

I'd like to work flexibly please!

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Today's agenda



The rise of workplace flexibility



What is a flexible work request?



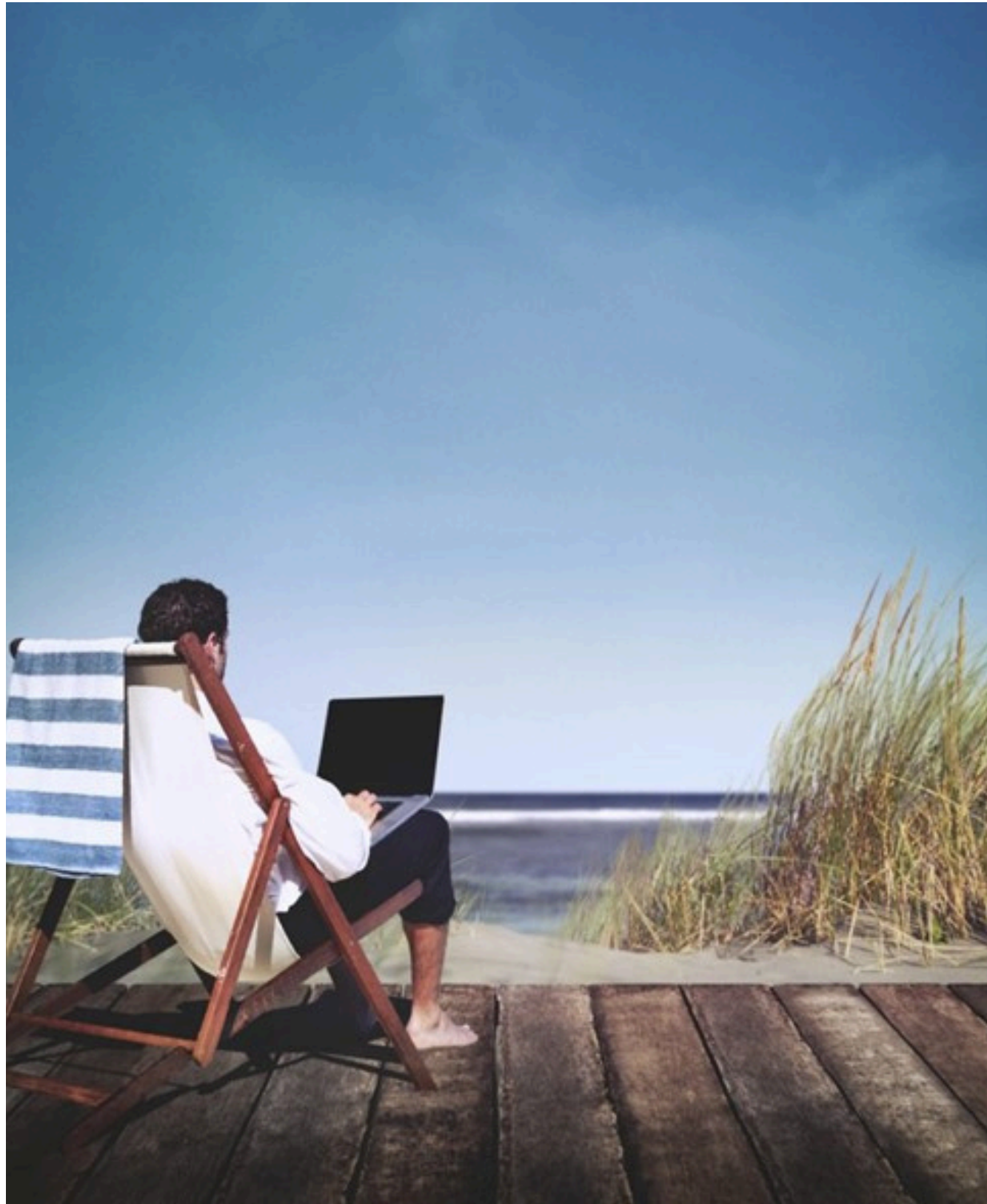
Eligibility



Considering and responding to a request



Case studies



The rise of flexible work in Australia

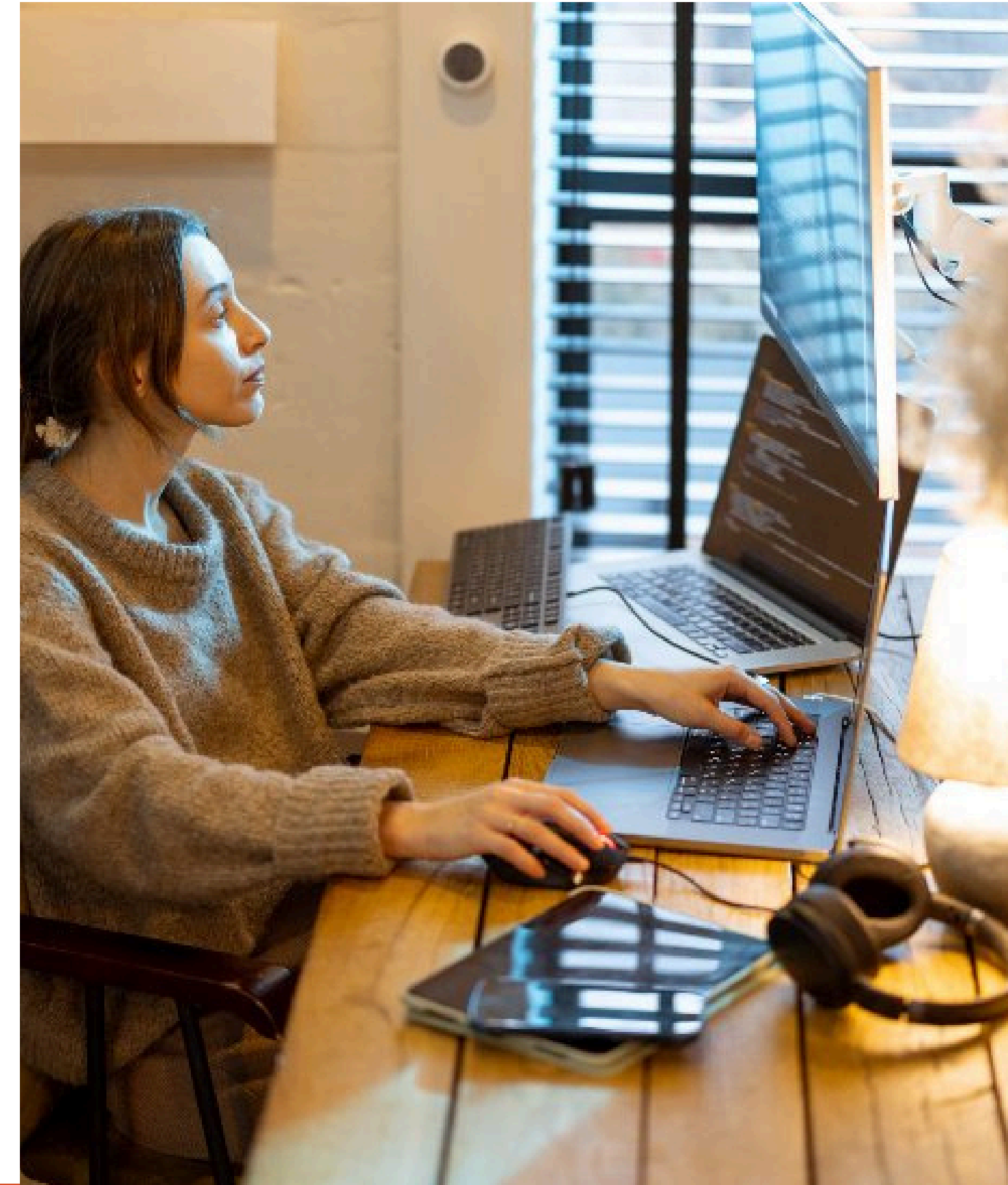
Flexible work: the new normal?

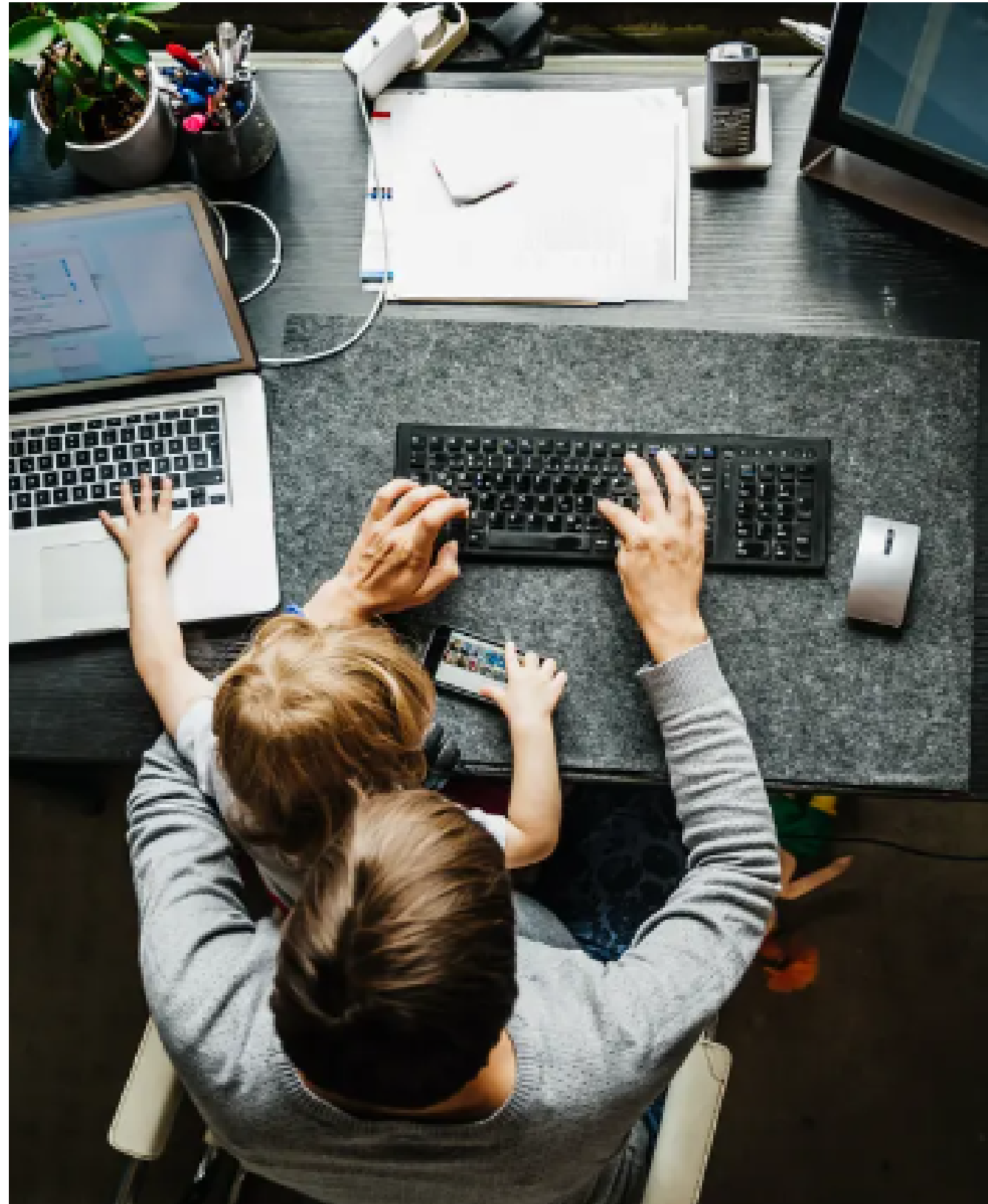


- Workplace flexibility involves employee and employers agreeing on when, where and in some cases how long work activities are undertaken.
- Although not a new concept, Covid-19 rapidly accelerated interest in greater workplace flexibility, largely driven by working from home.
- However, we have recently seen a shift with many large employers such as ANZ, Origin Energy, Suncorp and Amazon publicly announcing mandates for their employees to return to the office

What does flexible work look like?

- Adjusting start and finishing time (e.g. starting earlier or later)
- Reduced hours – part time or fractional work
- Change to shift pattern
- Working split shifts or job sharing
- Working from home (remote work)
- Time off – paid or unpaid, ongoing or temporary
- Working from another office or location closer to home
- Hybrid working arrangements (mix of office and home-based work)
- Compressed working hours (e.g. working full-time hours over fewer days)





What is a flexible work request?

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What is a flexible working request?

Anyone can request flexibility from their employer - **but** certain employees have a legal right to formally request flexible working arrangements under the Fair Work Act.

A flexible work arrangement under the Fair Work Act is a **formal agreement** between an employer and an employee to **change their standard working arrangements** to accommodate an employee's commitments out of work (e.g. child caring obligations).



As a result of amendments to the Fair Work Act, the Fair Work Commission has had power to conciliate and arbitrate disputes about flexible work requests since 6 June 2023



IMPORTANT

If employers receive a formal request for a flexible working arrangement under the Fair Work Act from an eligible employee, they must provide a written response to the flexible working arrangements requests within 21 days of the request being received.

Failure to respond to a request within 21 days may result in an employee bringing a claim in the Fair Work Commission and orders requiring compliance with the employee's flexible work request being issued.



Eligibility

Eligible Employees – preliminary requirement 1

At least one of the following circumstances must apply to the employee at the time of them making a workplace flexibility request:

- An employee who is **pregnant (NEW)**
- An employee who is the **parent**, or has responsibility for the care, of a child who is **of school age or younger**
- An employee who is a **carer**
- An employee has a **disability**
- An employee who is **55 or older**
- An employee is experiencing **family and domestic violence** or is supporting an immediate family member or household member facing family violence.

Eligible Employees – preliminary requirement 2

- The employee has completed at least 12 months of continuous service before making the request

Continuous service = an unbroken period of service with an employer.

What about casuals?

- A casual employee will meet this requirement where:
- they have been employed on a **regular and systematic** basis for a sequence of periods of employment of at least 12 months immediately before making the request
AND
- they have a reasonable expectation of continuing employment on a regular and systematic basis.

What if an employee is not eligible to make a request?

The employee is **not legally entitled** to make a formal flexible working arrangement request under the Fair Work Act.

The employee may still seek to informally change their working arrangements; however, you are not legally required to comply with the Fair Work Act when considering their request.

This also means any refusal of a request cannot be challenged in the Fair Work Commission.



Technical requirements for an eligible employee to make workplace flexibility request under the Fair Work Act

1. The employee's request for flexible work must be "**because of**" their relevant circumstance (e.g. age, pregnancy, parenting responsibilities) = there must be a causal link.
2. The request must have been made in writing
3. The request must set out the details of the change the employee is seeking AND the reasons for that requested change by reference to the eligibility criteria (e.g. age, pregnancy, childcare responsibilities disability).

Case example

An employee tried to argue before the Fair Work Commission that a Microsoft Teams message requesting a discussion about flexible working arrangements met the request requirements. This was rejected by the Fair Work Commission because it only included a request for a discussion, rather than being a request for a change in working arrangements supported by reasons

Jordan Quirke v BSR Australia Ltd [2023]
FWCFB 209



Considering & responding to a request

Considering a request

When considering and responding to a flexible working arrangements request, employers can decide to do one of three things:

- Approve the request
- Reach an alternative flexible working arrangements OR
- Refuse the request on *reasonable business grounds*

When considering a request you should consider the following questions:

- What are the employee's key duties?
- Do any of these duties need to be done at set times or locations?
- Who does the employee interact with in the normal course of their work? Will the proposed arrangement affect these interactions?
- Are there any technology solutions? (for example, video calling, instant messaging, email)
- Why is the employee requesting this new arrangement?

If you approve the request or reach an alternative agreement..

You must confirm this in writing within 21 days of the request being made.
In your response you should record the agreement reached.

Key things to record include:

- Details of the flexibility arrangement agreement to
- How the new arrangement is different from the employee's previous arrangements
- When the change will commence
- How long it is intended to go for (ongoing, or a fixed period)
- When it will be reviewed
- The process for dealing with any future changes

If you are considering refusing a request....

If you decide after receiving a request that you do not wish to approve it, then you **must** first do the following:

- **Discuss** the request with the employee
- **Genuinely try to reach an agreement** about changes to their working conditions including considering alternative arrangements which would still accommodate the employees' circumstances mentioned in their request, AND
- **Have regard to the consequences** of the refusal on the employee.

When can you refuse a request for flexible work?

A refusal is **only** be possible where:

- You and your employee have been **unable to reach agreement** after discussing the request
- You have **made genuine efforts to identify an alternative working arrangement** you would be willing to make to accommodate the employee's circumstances
- You have **considered the consequences** of the refusal for the employee; and
- Your refusal is **based on reasonable business grounds**.

‘Reasonable business grounds’

Reasonable business grounds can include (not an exhaustive list):

- **Cost** - the requested arrangements would be too costly for the employer;
- **Capacity** - there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested;
- **Practicality** - it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the request;
- **Efficiency or productivity** - the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity;
- **Customer service** - the new working arrangements requested would be likely to have a significant negative impact on customer service.
- **Supervision and/or the need for increased support**
- **Impact on team culture**
- **Loss of learning opportunities provided by face-to-face office attendance**

Formal requirements when denying a request

If you decide to refuse a request, you must give the employee a written response to this effect **within 21 days** which **must do the following four things**:

1. **Provide detailed reason** for why the request was refused, including the particular business ground for refusing the request.
2. **Include an explanation** for how those business grounds apply to the request.
3. **Inform** the employee of any alternative working arrangements that you would be willing to make to accommodate (to any extent) the employee's circumstances OR state that there are no such changes. AND
4. **Inform** the employee of the availability of dispute resolution processes through the Fair Work Commission.

When can the Fair Work Commission step in?

If you refuse a request (or fail to respond within 21 days) the employee may apply to the Fair Work Commission to **conciliate**, and if unsuccessful, **arbitrate** the dispute.

At arbitration, the Fair Work Commission is able to make orders which may:

- confirm that the employer's business grounds for refusal were reasonable; or
- order the employer to grant the employee's request or make specified changes to accommodate the employee.

**Additional
discrimination
claim risk**

Example

- Tamsin is a mother of an 8-year-old girl and a 5-year-old boy. She also is lawyer.
- She makes a request to work from home four mornings a week to assist with morning school run.
- Her request is refused on the basis that staff are required in the office for collaboration, client contact and mentoring purposes.
- Tamsin can now litigate this decision in the Fair Work Commission.
- FWC could impose a compromise say two days, FWC could require compliance with the request, FWC could impose conditions on the arrangement (eg. Tamsin be on constant video-chat) other employee's arrangements to be varied to accommodate the request





FairWork
Commission

Case studies

FWC 717

Guidance on ‘*reasonable business grounds*’

The mere fact work can be completed satisfactorily from home does not prevent an employer from refusing a request on reasonable business grounds as the Commission recognises the benefits of employees working in the office.

Commissioner Platt concluded in this case that even if the employee could meet his workload requirements from home, there are
“benefits of face-to-face interactions and employee collaboration” in the workplace and that “[t]he employment relationship is a two-way street”.



Elizabeth Naden v Catholic Schools Broken Bay Limited [2025] FWC 317

Reasonable business grounds depend on the context of the workplace and the services or products its staff provide.

Commissioner Matheson found the employer had reasonable business grounds for refusing the flexibility request as:

- the religious coordinator's critical role had to be available across the week.
- It was accepted there was *"a need for continuity of learning and teaching across the [employer's] key learning areas and that having three teachers spread across the teaching of these subjects would likely detract from this outcome"*.
- It was observed that the employer is *"not serving customers who are buying widgets"*, its *"product is of critical value to society, being the provision of education to primary school children in the formative years of their life"*.
- Such proposals *"impact the school's capacity to effectively deliver education effectively and which risk detriment to student learning should not be taken lightly"*.

Ridings v Fedex Express Australia Pty Ltd [2024] FWC 1845

Reasonable business grounds – The need for evidence

Deputy President Lake considered that FedEx had not provided a sufficient explanation for the reasonable business grounds relied on to refuse the request for a flexible working arrangement:

- the argument that remote work could harm productivity, and efficiency needs to be substantiated by evidence
- "Generic and blanket HR answers are not sufficient alone to establish a reasonable business ground for refusing a request,"
- He concluded that Fedex failed to provide "a sufficient explanation" for refusing the request on reasonable business grounds.

The meaning of 'request' in flexible working arrangements

"There is assumption by the Applicant that he is entitled to be working a flexible working arrangement without an approved request. This assumption is incorrect. Employees are to follow a lawful and reasonable direction until the request for a flexible working arrangement is granted."

Ms AB v Australian Nursing and Midwifery Federation – New South Wales Branch

[2025] FWC 338

Where an employer implement a working arrangement (e.g. new office attendance requirements) that were reasonable but fails to consider transitional arrangements for an employee with different arrangements.

Commission Matheson granted a temporary flexible arrangement, on different terms to that requested by the employee. Finding the employer should have:

- Had a discussion with the employee about the impact of the change on them
- Had a discussion about the negative consequences of her of the change and how this could be mitigated
- Transitioned the employee over to the new arrangements in a structured way rather than immediately and without discussion.





FOUR THINGS TO DO (IF YOU HAVENT ALREDY):

1. Enshrine a Decent Policy or Process

Robust policies and mechanisms for assessing and processing flexible work requests and parental leave extension requests.

2. Understand yourself or train managers in the Policy

They are the Front Line and need to apply a defensible and consistent approach.

3. Understand the new paradigm

A choice between being more flexible and being a more regular user of the FWC.

4. Be ready for the strategic claim




A Flex-Arbitration may be the new precursor to the unfair dismissal.

Don't forget the
FWC can
arbitrate your
decision to
refuse a flexible
work request



QUESTIONS

How we can help

-  Flexible work requests toolkits
-  Drafting and reviewing correspondence & responses
-  Representation at Fair Work Commission proceedings
-  Training your staff, management training
-  Subscribe to ABLA updates at ablawyers.com.au/subscribe
-  For legal assistance email info@ablawyers.com.au or call **1300 565 846**



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