

Table 2 (Appendix 5)

NES provisions (as amended by Fair Work Act 2009)	IR Act 1999 provisions	AIRC decision in Family Provisions Test Case	Comparison NES with IR Act More generous provision / less strict employee / employer obligations / better protection / wider application
REQUEST FOR FLEXIBLE WORKING ARRANGEMENTS	APPLICATION FOR PART-TIME WORK	REQUEST FOR PART-TIME WORK	
Flexible work arrangements are not defined but can include a wide variety of arrangements like reduction in hours of work (e.g. part-time work), a change to non-standard start or finish times, telecommuting, working split-shifts or job sharing arrangements.	Work arrangements are limited to part-time work.	Work arrangements are limited to part-time work.	NES more generous
No statutory declaration required.	The application needs to be accompanied by a statutory declaration by the employee stating the employee is seeking to work on a part-time basis so the employee can continue to be the child's primary caregiver when not at work.	Not included in AIRC decision	NES less strict employee obligations
Employer must give employee a written response to the request within 21 days.	Employer must give employee a written response to request within 14 days.	Not included in AIRC decision	NES less strict employer obligations
Request for flexible work arrangements does not require the employee to have been on parental leave for the child in relation to whom the request has been made. This allows guardians, foster parents etc. to apply as well.	Request for part-time work can only be made in relation to a child for which parental leave was taken.	Request for part-time work can only be made in relation to a child for which parental leave was taken.	NES more generous
'reasonable business grounds' that an employer may apply when considering a request are not defined.	29D(1) (c) of the Act outlines that in considering a request for part-time work, the employer must consider the impact that agreeing to the request would have on the conduct of their business. Some examples of business impacts are provided, but are not meant to be comprehensive.	In considering the request the employer may only refuse the request on the reasonable grounds related to the effect on: 1. the workplace; or 2. the employer's business (e.g. cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service).	IR Act more prescriptive, but providing better protection for employees
The employee's circumstances or the impact of refusal of the request on the employee do not need to be taken into account by the employer when considering an application for a flexible work arrangement.	29D(1)(a)(b) of the Act outlines that in considering a request for part-time work, the employer must consider the particular circumstances of the employee in its role as primary caregiver, and the impact refusal of the request may have on the employees and the	In considering the request the employer must also take into account: 1. the employee's circumstances; and 2. that the request is genuinely based on the employee's parental responsibilities.	IR Act provides better protection for employees

	employee's dependants.		
To be entitled to make a request, employees must have completed at least 12 months of continuous service (for casuals engagement on a regular and systemic basis for at least 12 months with a reasonable expectation of continuing engagement required)	The Act does not provide such a direct restriction, but as the right to request is available for employees returning from parental leave, it is implied that they have been engaged for a minimum of 12 months to be eligible for parental leave in the first place.	AIRC did not include any specification on required length of service in decision, but since the provision applies to employees entitled to parental leave pursuant to the provisions of their relevant award, it will generally be the case that employees need to have been engaged for a minimum of 12 months to be eligible.	similar
As a result of recent amendments to FW Act, new provisions will allow employers and employees to agree, in an enterprise agreement or contract of employment, that a dispute over a refusal to allow flexible work arrangements or an extension of parental leave may be dealt with by FWA or another person. If no such agreement is reached, FWA will be unable to assist parties where a dispute is based on reasonable business grounds.	Where the employee and employer cannot reach agreement in relation to a request made after application of the above criteria, the matter can be dealt with in accordance with the dispute settling procedure in the relevant industrial instrument (award, certified agreement, employer policy, IR Act 1999) as outlined under section 229 of the Act	Not included in AIRC decision. However, it would have been implied that the 'grievance and dispute settling procedure' clause in an award would deal with any disagreements regarding the application for part-time work.	IR Act provides a remedy for employees in general; no restriction as those posed under NES
<u>PARENTAL LEAVE</u>	<u>PARENTAL LEAVE</u>	<u>PARENTAL LEAVE</u>	
A female employee taking the first period of leave may start parental leave up to six weeks before the expected date of birth.	Act does not provide when pregnant employee may start taking maternity leave.	Test case standard provides that an employee may commence parental leave at any time within six weeks immediately prior to the expected date of birth.	IR Act less prescriptive
If a pregnant employee who is entitled to parental leave continues to work during the period of 6 weeks before the expected date of birth of the child, the employer may ask the employee to give the employer a medical certificate containing the following statements (as applicable).	The Act does not contain such a provision	Test case standard provides that where an employee continues to work within the six week period immediately prior to the expected date of birth, or where the employee elects to return to work within six weeks after the birth of the child, an employer may require the employee to provide a medical certificate stating that she is fit to work on her normal duties.	NES more prescriptive, but the provision is to protect the employee and the unborn child
Each parent is entitled to use 12 months of parental leave. Alternatively, one parent may take the total period of 24 months unpaid parental leave.	Act appears to say that only the person taking the first 12 months long-term parental leave can request an extension for another 12 months (totalling 24 months).	Not clear from AIRC decision	NES more generous
Parents are entitled to take three weeks of concurrent leave on the birth or adoption of a child.	- Parents are entitled to take one week of concurrent leave at the birth of a child	- Parents are entitled to take one week of concurrent leave at the birth of a child	IR Act more generous (right to request 8 weeks)

	<p>(short-term leave).</p> <ul style="list-style-type: none"> - Parents are entitled to take three weeks of concurrent leave for the adoption of a child. - Parents are entitled to apply for an extension of concurrent leave of up to 8 weeks for both the adoption or birth of a child. 	<p>(short-term leave).</p> <ul style="list-style-type: none"> - Parents are entitled to take three weeks of concurrent leave for the adoption of a child. - Parents are entitled to apply for an extension of concurrent leave of up to 8 weeks for both the adoption or birth of a child. 	concurrent leave)
<ul style="list-style-type: none"> - ‘reasonable business grounds’ that an employer may apply when considering a request for additional leave are not defined. 	29D(1) (c) of the Act outlines that in considering a request for an extension of the period of parental leave, the employer must consider the impact that agreeing to the request would have on the conduct of their business. Some examples of business impacts are provided, but are not meant to be comprehensive.	In considering the request the employer may only refuse the request on the reasonable grounds related to the effect on: <ol style="list-style-type: none"> 1. the workplace; or 2. the employer’s business (e.g. cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service). 	IR Act more prescriptive (better protection for employees)
The employee’s circumstances or the impact of refusal of the request on the employee do not need to be taken into account by the employer when considering an application for a flexible work arrangement.	29D(1)(a)(b) of the Act outlines that in considering a request for an extension of the period of parental leave, the employer must consider the particular circumstances of the employee in its role as primary caregiver, and the impact refusal of the request may have on the employees and the employee’s dependants.	In considering the request the employer must also take into account: <ol style="list-style-type: none"> 1. the employee’s circumstances; and 2. that the request is genuinely based on the employee’s parental responsibilities 	IR Act provides better protection for employees
Where an employee ceases to have responsibility for the care of the child, an employer may give written notice requiring the employee to return to work on a specified day at least four weeks from when the notice is given. For a female employee this must not be earlier than six weeks after the date of birth of the child.	Act has similar provision. However, it does not specify that for a female employee return to work must occur within 6 weeks of the notice.	Not addressed in AIRC decision	NES more prescriptive, providing better protection for employees as female employee gets <u>at least</u> 6 weeks
A female employee is entitled to unpaid special maternity leave if she is unfit to work because she has been pregnant and the pregnancy has ended <u>within 28 weeks of the expected date of birth</u> of the child (so miscarriage within first 3 months would not allow an employee to access special maternity leave)	If, before an employee starts maternity leave, the employee’s pregnancy terminates <u>before the expected date of birth</u> , other than by the birth of a living child, the employee is entitled to unpaid leave (special maternity leave) and/or paid sick leave.	Test case standard provides that where the pregnancy of an employee not then on maternity leave terminates after 28 weeks other than by the birth of a living child, then the employee may take unpaid special maternity leave of such periods as a registered medical practitioner certifies as necessary (so miscarriage within first 3 months would not allow an employee to access special maternity leave).	IR Act more generous

Female employee eligible for unpaid parental leave is entitled to transfer to a safe job when her present position is a risk due to her pregnancy or hazards connected to that position.	Female employee is entitled to transfer to a safe job when her present work is, because of her pregnancy or breastfeeding, a risk to the health or safety of the employee or of her unborn or newborn child.	Test case standard provides that female employees will be transferred to a safe job, if the employer deems it practicable, when illness or risks arising out of the pregnancy or hazards connected with the employee's work make it inadvisable for the employee to continue at her present work.	IR Act has wider application. It provides protection for the unborn child
The 'safe job' should have the same hours as the employee's current position, unless the employee agrees to change of hours, and provide her full rate of pay she receives in current position.	Where an employer can not adjust the employee's current job to avoid exposure to risk, the employer must transfer the employee to other appropriate work that is, as nearly as possible, comparable in <u>status</u> and remuneration to that of her present work.	Test case standard provides that the employee must be transferred to a safe job at the rate and on the conditions attaching to that job. This suggests that employees have different pay and conditions in the safe job compared to her original job.	IR Act better protection
Where there is no appropriate safe job available, the employee is entitled to paid leave ('no safe job leave') for the specified period, at her 'base rate of pay' for her 'ordinary hours of work'.	If a transfer to a safe job can not be made, the employer must grant the employee maternity leave (unpaid), or any available paid sick leave, for as long as a doctor certifies it is necessary to avoid exposure to the risk.	Test case standard provides that if the transfer to a safe job is not practicable, the employee may elect, or the employer may require the employee to commence parental leave for such period as is certified necessary by a registered medical practitioner.	NES more generous
Unpaid pre-adoption leave is available for up to two days where an employee requires it to attend any interviews or examinations necessary to obtain approval for adoption. However, an employee is not entitled to this leave if they could take other leave (e.g. annual leave) and their employer would prefer them to take that form of leave	Act does not provide for leave specifically for arrangements around adoption.	Not addressed in AIRC decision	NES more generous
NES has similar provision available as the <i>Industrial Relations Act 1999</i> . This provision was not in the original NES draft.	Act provides that an employer has to inform and discuss with an employee, whilst on parental leave, significant changes in the workplace. Employers need to take "reasonable steps" to inform workers if there will be any changes likely to have a significant effect on the "status or responsibility level" of the job they held before taking leave.	AIRC also granted a provision requiring the employer to inform and discuss with an employee, whilst on parental leave, significant changes in the workplace. Employers need to take "reasonable steps" to inform workers if there will be any changes likely to have a significant effect on the "status or responsibility level" of the job they held before taking leave.	IR Act more generous