Fair Work Commission

General Manager's report into individual flexibility arrangements under section 653 of the *Fair Work Act 2009*

2021–2024

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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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2021 report	General Manager's 2021 report into IFAs under section 653 of the *Fair Work Act 2009* (Cth)
AFAP	Australian Federation of Air Pilots
Agreement	*Surveillance Australia Pilot and Observer Agreement 2016*
Commission	Fair Work Commission
E	Officer or employee of an employer association
Fair Work Act	*Fair Work Act 2009* (Cth)
FIFO	fly-in fly-out
HR/ER	Human Resources/Employee Relations
IFA	individual flexibility arrangement
LE	Legal professionals who deal with employers
LW	Legal professionals who deal with employees
M	HR / ER / line manager
NES	National Employment Standards
NESB	Non-English speaking background
Regulations	*Fair Work Regulations 2009* (Cth)
Review	Modern Awards Review 2023–24
Surveillance Australia	Surveillance Australia Pty Ltd
U	Officer or employee of a union (or peak council)

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Executive summary

Under section 653 of the *Fair Work Act 2009* (Fair Work Act), every 3 years the General Manager of the Fair Work Commission (Commission) is required to 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. 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 reporting period 26 May 2021 to 25 May 2024. Under section 653(3) this report is due to the Minister within 6 months after the end of the reporting period (by 25 November 2024).

Research into the extent to which IFAs are made and agreed to was undertaken by The University of Sydney. Commissioned research is required because IFAs are not centrally registered with the Commission or any other body. The research uses a similar approach to the General Manager's report for the 2018–2021 reporting period[1] by obtaining information from stakeholders with knowledge and experience with IFAs using both quantitative and qualitative sources.

The report also includes an overview of the legislative framework and developments that occurred during the reporting period.

This report is the fifth report examining IFAs under the *Fair Work Act 2009* by a General Manager of the Commission since the reporting requirement commenced in 2009. While the research methods have changed over the course of the 5 reports, the findings in this report largely repeats those of the 2021 and prior reports. In particular that IFAs are reported to not be common in workplaces, are more commonly initiated by employees and are more frequently taken up by women.

[1] Furlong M (2021), *General Manager's report into individual flexibility arrangements under section 653 of the* Fair Work Act 2009*: 2018–2021*, November.

Key findings based on observations from the research:

- Interviewees across all types of stakeholders reported that IFAs were not widely used.
- Both employers and employees initiated IFAs, although respondents perceived that it was more common for employees to initiate the process.
- Women were perceived to have been more likely to enter IFAs, most likely for care-related reasons. IFAs were observed to have been more commonly initiated by full-time employees than part-time employees. Employees from non-English speaking backgrounds were perceived to be less likely to use IFAs, and young people were rarely observed to have used them.
- IFAs are used to vary both awards and enterprise agreements.
- Among employers and employees, the most common types of flexibilities requested were:
  - employers: changes to start and/or finish times to facilitate shifting the spread of ordinary hours by agreement, thereby addressing issues with overtime and penalties that arise from that change
  - employees: changes to start and/or finish times, most likely to accommodate caring responsibilities.
- It was observed that IFAs were not utilised more widely due to a limited understanding and awareness of the entitlement. There was also a concern by employers that an IFA could be unilaterally terminated by the employee, leading to uncertainty.
- Low rates of refusal of IFAs may reflect the practice of both parties tending to negotiate with each other before formally commencing the process to make an IFA.
- The main reason that requests for IFAs were refused by employers was due to operational requirements. This could be in circumstances where a change to working hours or working from home was sought but the role was required to deal with customers or provide a service, or for security reasons, or because businesses did not have capacity to change the working arrangements of other employees.
- Almost half of enterprise agreements had a flexibility term that differs from the model flexibility term and specifies which term(s) can be varied.

Key regulatory developments during the period:

- The Commission conducted a targeted review of modern awards (the Modern Awards Review 2023–24) which considered IFA terms in modern awards.

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1. Introduction

The Fair Work Commission (Commission) is the national workplace relations tribunal and is established by the *Fair Work Act 2009* (Fair Work Act). The Commission is comprised of Members who are appointed by the Governor-General under statute, headed by a President. The President is assisted by a General Manager, also a statutory appointee, who oversees the administration of Commission staff. The General Manager also has regulatory powers and functions under the *Fair Work (Registered Organisations) Act 2009* (Cth).

Under section 653(1) of the Fair Work Act, every 3 years the General Manager of the Commission 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 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 period 26 May 2021 to 25 May 2024 on matters relating to IFAs and on research conducted into the extent to which IFAs under modern awards and enterprise agreements are being agreed to, and the content of those arrangements.

In conducting this research the General Manager must 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.

No other persons are presently prescribed.

A written report of the research must be provided to the Minister within 6 months after the end of each reporting period. This report is due to the Minister by 25 November 2024.

1.1 Report outline

This report is structured as follows:

- Section 2 provides an overview of the relevant legislation, decisions and available data regarding IFAs during the reporting period.
- Section 3 discusses the research methodology for the collection of data to meet the research requirements under sections 653(1)(b) and 653(1)(d) of the Fair Work Act.
- Section 4 presents the findings from the research.
- Appendix A presents the current model flexibility term, which forms the basis of flexibility terms in all modern awards.
- Appendix B presents the model flexibility term for enterprise agreements.

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2. Legislative overview

IFAs are made under the flexibility terms in modern awards or enterprise agreements. IFAs are made between an individual employee and their employer and vary the effect of the terms of a modern award or enterprise agreement in relation to the employee and the employer.[2] Flexibility terms in modern awards and enterprise agreements detail the effect of the terms of the modern award or enterprise agreement that may be varied by an IFA and the mandatory content of an IFA.

This section provides a brief legislative overview of IFAs as well as an update on relevant decisions and data related to IFAs. It is structured as follows:

- flexibility terms in modern awards and Commission decisions related to these terms
- flexibility terms in enterprise agreements, and
- Commission decisions in disputes regarding IFAs.

For a detailed explanation of the governing legislation pertaining to IFAs, refer to the *General Manager's report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements: 2009–2012* which can be found on the Commission's website.

2.1 Flexibility terms in modern awards

2.1.1 Legislative framework for flexibility terms in modern awards

All modern awards must include a flexibility term that enables an individual employee and their employer to agree on an IFA to vary the effect of the modern award in relation to that employee and employer to meet their genuine needs.[3]

The flexibility term for modern awards is made by the Commission. In doing so, the Commission must ensure the flexibility term includes the matters listed in section 144(4) of the Fair Work Act.

[2] *Re Minister for Employment and Workplace Relations* [2010] FWAFB 3552; Fair Work Act, sections 144(2)–(3); 202(2)–(3).

[3] Fair Work Act, section 144(1).

If an individual employee and their employer agree to an IFA under a flexibility term in a modern award, the modern award has effect in relation to the individual employee and their employer as if it were varied by the IFA.[4] The IFA is taken for the purposes of the Fair Work Act to be a term of the modern award.[5]

2.1.2 Content of an IFA and the model flexibility term in modern awards

Section 144(4) of the Fair Work Act sets out the mandatory content for the Commission to include within the flexibility term in a modern award. The flexibility term must:

- identify the terms of the modern award, the effect of which the IFA may vary
- require genuine agreement between the parties
- require the employer to ensure the employee is better off overall as a result of the IFA than if no IFA were agreed to
- set out the steps for terminating an IFA
- require an employer to ensure that the IFA be in writing and signed by the employer and employee, and
- require the employer to ensure that a copy of the IFA is given to the employee.[6]

The flexibility term must not require that IFAs be approved, or consented to, by third parties.[7] The exception to this provision is where the employee is under 18 years of age where a parent or guardian must also sign the IFA.[8]

A model flexibility term was inserted into modern awards during the award modernisation process.[9] Modern awards with the flexibility term came into effect on 1 January 2010. The model flexibility term

[4] Fair Work Act, section 144(2)(a).

[5] Fair Work Act, section 144(2)(b).

[6] Fair Work Act, section 144(4).

[7] Fair Work Act, section 144(5).

[8] Fair Work Act, section 144(4)(e)(ii).

[9] [2008] AIRCFB 550 at [155]–[190]; see also [2008] AIRCFB 1000 at [35]–[39]; [2009] AIRCFB 345 at [11]–[12].

was varied during the transitional review of modern awards[10] and again during the 4-yearly review of modern awards as part of a plain language redrafting process.[11]

The current model flexibility term, which forms the basis of flexibility terms in the 121 modern awards, is included at Appendix A. Additional provisions are included in the *Textile, Clothing, Footwear and Associated Industries Award 2020*.[12] No changes were made to the model term during the reporting period.

2.1.3 Consideration of IFAs and the model flexibility term in the Modern Awards Review 2023–24

Although no changes were made to the model flexibility term in modern awards during the reporting period, consideration was given to IFAs during the Modern Awards Review 2023–24 (Review). The Review commenced on the Commission's own motion on 15 September 2023 following a request from the Minister to the President of the Commission on 12 September 2023 and considered 4 'priority' topics.[13] The issue of IFAs was raised in the streams of the Review concerning 'job security', 'work and care' and 'making awards easier to use'.

During the Review, some employer representative organisations sought changes to the flexibility term in modern awards to increase the utilisation of IFAs. Some employee representative organisations sought variations to the model flexibility provisions to provide greater employee protections while other employee representative organisations sought to remove the IFA model flexibility provisions in modern awards altogether.[14]

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[10] See [2013] FWCFB 2170 and [2013] FWCFB 8859.

[11] See [2018] FWCFB 4704, [2018] FWC 6091, and [2019] FWCFB 5409.

[12] The *Textile, Clothing, Footwear and Associated Industries Award 2020* contains additional provisions (giving the employee 7 working days to enable them to seek advice from the employee's union, and providing that the individual flexibility arrangements do not extend to outworkers). See Background Paper, *Model terms for enterprise agreements*, Fair Work Commission, 17 September 2024, p. 22.

[13] President's statement—Modern Awards Review 2023–24, 15 September 2023.

[14] See for example ACCI submission dated 12 March 2024, ACTU submission dated 12 March 2024, Ai Group submission dated 12 March 2024.

In relation to the latter, parties supporting those changes argued flexible working requirements under the Fair Work Act sufficiently addressed employee need for flexible working requirements and argued there is a general impression that IFAs are misused by employers to disadvantage employees who refuse to enter into them.[15] The Australian Council of Trade Unions sought variations and additional protections, including a regular Commission review after IFAs are entered into about whether an employee continues to be better off overall.[16]

Some employer parties and representative organisations advanced proposals to amend the better off overall requirement to include a consideration of an employee's genuine needs.[17] During consultations, parties also sought clarification about how the better off overall test should be applied in the context of an IFA.[18]

In a final report issued on 17 July 2024, the Review's Full Bench made the following observations:

- While the Fair Work Act includes rights and obligations about flexible working arrangements, those rights are limited to the circumstances in section 65 of the Fair Work Act, whereas IFAs may be requested for any reason.
- Many of the parties' proposals would require changes to the Fair Work Act which the Commission does not have power to do.[19]
  - Modern awards cannot define the meaning of 'better off overall' as it is used in section 144(4)(c) of the Fair Work Act.
  - Any variation to modern award terms would not displace the statutory requirements that employees are 'better off overall' under an IFA so there would be no utility in modifying the standard modern award term in relation to the better off overall test.

[15] See for example transcript, 4 March 2024 PN31 (Mr Maxwell – CFMEU C&G); ACTU submission dated 5 February 2024 at [25]–[29].

[16] ACTU submission dated 5 February 2024 at [32]–[37].

[17] ACCI submission dated 12 March 2024 at [14]–[18].

[18] Transcript, 10 April 2024 PN397.

[19] Modern Awards Review 2023–24 – final report, 18 July 2024 at [56] and [112]–[113].

The Full Bench was not convinced to commence an own motion matter to vary the model flexibility term in modern awards.[20]

2.2 Flexibility terms in enterprise agreements

2.2.1 Legislative framework for flexibility terms in enterprise agreements

An enterprise agreement must include a flexibility term enabling an individual employee and their employer to agree to an IFA. As with award flexibility terms, an IFA may vary the effect of the enterprise agreement in relation to that employee and employer to meet their genuine needs.[21]

If an enterprise agreement does not include a flexibility term, or the flexibility term does not meet the requirements of the Fair Work Act,[22] the model flexibility term is taken to be a term of the enterprise agreement.[23] The model flexibility term for enterprise agreements is currently based upon 'the model flexibility term developed by the AIRC [Australian Industrial Relations Commission] for inclusion in modern awards'.[24]

If an individual employee and their employer agree to an IFA under a flexibility term in an enterprise agreement, the enterprise agreement has effect in relation to the individual employee and their

[20] Modern Awards Review 2023–24 – final report, 18 July 2024 at [115].

[21] Fair Work Act, section 202(1).

[22] *Stewart and Sons Steel Pty Ltd. Collective Agreement 2013/2014* [2013] FWC 2132; Explanatory memorandum, Fair Work Bill 2008 (Cth) p. 136 [863].

[23] Fair Work Act, section 202(4); a flexibility term limited to one issue, such as payment of wages for periods of annual leave, meets the requirements of the FW Act as established in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Association Union known as Australian Manufacturing Workers Union (AMWU) re Strategic Labour Labour Hire Agreement 2011–2013* [2012] FWAA 6134 at [11]. Conversely, a term that does not provide for change in effect of any terms cannot be a flexibility term, as established in *Minister for Employment and Workplace Relations* [2010] FWAFB 3552 at [23].

[24] Explanatory Memorandum, Fair Work Bill 2008 (Cth) p.xxxvi [r.151]; see also Fair Work Commission, Discussion paper: job security, 18 December 2023 at [206]–[207].

employer as if it were varied by the IFA.[25] The IFA is taken to be a term of the enterprise agreement and hence may be enforced as though it were a term of the enterprise agreement.[26]

There have been no changes to the model flexibility term prescribed by the *Fair Work Regulations 2009 (Cth)* (Regulations) during the reporting period.

Whereas the model flexibility term for modern awards may be varied by the Commission,[27] the model flexibility term for enterprise agreements is currently prescribed by the Regulations.[28] Accordingly, the model flexibility term for enterprise agreements may only be modified by Parliament amending the Regulations.[29] The current model flexibility term from the Regulations is reproduced at Appendix B.

It is however noted that in February 2024, the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* was passed which requires the Commission to make a model flexibility term for enterprise agreements by 26 February 2025. In determining the model term, the Commission must take the following into account:

- whether the model flexibility term is broadly consistent with comparable terms in modern awards
- best practice workplace relations as determined by the Commission
- whether all persons and bodies have had a reasonable opportunity to be heard and make submissions to the Commission for consideration in determining the model term
- the object of the Fair Work Act (section 3) and the objects of Part 2–4 (see section 171), and
- the Commission must ensure that the model flexibility term is consistent with section 202(1).[30]

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[25] Fair Work Act 2009, section 202(2)(a).

[26] Fair Work Act 2009, section 202(2)(b).

[27] Fair Work Act, section 157.

[28] Fair Work Act, section 202(5); Fair Work Regulations 2009, Schedule 2.2.

[29] The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* amends the Fair Work Act to provide that the Commission must determine the model flexibility term, the model consultation term and the model term for dealing with disputes for enterprise agreements. These changes take effect from 26 February 2025.

[30] [2024] FWC 2520 at [18]–[19].

The commencement of a major case for model flexibility terms for enterprise agreements was announced in a Statement issued by the President on 17 September 2024. The Statement proposed a draft timetable to facilitate a comprehensive and inclusive consultation process to ensure stakeholders have an opportunity to contribute to the development of the model term.[31]

2.2.2 Content of an IFA and the model flexibility term in enterprise agreements

The content that may be included in an IFA made under a flexibility term in an enterprise agreement will vary between enterprise agreements.

The provisions of section 203 of the Fair Work Act detail the required content of a flexibility term in an enterprise agreement.

An enterprise agreement may, by the agreement of employers and employees incorporate the model flexibility term in the Regulations. This term limits the content able to be agreed within an IFA to 5 matters which aligns with the content specified in the modern award model flexibility term.[32] The Fair Work Act also provides scope for employees and employers to an enterprise agreement to agree to a flexibility term that permits the variation of the effect of one or more terms in an enterprise agreement not provided by the model flexibility term in the Regulations.

As noted further in Table 1, around 50 per cent of flexibility terms in enterprise agreements approved from 1 July 2021 to 30 June 2024 incorporated the model flexibility term in the Regulations.

The model flexibility term for enterprise agreements is set out in Schedule 2.2 of the Regulations and can be found at Appendix B.

2.2.3 Use of the model flexibility term in enterprise agreements

Table 1 presents data from the Department of Employment and Workplace Relations' Workplace Agreements Database on the types of flexibility terms (model or otherwise) incorporated into

[31] [2024] FWC 2520 at [22].

[32] Fair Work Regulations 2009, Schedule 2.2 (regulation 2.08), clause (1).

enterprise agreements approved between 1 July 2021 and 30 June 2024.[33] Almost half of enterprise agreements approved had a flexibility term that differs from the model flexibility term and specifies which term can be varied.

Table 1: Types of flexibility terms in enterprise agreements 1 July 2021–30 June 2024, per cent of enterprise agreements approved

	Per cent (%)
Model flexibility term: the flexibility term is the model term	34.1
Model flexibility term incorporated: the Fair Work Commission Member's decision incorporates the model flexibility term into the agreement	13.0
No flexibility clause: model flexibility term taken to be a term of the agreement	2.7
Flexibility – specific: the flexibility term differs from the model flexibility term and specifies which term can be varied	48.4
Flexibility – general: the flexibility term allows any term of the agreement to be varied	2.3

Note: Proportions may not add up to 100 as some agreements may contain more than one flexibility term.

Source: Department of Employment and Workplace Relations, *Workplace Agreements Database*, June quarter 2024.

Based on a small random sample of approximately 60 enterprise agreements approved between 1 January 2020 to 31 March 2024, an analysis was undertaken by staff of the Commission on flexibility terms in enterprise agreements. Some common differences between flexibility terms in enterprise agreements compared to the model flexibility term were identified. They included:

- changing the matters in an agreement that can be varied in an IFA, compared to the 5 matters provided for in the model term
- adding in additional safeguards in relation to the making of IFAs, such as requiring the arrangement to be translated into different languages applicable to the workforce
- reducing the timeframe the employer must give the employee a copy of the IFA after it has been agreed to, and

[33] The Workplace Agreements Database is collated on a quarterly basis. This period is presented as it most closely matches with the reporting period.

- reducing the timeframe of the notice period that an IFA can be unilaterally terminated.[34]

2.3 Commission decisions in disputes regarding IFAs

One dispute relating to an IFA referred to the Commission during the reporting period resulted in a decision.

The dispute concerned arrangements made by Surveillance Australia Pty Ltd (Surveillance Australia), which traded as Leidos Airborne Solutions, and some of its employed pilots in relation to fly-in fly-out (FIFO) arrangements which it sought to implement through IFAs and employment contracts.

Commissioner Connolly issued a decision in this matter on 24 October 2023.[35] This decision was appealed, and a Full Bench of the Commission issued a decision determining the appeal on 3 May 2024.[36] The Full Bench decision is summarised below.

Surveillance Australia Pty Ltd v Australian Federation of Air Pilots [2024] FWCFB 234

The Australian Federation of Air Pilots (AFAP) applied under section 739 of the Fair Work Act for the Commission to deal with a dispute in accordance with the dispute settlement procedure of the *Surveillance Australia Pilot and Observer Agreement 2016* (Agreement). The dispute concerned FIFO arrangements under which an employee would, over each 28-day period, have an 'on swing' of 16 days, made up of 14 days' work and 2 transit days to/from work, have a 12 day 'off swing' at home where the employee is not required to work, and would take annual leave during their off-duty periods so they could have 12 days 'off swing' rather than the 8 days off they were entitled to under clause 4.3.1 of the Agreement. Surveillance Australia sought to implement the FIFO arrangements by IFAs and employment contracts. The AFAP objected to the rostering arrangements on the basis they were inconsistent with the Fair Work Act and the Agreement.[37] By the time the dispute came to the Commission for determination, Surveillance Australia advised it had removed from any proposed IFA any agreement that leave would be acquitted during off-swing periods. At the time the dispute was

[34] Background paper, *Model terms for Enterprise agreements*, Fair Work Commission, 17 September 2024, p. 18.

[35] [2023] FWC 2427

[36] [2024] FWCFB 234

[37] [2024] FWCFB 234 at [2].

determined, therefore, it concerned only contractual agreements with FIFO employees which were not IFAs.

The Commissioner at first instance determined that the rostering arrangements sought to vary an employee's annual leave entitlements as provided for by the Agreement and the NES and that is not permissible by either an IFA or any other instrument purporting to have the same effect of an IFA.[38] Surveillance Australia appealed the decision under section 604 of the Fair Work Act.

The Full Bench found the Commissioner erred in concluding that the annual leave proposal sought to vary an employee's annual leave entitlements. Rather, provisions were found to affect requests for additional leave, not those conferred by the NES, while the rostering term provided a mechanism for accruing additional leave.[39] The Full Bench further accepted that the continued operation of rostering terms, while affecting employees' annual leave, did not mean that the 'full benefit of the NES is lost or diminished'.[40] Additional findings were made with respect to the Agreement. Ultimately, the Full Bench observed that rostering terms constitute an agreement between FIFO employees and the employer to take extra leave at particular periods or times and that this agreement was not inconsistent with annual leave provisions in the Agreement or NES.[41] Rather, the rostering term provided a mechanism for a FIFO worker to accrue extra leave rather than changing the annual leave which would accrue to a FIFO worker under the Agreement.[42] The Full Bench therefore upheld the appeal and quashed the decision at first instance. The Full Bench subsequently determined the matter, dismissing AFAP's application.

[38] [2024] FWCFB 234 at [3] and [2023] FWC 2427 at [119]–[120].

[39] [2024] FWCFB 234 at [27]–[29].

[40] [2024] FWCFB 234 at [30].

[41] [2024] FWCFB 234 at [31]–[40].

[42] [2024] FWCFB 234 at [40].

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3. Research approach

The General Manager is required to undertake research to determine the prevalence of IFAs and seek views on their application. The research for this report is intended to investigate IFAs only, which are one option available to employers and employees to increase flexibility.

As there is no requirement for IFAs to be lodged with the Commission or any other body, the approach in this report is similar to the one used in the General Manager's 2021 report into IFAs under section 653 of the *Fair Work Act 2009* (2021 report). Earlier research determined that the prevalence of IFAs is low,[43] and that large scale cross-sectional surveys are therefore inefficient for obtaining data on small sub-populations.[44] As such, the preferred approach continued to be collecting information from a smaller, targeted population of people working in roles relevant to IFAs, in order to provide a deeper understanding of the motivations behind why and how IFAs were made.

3.1 Research methodology

The University of Sydney was commissioned to undertake research and provide insights during the reporting period into the extent to which IFAs are being agreed to and the content of those arrangements.

As with the research that informed the 2021 report, in order to obtain relevant and detailed information on the topics of interest, a mixed-methods approach was devised that comprised both quantitative and qualitative elements. To locate and extract information from those with a detailed understanding of these instruments, a purposive sampling method was used. The aim was to sample stakeholders from employer associations, unions, legal professionals representing major employers or employees, Human Resources/Employee Relations (HR/ER) and line managers in organisations, as well as state-based Working Women's Centres and relevant Community Legal Centres. While the results

[43] Furlong M (2021), *General Manager's report into individual flexibility arrangements under section 653 of the* Fair Work Act 2009*: 2018–2021*, November, p. 10.

[44] Furlong M (2021), *General Manager's report into individual flexibility arrangements under section 653 of the* Fair Work Act 2009*: 2018–2021*, November, p. 3.

could not be considered to apply more broadly to the Australian working environment, they would be based on the observations of those with knowledge and experience with industrial relations instruments.

This approach was devised given the consistent findings in previous reports that only a small proportion of the workforce has exposure to these instruments. The research also examined the effects of the changes in legislation during the reporting period.

For the quantitative element, an online survey was conducted from 17 June 2024 to 31 July 2024 and survey respondents were directed to reflect on their experience with IFAs during the 26 May 2021 to 25 May 2024 reporting period. Survey participants were not required to respond to each question if they did not choose to, and if the question did not apply to the respondent the next set of questions in the section did not display for them. For some questions, participants could select more than one response.

Participants were invited to respond to the online survey through an email invitation and LinkedIn post distributed through Australian Labour and Employment Relations Associations (ALERA), as well as through social media alerts. There were 103 survey participants, with just over half representing employees (through their role as a union or legal professional) (Table 2).

Table 2: Categories of online survey respondents

Role category	Per cent (%)
I am an officer / industrial officer / organiser / lawyer / employee of a union (or peak council) [U]	43
I am a HR/ER manager (or similar) [M]	24
I am an employer association officer / lawyer / employee of an employer association [E]	11
I work for a Working Women's Centre, Community Legal Centre or a legal professional who advises and/or represents employees [LW]	8
I am a line manager [M]	4
I am a legal professional who advises and/or represents employers [LE]	4
Other	7

Note: There were 103 responses to this question. 'Other' included business owners, in-house counsel or employment lawyers and company directors.

Survey respondents were found across a broad range of industries, with only 4 industries not being represented (Table 3). Respondents were asked to identify which industries they work most closely with. The most common industries were Health care and social assistance (24 per cent), Financial and insurance services (16 per cent), Professional, scientific and technical services and Administrative and support services (both 14 per cent). More than one in 5 (21 per cent) responded that they advise across a number of different industries.

Table 3: Industry of online survey respondents

Industry	Per cent (%)
Health care and social assistance	24
Financial and insurance services	16
Professional, scientific and technical services	14
Administrative and support services	14
Transport, postal and warehousing	13
Education and training	11
Retail	9
Public administration and safety	9
Accommodation and food services	7
Electricity, gas, water and waste services	7
Manufacturing	7
Mining	6
Construction	5
Other services	3
Agriculture, forestry and fishing	1
Rental, hiring and real estate services	0
Information media and telecommunications	0
Arts and recreation services	0
Wholesale trade	0
I advise across a number of different industries	21

Note: There were 100 responses to this question. Participants could provide more than one response.

The quantitative survey was comprised of questions relating to three topics: IFAs, requests for flexible working arrangements and requests to extend unpaid parental leave. The results to the questions

relating to IFAs were based on 71 survey respondents who had been involved in the implementation and use of an IFA during the reporting period.[45]

As part of the qualitative element, the research team interviewed 23 participants who self-selected to participate in an in-depth interview via Zoom.[46] The interview questions were related to the topics from the online survey and the interview lasted around an hour. Interviewees were asked to reflect on their experience with IFAs during the 26 May 2021 to 25 May 2024 reporting period. Approximately half of interviewees represented or dealt with employees and around half with employers. While the largest group of interviewees worked in New South Wales, interviews were also held with participants from Victoria, the Australian Capital Territory, Queensland, South Australia and Western Australia.

The report provided to the Commission from The University of Sydney collated and summarised the findings and themes from the online survey and interviews. A summary of these findings and themes are presented in Section 4.

[45] This is consistent with the online survey from the 2021 report which were based on 78 respondents of which 53 had direct experience with IFAs.

[46] Initially there were 26 self-selected participants, however 3 were unable to participate in an interview.

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4. Findings

This section presents findings from the research by The University of Sydney. Many findings were consistent with those in the 2021 report, noting that there were some new findings related to the impact from the COVID-19 pandemic period.

Interviewee quotes presented in this section denote the role category of the interviewee as identified by the corresponding abbreviations provided in Table 2.

4.1 Incidence of IFAs

The following findings are based on the responses to the online survey from respondents who reported they had been involved in the making of, or responding to, a formal application for IFAs during the reporting period. Table 4 shows that it was most common for survey respondents to have direct experience with 2–10 IFAs during the reporting period.

Table 4: Estimated number of IFAs that respondents had direct experience with during the reporting period

Number of IFAs	Per cent (%)
0	3
1	8
2–10	46
11–20	15
21–50	12
51–100	10
101–500	5
501–999	0
1000+	2

Note: There were 67 responses to this question.

Interviewees across the different types of stakeholders reported that IFAs were not commonly used. For example:

> *IFAs were an area that was often asked about, but more occasions than not, this did not translate into actually implementing the IFA. (E)*

> *We have 4 IFAs in place. So, I've worked for this business for 7 years and I can't even remember when we do IFAs… we just don't do them. (M)*

While the survey respondents have experience working with IFAs, they observed that there was a general lack of awareness and understanding of IFAs across employers and employees.

4.2 Who initiates a request for an IFA

The online survey indicated that IFAs were more commonly initiated by employees than employers (Table 5). This corresponds with findings from the 2021 report. In some cases, they were initiated by both parties.

Table 5: In your experience, who usually initiates an IFA?

	Per cent (%)
Employee	54
Employer	31
Both employer and employee	13
Other	1

Note: There were 67 responses to this question.

The party that initiated the request was generally determined by the type of flexibility sought (Table 6). Most online survey respondents indicated that IFAs were usually offered when employee circumstances changed. This was also found in the 2021 report.

Table 6: Circumstances when IFAs are offered

	Per cent (%)
When an employee's circumstances change	64
On commencement of employment	46
At the end of a probation period	3
Other	18

Note: There were 61 responses to this question. Participants could select more than one response.

According to one interviewee, it was perceived that when employees need to request a change, they would work together with their employer to determine if an IFA or other flexible working arrangement was suitable.

> *We'll normally see it from the employees where they want to change their hours or days per week, especially for caring type arrangements to alter something they've agreed to under employment conditions when they signed up with the organisation or when their own personal circumstances have changed. (E)*

When an employer initiates a request, it was observed in interviews as being attached to contracts at commencement (as found in the online survey). IFAs initiated by employers were also perceived to be made concurrently with other employees for circumstances where conditions have changed under an enterprise agreement or where common changes to employment conditions are sought.

> *But when it's coming from the employer … they're doing them in bulk. For example, the agreement changed the breaks provision, so the employer very kindly generated IFAs and said, if you want to stay on your current thing, then fill this in and you have to fill in the section about why you're better off … (U)*

The model flexibility term in an enterprise agreement and in modern awards require that an IFA only be made after an employee has commenced employment. However, a model flexibility term in an enterprise agreement may allow an individual employee and their employer to agree to an IFA on commencement, if other requirements under the Fair Work Act are fulfilled, such as it being based on genuine agreement (section 203).

4.3 Who makes IFAs

All respondents to the online survey cited employees who are women as having made requests for IFAs, while a majority of respondents noted that men had also made requests. It was perceived by respondents that, on average, 57 per cent of IFAs were entered into by women and 42.5 per cent by men.

It was observed by online survey respondents that there was a gendered-difference in the operation of IFAs, with women more likely to enter into IFAs for care-related flexibility reasons and men more likely as a means to increase take-home pay above the collectively bargained agreement.

As observed in the 2021 report, the responses by interviewees reflected the industries in which they worked in, the nature of the work and the prescriptiveness of the working arrangements. As shown in Table 3, many respondents work with employees in female-dominated industries, and they observed that there was a higher proportion of women making IFAs in those industries.

> *It's a higher proportion of females asking … I would say at least 75% of the requests. (E)*

> *Employee initiated … they've probably been more female focused rather than male driven because of requesting the flexibility for change of hours for caring responsibilities. There's been more of that from a female point of view from our perspective. (M)*

However, some interviewees from male-dominated industries tended to observe more males entering IFAs.

> *Absolutely more men, and there'd be a handful of women, but it would be probably something like a 70/30 or 80/20 split. And that will be aligned with occupation. So, it would be reflective of roles in construction, project management and IT operations. Those would be the primary occupations where we have them that there'd be a handful for women in like specialist and some technical roles, but definitely more men than women. (M)*

On average, survey respondents perceived that 57 per cent of those who signed IFAs were full-time employees and 43 per cent were part-time employees. Interviewees also observed that full-time employees were the majority of those initiating IFAs, typically relating to moving to part-time hours or

seeking to work more hours. One employer interviewee noted that part-time employees had greater opportunity to negotiate their working arrangements without needing to make an IFA.

> *A lot more full-time employees probably because they are working a lot more consistently, maybe, and with part-time you can kind of have the negotiation of a bit more of hours. Then casuals, there's no set hours. (E)*

Most interviewees did not have experience with casual employees entering into IFAs.

4.4 What instrument is varied

Among survey respondents, it was common to have had experience with variations to both awards and enterprise agreements (Table 7).

Table 7: Is your experience with IFAs in relation to employees covered by an award or an enterprise agreement?

	Per cent (%)
Both	44
Enterprise Agreement	35
Award	21

Note: There were 66 responses to this question.

The responses from interviewees depended on their experience and the industry they dealt with. For example, those who dealt with industries with higher award coverage were more likely to note that IFAs varied an award.

> *I definitely see them used more under a modern award. I have seen them used on enterprise agreements as well. But my direct experience probably relates to modern awards. (E)*

> *It's mostly awards because the clientele that come through the [legal service] are predominantly award-based employees. They are non-unionised workplaces that don't have EBAs. (LW)*

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4.5 What is requested when making IFAs

According to the online survey, the most common types of flexibilities requested by employers were overtime and penalty rates, and changes to start and/or finish times (Table 8).

Table 8: Types of flexibility requested by *employers*

	Per cent (%)
Overtime rates	53
Change in start times	53
Penalty rates	43
Change in finish times	43
Allowances	35
Change in days worked	27
Leave loading	24
Change in averaging of hours	22
Change in breaks	20
Compressed work week	18
Reduce hours	16
Reduction in number of days worked	14
Change from full-time to part-time	14
Change to work from home/hybrid working	12
Increase hours	12
Change in location	10
Change in shifts	8
Maintain consistent shifts/consistent rostering	6
Other	20

Note: There were 51 responses to this question. Participants could select more than one response.

Information garnered from the interviews suggested that requests for changes to start and/or finish times were to facilitate shifting the spread of ordinary hours by agreement, thereby addressing issues with overtime and penalties that arise from that change. This was also observed in the 2021 report. These were particularly noted by interviewees working in male-dominated industries.

> *…To vary hours of work, in particular span of hours, and trying to leverage IFAs for having people start early morning shifts without incurring overtime penalty. (E)*

> *It's often because if you go outside your ordinary hours, or outside of the spread of hours, etc, you're liable to pay for the penalties and/or overtime and a lot of organisations aren't willing to actually do that, whereas a lot of employees actually want that extra money, they want to be able to do those extra hours, and they're happy to do it at discounted rate or at the ordinary rate just to get the money. (E)*

As noted earlier, an IFA can be initiated by the employer or the employee but must be genuinely made without coercion or duress. The IFA must result in the employee being better off overall than if the agreement had not been made. The research did not identify how the IFAs discussed in the interviews met the better off overall requirements of the Fair Work Act.

Employers and officers from employer associations also identified annual salaries to offset rostering conditions as a flexibility commonly cited. This was also observed in the 2021 report.

> *The employer will ask for an IFA when they're talking about an annualised salary arrangement to go with it. You get rolled up rate, or an annual salary arrangement. **(E)***

Another reason for employers to initiate IFAs was to achieve operational needs, such as adjusting work hours or rostering arrangements.

> *I have seen them being utilised in terms of actually changing hours of work, introducing a different shift arrangement on different days of the week and changing the way that overtime and allowances are being paid. (M)*

A legal professional who advises and represents employers noted that IFAs were used to vary enterprise agreements that no longer met the requirement of the business.

Enterprise agreement is in place, and it hasn't worked, or the clauses aren't doing what functionally the business needs. In that case, there's been employer-initiated discussions around IFAs in order to avoid a breach of an enterprise agreement term. (LE)

Union officials also observed that some employers initiated IFAs in bulk to respond to changed conditions. These types of requests were found in the interviews to be more common for lower-paid and lower-skilled employees. Other types of requests sought to improve wages and conditions of higher-paid employees or those with technical or specialist skills, as found in the 2021 report.

… primarily around remuneration because our enterprise agreement is restrictive in that capacity. Typically, it's to enhance their pay or to offer a retention incentive. (M)

According to the online survey, changes to start and/or finish times were also common among the types of flexibilities requested by employees, together with a compressed work week, reduction in number of days worked and changes to work from home/hybrid working (Table 9).

Table 9: Types of flexibility requested by *employees*

	Per cent (%)
Change in start times	60
Change in finish times	59
Compressed work week	54
Reduction in number of days worked	54
Change to work from home/hybrid working	52
Change in days worked	46
Reduce hours	34
Change in breaks	29
Change from full-time to part-time	29
Change in location	25
Maintain consistent shifts/consistent rostering	16
Increase hours	16
Penalty rates	14
Change in averaging of hours	14
Overtime rates	13
Allowances	13
Leave loading	2
Other	11

Note: There were 56 responses to this question. Participants could select more than one response.

Reasons observed by interviewees for changes to start and/or finish times were to accommodate parents and those with caring responsibilities.

> *We'll normally see it from the employees where they want to change their hours or days per week, especially for caring type arrangements to alter something they've agreed to under employment conditions when they signed up with the organisation or when their own personal circumstances have changed. (E)*

Overwhelmingly women in the childbearing years. We see ... older women caring for elderly parents. That comes up. Less young people, but certainly right in that middle childbearing years, and then older women. (LW)

Another reason was employees preferring to finish work earlier rather than have a meal break.

Another reason I can think of is where a part-time employee is required to have a meal break ... but they only work, let's say 5 and a half or 6 hours and don't wish to have a meal break, because it actually extends their day by half an hour. (E)

Changes to overtime related to requests to perform work outside of the ordinary spread of hours. Employer and employer representatives were aware of requests from both employees and employers to accommodate an employee wanting to work more hours without the employer offering overtime rates.

It's money they're wanting. A lot of them ... they don't have families, or they don't have kids and things like that, and they just want to earn as much money as they can, and the employer is sometimes limited to be able to do that if they've got to pay the overtime rates to do it ... it'd be the overtime would be the main one that we find that employees are looking for. (E)

Some respondents had observed the use of formal IFAs to change rostering flexibility as a result of award variations in response to COVID-19 (9 out of 24 respondents).

4.6 Reasons for not making an IFA

Across both employer and employee role categories, it was observed that in some cases where IFAs were not utilised it was due to a limited understanding and awareness of the entitlement. Some respondents observed that the process of initiating IFAs was also misunderstood or confusing, and even misapplied. This may have led to limited use of IFAs.

The understanding and the knowledge of an IFA is in part very, very limited because people aren't aware that they do have that capacity to potentially change things. One reason why IFAs might not be used as much as what they could or should be is purely simply because people aren't aware of what they can do or if they even exist. (E)

The employee would initiate drafting them ... because the employer doesn't understand them. Whenever we propose a flexible arrangement like an IFA, we get pushback because they literally don't think it's possible. So, store managers are ... I'd love to, but I can't, because of the agreement, and it's quite an education process to get them through that. (U)

I don't think IFAs have been used properly or they are used in the wrong context. So, I've seen that probably the understanding of when an IFA should or shouldn't be used hasn't always been consistently applied a lot of the time. (M)

Another reason for not using IFAs observed by employers was because they could be terminated by employees, which leads to uncertainty. There was also concern from employers and employer representatives as to whether the IFA would satisfy the better off overall test, particularly around non-monetary benefits in an award or agreement.

There was that, I guess, uncertainty around the status, and of a non-monetary benefit as whether it was sufficient to hold the validity of an IFA, and so, for that reason, combined with the unilateral termination provisions that was in my experience as a reluctance by employers to use them. There was a level of apprehension that the IFA could be challenged on the basis that the employer had underpaid the employee or contravened the award if the agreement was held to be invalid. (E)

Employees and union officials observed that flexible working arrangements under section 65 of the Fair Work Act were being utilised instead of IFAs. Other options cited as reasons for not using IFAs, were that flexibility could be achieved through informal arrangements and entitlements within enterprise agreements.

Because our enterprise agreement is so expansive and there's a huge amount of flexibility built into policies it's very rare that someone will want to put in an IFA ... we had 2, so, very, very rare ... They're actually quite redundant. (M)

... we have a very high uptake of flexible working arrangements ... an area that is very well understood and accessed. I think both the quality of the terms of conditions under the agreement, not wanting to contract out of those terms with an IFA. There is a high

prevalence of shift work, so needing to access those terms and conditions. It's just the full scope of this agreement really covers all areas of working life. It's just so comprehensive, that it really limits the necessity of it. (U)

In other instances, the terms that could be varied within an enterprise agreement were too limited, as found in the 2021 report.

... and it's always one of their biggest issues ... our employees are saying we want over time, and we can't give it to them, because it's just too expensive for us ... I would love to say at a minimum, those things need to be in the IFA clause in any enterprise agreement. That's what I would be advocating highly for. (E)

Our IFA clause actually narrows what is in the NES, it restricts even further what an IFA can cover ... limited to only one of a couple of areas. So even if an employer wanted to engage a worker under an IFA, you're pretty limited in the scope that you can engage them. (U)

4.7 Designated groups

Almost two-thirds of participants that responded to this question on the online survey had experience with persons from a non-English speaking background (NESB), one-third with mature workers and very few with young workers.

Most interviewees did not have direct experience with workers from a NESB. Most interviewees who dealt with employees from a NESB were legal professionals in community centres.

We do get a lot of clients from Non-English-Speaking Backgrounds ... when you have those compounding indicators of vulnerability, a woman with a NESB may have children, it compounds that power imbalance, and I think often there may even be a reluctance in the first place to make the request for an IFA. That could also be from the lack of knowledge that ... they do have the right under the Act to make that request. (LW)

An employer representative also commented that IFAs were not common among people from a NESB.

I cannot recall a person from non-English speaking background requesting an IFA. It's usually been the other way. Typically, the plan would always be to take the extra steps to

make sure they fully understood what it was ... it's whether you can actually do that time in terms of controls in place and from a process perspective, that's always the risk. (M)

Interviewees commented that it was rare for young workers to make an IFA, with one observing that they requested IFAs to earn more money through working more hours while addressing issues with overtime rates that arise from that change.

Fewer mature-aged workers were observed to have entered IFAs as they chose other options to increase flexibility, however, when they did make an IFA it was often to increase their remuneration because of their skills.

... it's workers in demand ... those that are more likely to be in highly sought after occupations, and of course, that's people who are mid-career onwards. (U)

4.8 Refusals

Around half of online survey respondents were aware of a formal IFA being refused in full during the reference period (Table 10). Several others responded that they were aware of IFAs being refused in part.

Table 10: Aware of any requests for a formal IFA being refused in full

	Per cent (%)
Yes	51
No	49

Note: There were 59 responses to this question.

Interviewees noted that IFAs were not refused because both parties tend to negotiate with each other before making the IFA.

I haven't seen too many of them being refused, because typically, discussions have occurred, and the IFAs only entered into once you know that you could actually do it and reflective of what both parties have indicated they wanted. (M)

The types of flexibilities being refused from the online survey are shown in Tables 11 and 12.

Table 11: Types of flexibility in a formal IFA that you have observed refused by *employers*

	Per cent (%)
Change to work from home/hybrid working	56
Reduction in number of days worked	52
Change in finish times	52
Change in start times	48
Change in location	40
Change in days worked	36
Reduce hours	36
Change in shifts	24
Maintain consistent shifts/consistent, predictable rostering	24
Compressed work week	20
Change from full-time to part-time	20
Change to breaks	12
Allowances	12
Increase hours	8
Change to leave	8
Overtime rates	8
Penalty rates	8
Leave loading	4
Change in averaging of hours	0
Other	12

Note: There were 25 responses to this question. Participants could select more than one response.

The main reason that requests for IFAs were reported to be refused by employers was due to operational requirements. This could be where the role was required to deal with customers or provide a service, or for security reasons.

It is a dramatic one for the customer facing people because I've had several requests where they've said we can start early and finish early. Business isn't open at that time; I need you to deal with the customers. So, there's been a couple of rejections on that. (E)

They've requested an IFA so that they could stay, because they're the only person left in the store. A way we could accommodate your IFA is if we've also got someone else who hasn't requested an IFA staying in the store, and that's against our policy. (U)

According to a union official interviewee, employers often refuse IFAs because they were too complex and that they found it easier to remain within the terms of the enterprise agreement.

Employers routinely refuse. And I would say that the main reason they refuse is because they don't understand it. It's too hard. I've got enough things to think about. Don't make me think about this. (U)

The most common flexibility refused by employees were changes to start and finish times. Among interviewees, it was observed that employees refused requests because they did not want to forego entitlements under an award or enterprise agreement. However, employers observed that employees may refuse IFAs until the benefits they will receive are explained to them.

… a lot of time, what's being requested, they either don't understand it, which is an issue. You explain to them and they're happy to do it, because from their perspective it'll work for them as well. (M)

Table 12: Types of flexibility in a formal IFA that you have observed refused by *employees*

	Per cent (%)
Change in start times	42
Change in finish times	42
Reduce hours	25
Reduction in number of days worked	17
Change to work from home/hybrid working	17
Change in days worked	17
Compressed work week	17
Overtime rates	17
Penalty rates	17
Leave loading	17
Change in location	8
Change to breaks	8
Change in shifts	8
Change in averaging of hours	8
Increase hours	8
Change from full-time to part-time	8
Allowances	8
Maintain consistent shifts/consistent, predictable rostering	0
Other	8

Note: There were 12 responses to this question. Participants could select more than one response.

Businesses having no capacity to change the working arrangements of other employees to accommodate the arrangement was the most common reason given for refusal (Table 13).

Table 13: Reasons that IFA requests were refused during the reporting period

	Per cent (%)
The employer considered it had no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee	64
The employer considered the new working arrangements requested by the employee were likely to result in significant loss of efficiency or productivity	52
The employer did not give a reason	40
The employer considered 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	40
The employer considered the new working arrangements requested by the employee were likely to have a significant negative impact on customer service	40
The employer considered the employee's proposed flexibility arrangements to be too costly	32
The employee did not agree to a reduction in wages	32
The employee did not agree to changes to working hours or arrangements (e.g., placement of work)	20
The union did not agree to changes to working hours or arrangements (e.g., placement of work)	8
The union did not agree to a reduction in wages	4
Other	20

Note: There were 12 responses to this question. Participants could select more than one response.

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Appendix A: Standard flexibility clause – Modern awards

A. Individual flexibility arrangements

A.1 Despite anything else in this award, an employer and an individual employee may agree to vary the application of the terms of this award relating to any of the following in order to meet the genuine needs of both the employee and the employer:

(a) arrangements for when work is performed; or

(b) overtime rates; or

(c) penalty rates; or

(d) allowances; or

(e) annual leave loading.

A.2 An agreement must be one that is genuinely made by the employer and the individual employee without coercion or duress.

A.3 An agreement may only be made after the individual employee has commenced employment with the employer.

A.4 An employer who wishes to initiate the making of an agreement must:

(a) give the employee a written proposal; and

(b) if the employer is aware that the employee has, or should reasonably be aware that the employee may have, limited understanding of written English, take reasonable steps (including providing a translation in an appropriate language) to ensure that the employee understands the proposal.

A.5 An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.

A.6 An agreement must do all of the following:

(a) state the names of the employer and the employee; and

(b) identify the award term, or award terms, the application of which is to be varied; and

(c) set out how the application of the award term, or each award term, is varied; and

(d) set out how the agreement results in the employee being better off overall at the time the agreement is made than if the agreement had not been made; and

(e) state the date the agreement is to start.

A.7 An agreement must be:

(a) in writing; and

(b) signed by the employer and the employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

A.8 Except as provided in clause A.7(b), an agreement must not require the approval or consent of a person other than the employer and the employee.

A.9 The employer must keep the agreement as a time and wages record and give a copy to the employee.

A.10 The employer and the employee must genuinely agree, without duress or coercion to any variation of an award provided for by an agreement.

A.11 An agreement may be terminated:

(a) at any time, by written agreement between the employer and the employee; or

(b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013).

Note: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in section 144 then the employee or the employer may terminate the

arrangement by giving written notice of not more than 28 days (see section 145 of the FW Act).

A.12 An agreement terminated as mentioned in clause A.11(b) ceases to have effect at the end of the period of notice required under that clause.

A.13 The right to make an agreement under clause A is additional to, and does not affect, any other term of this award that provides for an agreement between an employer and an individual employee

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Appendix B: Regulations, Schedule 2.2—Model flexibility term (enterprise agreements)

(1) An employer and employee covered by this enterprise agreement may agree to make an individual flexibility arrangement to vary the effect of terms of the agreement if:

(a) the agreement deals with 1 or more of the following matters:

(i) arrangements about when work is performed;

(ii) overtime rates;

(iii) penalty rates;

(iv) allowances; and

(v) leave loading.

(b) the arrangement meets the genuine needs of the employer and employee in relation to 1 or more of the matters mentioned in paragraph (a); and

(c) the arrangement is genuinely agreed to by the employer and employee.

(2) The employer must ensure that the terms of the individual flexibility arrangement:

(a) are about permitted matters under section 172 of the Fair Work Act 2009; and

(b) are not unlawful terms under section 194 of the Fair Work Act 2009; and

(c) result in the employee being better off overall than the employee would be if no arrangement was made.

(3) The employer must ensure that the individual flexibility arrangement:

(a) is in writing; and

(b) includes the name of the employer and employee; and

(c) is signed by the employer and employee and if the employee is under 18 years of age, signed by a parent or guardian of the employee; and

(d) includes details of:

(i) the terms of the enterprise agreement that will be varied by the arrangement; and

(ii) how the arrangement will vary the effect of the terms; and

(iii) how the employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and

(e) states the day on which the arrangement commences.

(4) The employer must give the employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.

(5) The employer or employee may terminate the individual flexibility arrangement:

(a) by giving no more than 28 days written notice to the other party to the arrangement; or

(b) if the employer and employee agree in writing—at any time.