5) The employer or employee may appoint a person or industrial association to provide the employer or employee (as the case may be) with support or representation for the purposes of:
- (a) resolving the dispute; or
 - (b) the FWC dealing with the dispute.

Note: A person may be represented by a lawyer or paid agent in a matter before the FWC only with the permission of the FWC (see section 596).

76C Arbitration

- (1) For the purposes of paragraph 76B(4)(b), the FWC may deal with the dispute by arbitration by making any of the following orders:
- (a) 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;
 - (b) if the employer refused the request:
 - (i) 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; or
 - (ii) 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;
 - (c) if the FWC is satisfied that the employer has not responded, or has not responded adequately, to the employee's request under section 76A—an order that the employer take such further steps as the FWC considers appropriate, having regard to the matters in section 76A;
 - (d) subject to subsection (4) of this section:
 - (i) an order that the employer grant the request; or

- (ii) an order that the employer agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months (other than the period requested by the employee) immediately following the end of the available parental leave period.

Note: An order by the FWC under paragraph (c) could, 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.

- (2) In making an order under subsection (1), the FWC must take into account fairness between the employer and the employee.
- (3) The FWC must not make an order under paragraph (1)(c) or (d) that would be inconsistent with:
 - (a) a provision of this Act; or
 - (b) a term of a fair work instrument (other than an order made under that paragraph) that, immediately before the order is made, applies to the employer and employee.
- (4) The FWC may make an order under paragraph (1)(d) only if the FWC is satisfied that there is no reasonable prospect of the dispute being resolved without the making of such an order.
- (5) If the FWC makes an order under paragraph (1)(a), the employer is taken to have refused the request.
- (6) If the FWC makes an order under paragraph (1)(b), the grounds on which the employer refuses the request are taken:
 - (a) for an order made under subparagraph (1)(b)(i)—to be reasonable business grounds; or
 - (b) for an order made under subparagraph (1)(b)(ii)—not to be reasonable business grounds.

Contravening an order under subsection (1)

- (7) A person must not contravene a term of an order made under subsection (1).

Note: This subsection is a civil remedy provision (see Part 4-1).

Section 77

77 Reducing period of unpaid parental leave

If the employer agrees, an employee whose period of unpaid parental leave has started may reduce the period of unpaid parental leave the employee takes.

77A Effect of stillbirth or death of child on unpaid parental leave

Stillbirth—preserving entitlement to birth-related leave

- (1) If:
- (a) a child is stillborn; and
 - (b) an employee would have been entitled to unpaid parental leave that is birth-related leave, if the child had been born alive;
- then the employee is taken to be entitled to the unpaid parental leave, despite the stillbirth of the child.
- (2) A **stillborn** child is a child:
- (a) who weighs at least 400 grams at delivery or whose period of gestation was at least 20 weeks; and
 - (b) who has not breathed since delivery; and
 - (c) whose heart has not beaten since delivery.
- (3) The provisions of this Division have effect in relation to the employee as if the birth of a child included the stillbirth of a child.

Note: One effect of this subsection is that if the employee has not given notice in accordance with section 74 before the stillbirth of the child, the employee can do so as soon as practicable (which may be a time after the leave has started).

Stillbirth or death of child—cancelling leave or returning to work

- (4) If a child is stillborn, or dies during the 24-month period starting on the child's date of birth, then an employee who is entitled to a period of unpaid parental leave in relation to the child may:
- (a) before the period of leave starts, give the employee's employer written notice cancelling the leave; or

- (b) if the period of leave has started, give the employee's employer written notice that the employee wishes to return to work on a specified day.
- (5) For the purposes of paragraph (4)(b), the specified day must be at least 4 weeks after the employer receives the notice.
- (6) If the employee takes action under subsection (4), the employee's entitlement to unpaid parental leave in relation to the child ends:
 - (a) if the action is taken under paragraph (4)(a)—immediately after the cancellation of the leave; or
 - (b) if the action is taken under paragraph (4)(b)—immediately before the specified day.

Interaction with section 77

- (7) Subsections (4) to (6) do not limit section 77 (which deals with the employee reducing the period of unpaid parental leave with the agreement of the employer).

78 Employee who ceases to have responsibility for care of child

- (1) This section applies to an employee who has taken unpaid parental leave in relation to a child if the employee ceases to have any responsibility for the care of the child for a reason other than because the child:
 - (a) is stillborn; or
 - (b) dies during the 24-month period starting on the child's date of birth.
- (2) The employer may give the employee written notice requiring the employee to return to work on a specified day.
- (3) The specified day:
 - (a) must be at least 4 weeks after the notice is given to the employee; and
 - (b) if the leave is birth-related leave taken by an employee who has given birth—must not be earlier than 6 weeks after the date of birth of the child.

Section 78A

- (4) The employee's entitlement to unpaid parental leave in relation to the child ends immediately before the specified day.

78A Hospitalised children

Agreeing to not take unpaid parental leave for a period while child remains in hospital

- (1) If:
- (a) a child is required to remain in hospital after the child's birth, or is hospitalised immediately after the child's birth, including because:
 - (i) the child was born prematurely; or
 - (ii) the child developed a complication or contracted an illness during the child's period of gestation or at birth; or
 - (iii) the child developed a complication or contracted an illness following the child's birth; and
 - (b) an employee, whether before or after the birth of the child, gives notice in accordance with section 74 of the taking of a period of unpaid parental leave (the **original leave period**) in relation to the child;

then the employee may agree with the employee's employer that the employee will not take unpaid parental leave for a period (the **permitted work period**) while the child remains in hospital.

Note: Section 344 prohibits the exertion of undue influence or undue pressure on the employee in relation to a decision by the employee whether to agree.

- (2) If the employee and employer so agree, then the following rules have effect:
- (a) the employee is taken to not be taking unpaid parental leave during the permitted work period;
 - (b) the permitted work period does not break the continuity of the original leave period;
 - (c) the employee is taken to have advised the employer, for the purposes of subsection 74(4), of an end date for the original

leave period that is the date on which that period would end if it were extended by a period equal to the permitted work period.

Note: One effect of paragraph (b) is that, if the employee takes periods of unpaid parental leave either side of the permitted work period, the periods are still treated as a single continuous period for the purposes of section 71.

When permitted work period must start

- (3) The permitted work period must start after the birth of the child.

When permitted work period ends

- (4) The permitted work period ends at the earliest of the following:
- (a) the time agreed by the employee and employer;
 - (b) the end of the day of the child's first discharge from hospital after birth;
 - (c) if the child dies before being discharged—the end of the day the child dies.

Only one permitted work period allowed

- (5) Only one period may be agreed to under subsection (1) for which the employee will not take unpaid parental leave in relation to the child.

Evidence

- (6) The employee must, if required by the employer, give the employer evidence that would satisfy a reasonable person of either or both of the following:
- (a) that paragraph (1)(a) applies in relation to the child;
 - (b) that the employee is fit for work.
- (7) Without limiting subsection (6), an employer may require the evidence referred to in that subsection to be a medical certificate.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

Section 79

79 Interaction with paid leave

- (1) This Subdivision (except for subsections (2) and (3)) does not prevent an employee from taking any other kind of paid leave while the employee is taking unpaid parental leave. If the employee does so, the taking of that other paid leave does not break the continuity of the period of unpaid parental leave.

Note: For example, if the employee has paid annual leave available, the employee may (with the employer's agreement) take some or all of that paid annual leave at the same time as the unpaid parental leave.

- (2) While an employee is taking unpaid parental leave, the employee is not entitled to take:
- (a) paid personal/carer's leave; or
 - (b) compassionate leave, unless the permissible occasion is the stillbirth or death of the child in relation to whom the employee is taking unpaid parental leave.
- (3) An employee is not entitled to any payment under Division 8 (which deals with community service leave) in relation to activities the employee engages in while taking unpaid parental leave.

79A Keeping in touch days

- (1) This Subdivision does not prevent an employee from performing work for the employee's employer on a keeping in touch day while the employee is taking unpaid parental leave. If the employee does so, the performance of that work does not break the continuity of the period of unpaid parental leave.
- (2) A day on which the employee performs work for the employer during the period of leave is a **keeping in touch day** if:
- (a) the purpose of performing the work is to enable the employee to keep in touch with the employee's employment in order to facilitate a return to that employment after the end of the period of leave; and
 - (b) both the employee and the employer consent to the employee performing work for the employer on that day; and

- (c) the day is not within:
 - (i) if the employee suggested or requested that the employee perform work for the employer on that day—14 days after the date of birth, or day of placement, of the child to which the period of leave relates; or
 - (ii) otherwise—42 days after the date of birth, or day of placement, of the child; and
- (d) the employee has not already performed work for the employer or another entity on 10 days during the period of leave that were keeping in touch days.

The duration of the work the employee performs on that day is not relevant for the purposes of this subsection.

Note: The employer will be obliged, under the relevant contract of employment or industrial instrument, to pay the employee for performing work on a keeping in touch day.

- (3) The employee's decision whether to give the consent mentioned in paragraph (2)(b) is taken, for the purposes of section 344 (which deals with undue influence or pressure), to be a decision to make, or not make, an arrangement under the National Employment Standards.
- (4) For the purposes of paragraph (2)(d), treat as 2 separate periods of unpaid parental leave:
 - (a) a period of unpaid parental leave taken during the employee's available parental leave period; and
 - (b) a period of unpaid parental leave taken as an extension of the leave referred to in paragraph (a) for a further period immediately following the end of the available parental leave period.
- (5) Subsection (1) does not apply in relation to flexible unpaid parental leave.

Section 79B

79B Unpaid parental leave not extended by paid leave or keeping in touch days

If, during a period of unpaid parental leave, an employee:

- (a) takes paid leave; or
- (b) performs work for the employee's employer on a keeping in touch day;

taking that leave or performing that work does not have the effect of extending the period of unpaid parental leave.

Subdivision C—Other entitlements

80 Unpaid special parental leave

Entitlement to unpaid special parental leave

- (1) An employee is entitled to a period of unpaid special parental leave if the employee is not fit for work during that period because:
 - (a) the employee is pregnant and has a pregnancy-related illness; or
 - (b) all of the following apply:
 - (i) the employee has been pregnant;
 - (ii) the pregnancy ends after a period of gestation of at least 12 weeks otherwise than by the birth of a living child;
 - (iii) the child is not stillborn.

Note 1: Entitlement is also affected by section 67 (which deals with the length of the employee's service).

Note 1A: If the child is stillborn, the employee may be entitled to unpaid parental leave (see section 77A).

Note 2: If an employee has an entitlement to paid personal/carer's leave (see section 96), the employee may take that leave instead of taking unpaid special parental leave under this section.

Notice and evidence

- (2) An employee must give the employee's employer notice of the taking of unpaid special parental leave by the employee.

- (3) The notice:
 - (a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
 - (b) must advise the employer of the period, or expected period, of the leave.
- (4) An employee who has given the employee's employer notice of the taking of unpaid special parental leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason specified in subsection (1).
- (5) Without limiting subsection (4), an employer may require the evidence referred to in that subsection to be a medical certificate.
- (6) An employee is not entitled to take unpaid special parental leave unless the employee complies with subsections (2) to (4).
- (7) Subdivision B does not apply to unpaid special parental leave.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

81 Transfer to a safe job

- (1) This section applies to a pregnant employee if the employee gives the employee's employer evidence that would satisfy a reasonable person that the employee is fit for work, but that it is inadvisable for the employee to continue in the employee's present position during a stated period (the *risk period*) because of:
 - (a) illness, or risks, arising out of the employee's pregnancy; or
 - (b) hazards connected with that position.

Note: Personal information given to an employer under this subsection may be regulated under the *Privacy Act 1988*.

- (2) If there is an appropriate safe job available, then the employer must transfer the employee to that job for the risk period, with no other change to the employee's terms and conditions of employment.

Section 81A

Note: If there is no appropriate safe job available, then the employee may be entitled to paid no safe job leave under section 81A or unpaid no safe job leave under 82A.

- (3) An **appropriate safe job** is a safe job that has:
- (a) the same ordinary hours of work as the employee's present position; or
 - (b) a different number of ordinary hours agreed to by the employee.
- (4) If the employee is transferred to an appropriate safe job for the risk period, the employer must pay the employee for the safe job at the employee's full rate of pay (for the position the employee was in before the transfer) for the hours that the employee works in the risk period.
- (5) If the employee's pregnancy ends before the end of the risk period, the **risk period** ends when the pregnancy ends.
- (6) Without limiting subsection (1), an employer may require the evidence to be a medical certificate.

81A Paid no safe job leave

- (1) If:
- (a) section 81 applies to a pregnant employee but there is no appropriate safe job available; and
 - (b) the employee is entitled to unpaid parental leave; and
 - (c) the employee has complied with the notice and evidence requirements of section 74 for taking unpaid parental leave;
- then the employee is entitled to paid no safe job leave for the risk period.
- (2) If the employee takes paid no safe job leave for the risk period, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the risk period.

82 Employee on paid no safe job leave may be asked to provide a further medical certificate

Employer may ask employee to provide a medical certificate

- (1) If an employee is on paid no safe job leave during the 6 week period before the expected date of birth of the child, the employer may ask the employee to give the employer a medical certificate stating whether the employee is fit for work.

Note: Personal information given to an employer under this subsection may be regulated under the *Privacy Act 1988*.

Employer may require employee to take unpaid parental leave

- (2) The employer may require the employee to take a period of unpaid parental leave (the ***period of leave***) as soon as practicable if:
 - (a) the employee does not give the employer the requested certificate within 7 days after the request; or
 - (b) within 7 days after the request, the employee gives the employer a certificate stating that the employee is not fit for work.

Entitlement to paid no safe job leave ends

- (3) When the period of leave starts, the employee's entitlement to paid no safe job leave ends.

When the period of leave must end etc.

- (4) Subsections 73(3), (4) and (5) apply to the period of leave.

82A Unpaid no safe job leave

- (1) If:
 - (a) section 81 applies to a pregnant employee but there is no appropriate safe job available; and
 - (b) the employee is not entitled to unpaid parental leave; and

Section 83

- (c) if required by the employer—the employee has given the employer evidence that would satisfy a reasonable person of the pregnancy;
then the employee is entitled to unpaid no safe job leave for the risk period.
- (2) Without limiting subsection (1), an employer may require the evidence referred to in paragraph (1)(c) to be a medical certificate.

83 Consultation with employee on unpaid parental leave

If:

- (a) an employee is taking a period of unpaid parental leave, other than flexible unpaid parental leave; and
- (b) the employee's employer makes a decision that will have a significant effect on the status, pay or location of the employee's pre-parental leave position;

the employer must take all reasonable steps to give the employee information about, and an opportunity to discuss, the effect of the decision on that position.

84 Return to work guarantee

On ending a period of unpaid parental leave, an employee is entitled to return to:

- (a) the employee's pre-parental leave position; or
- (b) if that position no longer exists—an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.

84A Replacement employees

- (1) Before an employer engages an employee to perform the work of another employee who is going to take, or is taking, unpaid parental leave, the employer must notify the replacement employee:
 - (a) that the engagement to perform that work is temporary; and

- (b) of the rights the employee taking unpaid parental leave has under:
 - (i) subsections 77A(4) and (5) (which provide a right to cancel the leave or end the leave early if the child is stillborn or dies within 24 months); and
 - (ii) section 84 (which deals with the return to work guarantee); and
 - (d) of the effect of section 78 (which provides the employer with a right to require the employee taking unpaid parental leave to return to work if the employee ceases to have any responsibility for the care of the child).
- (2) Subsection (1) does not apply in relation to the taking of flexible unpaid parental leave.

85 Unpaid pre-adoption leave

Entitlement to unpaid pre-adoption leave

- (1) An employee is entitled to up to 2 days of unpaid pre-adoption leave to attend any interviews or examinations required in order to obtain approval for the employee's adoption of a child.
- Note: Entitlement is also affected by section 68 (which deals with the age etc. of the adopted child).
- (2) However, an employee is not entitled to take a period of unpaid pre-adoption leave if:
- (a) the employee could instead take some other form of leave; and
 - (b) the employer directs the employee to take that other form of leave.
- (3) An employee who is entitled to a period of unpaid pre-adoption leave is entitled to take the leave as:
- (a) a single continuous period of up to 2 days; or
 - (b) any separate periods to which the employee and the employer agree.

Section 85

Notice and evidence

- (4) An employee must give the employee's employer notice of the taking of unpaid pre-adoption leave by the employee.
- (5) The notice:
 - (a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
 - (b) must advise the employer of the period, or expected period, of the leave.
- (6) An employee who has given the employee's employer notice of the taking of unpaid pre-adoption leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken to attend an interview or examination as referred to in subsection (1).
- (7) An employee is not entitled to take unpaid pre-adoption leave unless the employee complies with subsections (4) to (6).

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.