Fair Work Commission

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

2018–2021

Murray Furlong, General Manager

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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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Table of contents

1 Introduction 1

2 Report Outline 3

3 Legislative overview 3

3.1 Flexibility terms in modern awards 3

3.1.1 Legislative framework for flexibility terms in modern awards 3

3.1.2 Changes to the model flexibility term in modern awards 4

3.1.2 Content of an IFA and the model flexibility term in modern awards 4

3.1.3 Legislative framework for flexibility terms in enterprise agreements 5

3.1.4 Content of an IFA and the model flexibility term in enterprise agreements 5

3.1.5 Use of the model flexibility clause in enterprise agreements 6

3.2 Commission decisions in disputes regarding IFAs 6

4 Research methodology 8

4.1 Research by The University of Sydney 9

5 Findings 10

5.1 Incidence of IFAs 10

5.2 Making an IFA 11

5.3 Instrument varied 11

5.4 Types of variations requested 12

5.5 Reasons for making IFAs 13

5.6 Reasons for not using IFAs 14

5.7 Refusal 14

5.8 Designated groups 15

5.9 The impact of COVID-19 on IFAs 16

Appendix A – Model flexibility term – enterprise agreements 17

Appendix B – Model flexibility term – modern awards 19

List of tables

Table 3.1: Types of flexibility terms in enterprise agreements 1 July 2018–30 June 2021, per cent of approved enterprise agreements 6

Table 5.1: In total how many IFAs you have been involved in the making of, or responding to, during the period 26 May 2018 to 25 May 2021? 10

Table 5.2: In your experience, who usually initiates an IFA? 11

Table 5.3: Is your experience with IFAs in relation to employees covered by an award or an enterprise agreement? 12

Table 5.4: Types of flexibility requested 13

Table 5.5: Groups that have signed IFAs 15

List of abbreviations

AIRC	Australian Industrial Relations Commission
Commission	Fair Work Commission
Explanatory Memorandum	Fair Work Bill 2008 (Cth) Explanatory Memorandum
Fair Work Act	*Fair Work Act 2009* (Cth)
IFA	individual flexibility arrangement
NES	National Employment Standards
Regulations	Fair Work Regulations 2009 (Cth)

Executive summary

The General Manager of the Fair Work Commission (the Commission) is required, every three years, under section 653(1) of the *Fair Work Act 2009* (Cth) (Fair Work Act) to:

- review the developments in making enterprise agreements in Australia;
- conduct research into the extent to which individual flexibility arrangements (IFAs) under modern awards and enterprise agreements are being agreed to, and the content of those arrangements; and
- conduct research into the operation of the provisions of the National Employment Standards (NES) relating to employee requests for flexible working arrangements (under ss.65(1)) and extensions to unpaid parental leave (under ss.76(1)).

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 2018 to 25 May 2021 from research conducted into the extent to which IFAs under modern awards and enterprise agreements are being agreed to, and the content of those arrangements. Pursuant to s.653(3) this report is due to the Minister within six months from the end of the reporting period, i.e. by 25 November 2021.

As the General Manager has noted in previous reports, there are no sources of administrative data in relation to IFAs. Although IFAs have been part of the Australian industrial landscape since 2009, they remain a small part of the overall mix of industrial instruments in Australia. This makes the research in this area both difficult to conduct and difficult to extrapolate from.

This report includes a summary of matters relating to IFAs during the period. Information on the extent and content of IFAs are drawn from a report compiled by researchers from The University of Sydney. The report is based on a qualitative study of a range of organisations representing stakeholders in the Australian workplace relations system.

Key findings

- The prevalence of IFAs was low but spread across a number of industries.
- IFAs were more frequently initiated by employees than employers, with smaller proportions responding that an IFA had been initiated by an employer or jointly made by both employers and employees.
- Whether IFAs are made to vary awards or enterprise agreements is dependent on the industry it operates in, with the instrument being varied dependent on the predominant instrument used in that industry.
- Variations requested by employers were changes to start/finish times; change in shifts and change in the days worked. For employees, it was also changes to start/finish times; change in days worked; and also reduction in number of days worked.
- The most common reasons for initiating an IFA are to change an employee's hours of work and to address issues with overtime and penalties that result from the change.
- Variations requested in IFAs and refused included working from home.

- Respondents to the online survey were more likely to indicate that IFAs were mostly signed by females, although a similar proportion also indicated no discernible difference between females and males.
- The use of IFAs for regulating working from home during COVID-19 was uncommon.

1 Introduction

The Fair Work Commission (the Commission) is the national workplace relations tribunal. It is established by the *Fair Work Act 2009* (Cth) (Fair Work Act). The Commission carries out a range of functions including maintaining a safety net of modern award minimum wages and conditions, facilitating enterprise bargaining and approving enterprise agreements, administering the taking of protected industrial action and settling industrial disputes and granting remedies for unfair dismissal.

The Commission is comprised of Members who are appointed by the Governor-General under statute, headed by a President.[1] The President is assisted by a General Manager,[2] also a statutory appointee, who oversees the administration of Commission staff.

Under section 653(1) of the Fair Work Act, the General Manager must:

- review the developments in making enterprise agreements in Australia;
- conduct research into the extent to which individual flexibility arrangements (IFAs) under modern awards and enterprise agreements are being agreed to, and the content of those arrangements; and
- conduct research into the operation of the provisions of the National Employment Standards (NES) relating to employee requests for flexible working arrangements and extensions to unpaid parental leave.

The 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.

The review and research must also consider the effect that these matters have had on the employment (including wages and conditions of employment) of the following persons:

- women;
- part-time employees;
- persons from a non-English speaking background;
- mature age persons;
- young persons; and
- any other persons prescribed by the regulations.[3]

The Fair Work Act specifies that the research must be conducted in relation to the first three years following the commencement of section 653 and each subsequent three-year period.[4] A written report of the review and research must be provided to the Minister within six months after the end of the relevant reporting period.[5]

[1] Fair Work Act, ss.575 and 626.

[2] Fair Work Act, s.657.

[3] Fair Work Act, s.653(2). The regulations do not prescribe any other persons.

[4] Fair Work Act, s.653(1A).

[5] Fair Work Act, s.653(3).

This report presents findings for the period 26 May 2018 to 25 May 2021 on matters relating to IFAs and research conducted into the extent to which IFAs under modern awards and enterprise agreements are being agreed to, and the content of those arrangements.[6] Pursuant to s.653(3) this report is due to the Minister within six months from the end of the reporting period, i.e. by 25 November 2021.[7]

[6] The Fair Work Act provides that all modern awards must include a flexibility term enabling an employee and their employer to agree on an arrangement varying the effect of the award in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer (s.144(1)). Such an arrangement is known as an IFA. The Fair Work Act also requires a flexibility term to be included in all enterprise agreements to enable the making of IFAs (s.202(1)).

[7] Section 653(1A) of the Fair Work Act provides that the General Manager is required to review and undertake research for the three-year period from commencement of the provision and each later three-year period. Section 653 commenced operation on 26 May 2009 (see s.2 of the Fair Work Act). The initial reporting period concluded 25 May 2012. The initial General Manager's report presented results which included data up to 30 June 2012 as a result of data collection periods. This report includes data from 1 July 2015 to 30 June 2018 for the same reason.

2 Report outline

Section 3 provides an overview of the relevant legislation. For a detailed explanation of the governing legislation pertaining to IFAs, refer to the 2009–2012 report which can be found on the Commission's website.

Unlike the earlier reports, the Commission did not utilise a large-scale survey for this report. Large-scale surveys for the 2012 and 2015 reports determined that the use of IFAs was not widespread. The absence of any significant legislative or policy changes relating to IFAs between 2018 and 2021 meant that an approach was taken to collect information that could provide a deeper understanding of the motivations behind why and how IFAs were made. This follows a similar approach for the 2018 report, where it was noted that large scale cross-sectional surveys are extremely inefficient for obtaining data on small sub-populations.[8]

The methodology behind the research conducted for this report is set out in Section 4. The findings of the research pertaining to IFAs required by s.653(1)(b) of the Fair Work Act are presented in Section 5.

The model flexibility terms set out in enterprise agreements and modern awards are provided in the Appendices.

3 Legislative overview

IFAs are made under the flexibility terms in modern awards or enterprise agreements. IFAs are made between an individual employee and his or her employer and vary the effect of the terms of a modern award or enterprise agreement in relation to the employee and the employer.[9] 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 is structured as follows:

- flexibility terms in modern awards;
- flexibility terms in enterprise agreements; and
- Commission decisions in disputes regarding IFAs.

3.1 Flexibility terms in modern awards

3.1.1 Legislative framework for flexibility terms in modern awards

A modern award must include a flexibility term enabling an individual employee and his or her employer to agree on an IFA varying the effect of the modern award in relation to that employee and employer to meet their genuine needs.[10]

If an individual employee and his or her 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

[8] O'Neil B (2018), *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth)*, Fair Work Commission, November, p. 8.

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

[10] Fair Work Act, s.144(1).

varied by the IFA.[11] The IFA is taken for the purposes of the Fair Work Act to be a term of the modern award.[12]

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 s.144(4) of the Act.

3.1.2 Changes to the model flexibility term in modern awards

As part of the 4 yearly review of modern awards, a Full Bench of the Commission was constituted to consider the redrafting of modern awards in plain language. Flexibility terms were among 5 standard provisions identified for plain language redrafting.[13]

In August 2018, the Commission finalised the consolidated model flexibility term[14] and, in October 2018, determinations were issued that inserted redrafted flexibility terms into 104 modern awards with an effective date of 1 November 2018.[15]

In August 2019, a further 16 modern awards were varied to include the redrafted terms which came into effect on 30 August 2019.[16] Variation determinations were then issued for 6 modern awards in September 2019[17] with an effective date of 4 October 2019. In January 2020, a single variation determination was issued with an effective date of 5 February 2020.[18]

Changes to flexibility terms during the plain language redrafting process reflected the plain language principles developed in accordance with the Commission's plain language project and the plain language drafting guidelines.[19] No other changes to the model flexibility term occurred during the reporting period.

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

Section 144(4) 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; and

[11] Fair Work Act, s.144(2)(a).

[12] Fair Work Act, s.144(2)(b).

[13] [2016] FWC 4756 at [5].

[14] [2018] FWCFB 4704 at [15].

[15] [2018] FWC 6091; schedule of determinations.

[16] [2019] FWCFB 5409; schedule of determinations.

[17] [2019] FWCFB 6572; PR712686, PR712689, PR712680, PR712698, PR712713.

[18] [2020] FWCFB 391; PR716167.

[19] Fair Work Commission, *Plain Language Guidelines*, published 20 June 2017.

- require the employer to ensure that a copy of the IFA is given to the employee.[20]

The flexibility term must not require that IFAs be approved, or consented to, by third parties.[21] 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.[22]

The current model flexibility term, which forms the basis of flexibility terms in all modern awards, is included at Appendix B.

3.1.4 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 varying the effect of the enterprise agreement in relation to that employee and employer, in order to meet their genuine needs.[23] If an enterprise agreement does not include a flexibility term, or the flexibility term does not meet the requirements of the Fair Work Act,[24] the model flexibility term is taken to be a term of the enterprise agreement.[25]

The model flexibility term for enterprise agreements is based upon 'the model flexibility term developed by the AIRC [Australian Industrial Relations Commission] for inclusion in modern awards'.[26] Whereas the model flexibility term for modern awards may be varied by the Commission,[27] the model flexibility term for enterprise agreements is prescribed by the Fair Work Regulations 2009 (Cth) (Regulations).[28] Accordingly, the model flexibility term for enterprise agreements may only be modified by amending the Regulations.

If an individual employee and his or her 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 his or her employer as if it were varied by the IFA.[29] The IFA is taken to be a term of the enterprise agreement[30] and hence may be enforced as though it were a term of the enterprise agreement.

There have been no changes to Schedule 2.2 of the Regulations during the reporting period.

3.1.5 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 flexibility terms provided for in modern awards are determined by the Commission, within the requirements of the Fair Work Act. By contrast, as enterprise agreements

[20] Fair Work Act, s.144(4).

[21] Fair Work Act, s.144(5).

[22] Fair Work Act s144(4)(e)(ii).

[23] Fair Work Act, s.202(1).

[24] *Stewart And Sons Steel P/L. Collective Agreement 2013/2014* [2013] FWCA 2132; Explanatory Memorandum to the Fair Work Bill 2008, cl. 863.

[25] Fair Work Act, s.202(4).

[26] Explanatory Memorandum to the Fair Work Bill 2008, r.151 and clause 864.

[27] Fair Work Act, s 157.

[28] Fair Work Act, s.202(5) and reg. 2.08 and Schedule 2.2 of the Regulations.

[29] Fair Work Act, s.202(2)(a).

[30] Fair Work Act, s.202(2)(b).

are negotiated between employees and employers, there is scope, within the requirements of the Fair Work Act, for employees and employers to agree to a flexibility term that permits the variation of the effect of more terms in an enterprise agreement.

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

If an enterprise agreement does not include a flexibility term, or the flexibility term does not meet the requirements of the Fair Work Act, the model flexibility term for enterprise agreements is taken to be a term of the enterprise agreement.[31]

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

3.1.6 Use of the model flexibility clause in enterprise agreements

Table 3.1 presents data from the Workplace Agreements Database on the types of flexibility terms (model or otherwise) incorporated into enterprise agreements approved between 1 July 2018 and 30 June 2021. More than half had a flexibility term that differs from the model flexibility term and specifies which term can be varied. Around one-third had the model flexibility term.

Table 3.1: Types of flexibility terms in enterprise agreements 1 July 2018–30 June 2021, per cent of approved enterprise agreements

Type of flexibility term	(%)
Model flexibility term: the flexibility term is the model term	32.7
Model flexibility term incorporated: the Fair Work Commission Member's decision incorporates the model flexibility term into the agreement	10.4
No flexibility clause: model flexibility term taken to be a term of the agreement	3.6
Flexibility – specific: the flexibility term differs from the model flexibility term, and specifies which term can be varied	51.5
Flexibility – general: the flexibility term allows any term of the agreement to be varied	2.3

Note: Some agreements may contain more than one flexibility term and therefore proportions may not add up to 100.

Source: Attorney-General's Department, *Workplace Agreements Database*, June quarter 2021.

3.2 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 decision concerned the unilateral termination of IFAs under an enterprise agreement by an employer in response to the COVID-19 pandemic. A further decision, dealing with broader issues raised by the dispute, was issued after the reporting period.[32]

The case is summarised below.

[31] Fair Work Act, s.202(4) and *Re Minister for Employment and Workplace Relations* (2010) 195 IR 138.

[32] [2021] FWC 5162

Australian Federation of Air Pilots v Surveillance Australia Pty Ltd T/A Cobham Aviation Services Australia - Special Mission

[2020] FWC 3367

The Australian Federation of Air Pilots (AFAP) applied under the dispute settlement procedure of the *Surveillance Australia Pilot and Observer Enterprise Agreement 2016* (Agreement) and s.739 of the Fair Work Act for the Commission to deal with a dispute between 10 pilots and their employer, Cobham Aviation Services Australia–Special Mission (Cobham SM).

Cobham SM operated aircraft from bases in Broome, Darwin and Cairns as part of a surveillance contract with the Australian Border Force (ABF). The pilots were engaged on the basis of IFA-facilitated fly in-fly out (FIFO) arrangements whereby they undertook their duties from ports other than the ABF bases.[33]

In response to the COVID-19 pandemic and associated Government restrictions, the parties agreed to temporary arrangements to relocate the pilots to the ABF bases for three months, subject to extension by agreement. Cobham SM proceeded to terminate the pilots' IFAs without the AFAP's support.[34]

During proceedings before Commissioner Hampton, the parties agreed to settlement terms resuming the former FIFO arrangements. Cobham agreed to provide the pilots with new IFAs consistent with the original IFAs, unless varied by agreement. Commissioner Hampton formally endorsed the outcome, noting that the broader issues raised by the dispute would be considered in further proceedings.[35]

[33] [2020] FWC 3367 at [2]–[3].

[34] [2020] FWC 3367 at [4].

[35] [2020] FWC 3367 at [6]–[10].

4 Research methodology

The capacity of the Commission to accurately assess both the extent and terms of IFAs is limited as IFAs are not lodged with or assessed by the Commission or any agency and no administrative data source exists from which to report. The intent of these reports is to investigate IFAs, which are just one instrument among many options that employers and employees have to achieve/increase flexibility.

Findings in the first set of reports, provided in 2012, were obtained from two surveys—a household survey of 4500 employees and a survey of 2650 employers. In the second set of reports, provided in 2015, data were obtained from a wide-ranging linked employer-employee survey of 3057 employer respondents and 7883 employees from those workplaces. Both reports found that the extent of IFAs was small and that using very large representative surveys to obtain information on those few IFAs was inefficient. The 2015 report found little difference in the incidence of IFAs from the 2012 report.

Results for the 2018 reports were based on a smaller quantitative survey supplemented with quantitative research to provide more detailed understanding of IFAs. Survey data were obtained from additional questions to the Survey of Employers' Recruitment Experiences, a survey of employers conducted by the (then) Department of Jobs and Small Business undertaken through a range of Australian regions. The survey monitors recruitment conditions and identifies practical information about what employers are looking for in applicants and how job seekers can better connect with employment opportunities. In addition, qualitative studies consisting of in-depth interviews were conducted with employees and employers in relation to their experiences of IFAs.

A similar approach has been undertaken for these reports. Together with the absence of any legislative and/or policy changes designed to alter the use of IFAs between 2018 and 2021, it is suggestive that there is unlikely to have been significant change in the use of IFAs during the current reference period in comparison to the previous periods.

The General Manager noted in the 2018 reports that 'the complexities associated with conducting the research with respect to the small populations in sections 653(1) and (2) raise questions about the best method to meet the objectives' and that 'the research that the Commission must conduct can only ever provide a superficial picture of the extent and circumstances associated with IFAs'.[36]

The General Manager further noted that '[t]he absence of a specific form, or a registry, where any such arrangements are ultimately filed, means that the Commission is relying upon the knowledge of survey respondents concerning their own employment arrangements. Unfortunately, experience in research concerning employment arrangements has shown that many employees and employers are genuinely uncertain as to how their employment arrangements are regulated.'[37]

To improve the utility of any information gathered for this report, the commissioned research obtains findings from a purposive sample which specifically targets individuals for their knowledge and expertise in IFAs and s.65 and s.76 requests for flexibility.

[36] O'Neil B (2018), *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth)*, Fair Work Commission, November, p. 8.

[37] O'Neil B (2018), *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth)*, Fair Work Commission, November, p. 8.

4.1 Research by The University of Sydney

Information on IFAs has been collected using a mixed method research approach that draws on qualitative case studies and an online survey. The approach was developed by researchers from the University of Sydney and sponsored by the Commission. The research also provides information for the General Manager's report into the operation of the provisions of the National Employment Standards (NES) relating to requests for flexible working arrangements and extensions of unpaid parental leave under s.653.

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

Contact persons were asked to:

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

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

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

Interviewees were from the following industries:

- Finance
- Mining
- Ports
- Manufacturing
- Transport and logistics
- Energy
- Hospitality

- Federal and state governments
- Tourism and amusement
- Aged care
- Disability care
- Security.

5 Findings

5.1 Incidence of IFAs

The University of Sydney research reported that the prevalence of IFAs was low but spread across a number of industries. While an estimate of the incidence of IFAs made during the reporting period cannot be calculated from this type of survey, it was most common for respondents to the online survey to report that they had been involved with only 2–10 IFAs (Table 5.1).

Table 5.1: In total how many IFAs you have been involved in the making of, or responding to, during the period 26 May 2018 to 25 May 2021?

	Frequency	Per cent
0	3	8.1
1	2	5.4
2–10	19	51.4
11–20	6	16.2
21–50	3	8.1
51–100	3	8.1
1000+	1	2.7
Total	**37**	**100**

Source: Baird, Williams, Heron & Cooper, p. 66, Table B4.

Respondents to the online survey indicated that they were more involved with making or responding to IFAs in Health care and social assistance, Financial and insurance services and Retail trade, although it was reported in interviews that IFAs were rarely used in Retail trade. IFAs were reportedly not used or used by only a small number of businesses in community services, maritime, hospitality, construction and aviation sectors.[38]

One union representative had direct experience with an employer who had thousands of IFAs, although other employers in that industry sought flexibilities through their enterprise agreements. According to another union representative, there were hundreds of IFAs in the resources sector.[39]

One interviewee from a law firm discussed that the use of IFAs appeared to have increased over the three-year period for employers that already made IFAs, while another reported that the number had decreased

[38] Baird, Williams, Heron & Cooper, p. 17.

[39] Baird, Williams, Heron & Cooper, p. 17.

apart from a spike at the beginning of the COVID-19 pandemic.[40] One manufacturer had made IFAs with about 10 per cent of its enterprise agreement-covered workforce, though there was no increase over the three-year period.[41]

5.2 Making an IFA

The responses to the online survey indicated that IFAs were more frequently initiated by employees than employers, with smaller proportions responding that an IFA had been initiated by an employer or jointly made by both employers and employees (Table 5.2). Some noted that employees may suggest a certain flexibility, however, the employer would propose the IFA to achieve the flexibility in an acceptable way.[42]

Table 5.2: In your experience, who usually initiates an IFA?

	Frequency	Per cent
Employer	10	27
Employee	16	43
Both employer and employee	8	22
Other	3	8
Total	**37**	**100**

Source: Baird, Williams, Heron & Cooper, p. 18.

Where IFAs are instigated by employers, it was because they had the resources to create and then offer the same instrument/IFA to multiple employees. These include flexibilities that may not be possible under an award or enterprise agreement. According to a union representative, employers instigated IFAs as a way of managing a rostering practice rather than to meet individual needs. However, employees tend to instigate the making of an IFA for individual needs.[43]

One manufacturing employer described how an IFA was used as a trial for a new roster initially for an individual employee that was not able to be run through the enterprise agreement. However, the new roster was more broadly liked and was rolled out to other employees.[44]

Although IFAs cannot be offered at the commencement of employment, instances of this were reported in the online survey. However, the majority were offered when an employee's circumstances change.[45]

5.3 Instrument varied

Whether IFAs are made to vary awards or enterprise agreements is dependent on the industry it operates in. For instance, an IFA in an award-reliant industry, such as the services industry would likely have varied an award rather than an enterprise agreement.[46]

[40] Baird, Williams, Heron & Cooper, p. 17.

[41] Baird, Williams, Heron & Cooper, p. 18.

[42] Baird, Williams, Heron & Cooper, p. 18.

[43] Baird, Williams, Heron & Cooper, p. 18.

[44] Baird, Williams, Heron & Cooper, p. 18

[45] Baird, Williams, Heron & Cooper, p. 19.

[46] Baird, Williams, Heron & Cooper, p. 19.

An interviewee mentioned that there are employers who will not use IFAs as they have spent a lot of work in negotiating the enterprise agreement and consider IFAs as potentially undermining the agreement.[47] It was also found that the number of provisions that could be changed for an IFA can be limited by the flexibility clause in the enterprise agreement—that is, it was common for unions in their bargaining log of claims to seek to restrict IFAs to a small number of non-contentious issues.[48]

The online survey found that the experience of the respondents was that IFAs varied both enterprise agreements and awards fairly evenly (Table 5.3).

Table 5.3: Is your experience with IFAs in relation to employees covered by an award or an enterprise agreement?

Instrument	Frequency	Per cent
Award	10	26
Enterprise agreement	14	37
Both	14	37
Total	**38**	**100**

Source: Baird, Williams, Heron & Cooper, p. 20.

5.4 Types of variations requested

Within the model flexibility term the following flexible arrangements are permitted:[49]

- arrangements for when work is performed;
- overtime rates;
- penalty rates;
- allowances; and
- leave loading.

Respondents to the online survey were more likely to indicate that variations requested by employers were changes to start/finish times, change in shifts and change in the days worked (Table 5.4). For employees, it was also changes to start/finish times, change in days worked, and also reduction in number of days worked.

[47] Baird, Williams, Heron & Cooper, p. 20.

[48] Baird, Williams, Heron & Cooper, p. 22.

[49] In this Section, 'model flexibility term' refers to both the model flexibility term for enterprise agreements contained in Schedule 2.2 of the Fair Work Regulations 2009 (Cth) and the model flexibility term developed by the Commission for inclusion in modern awards in [2018] FWCFB 4704.

Table 5.4: Types of flexibility requested

	By employers		By employees	
Flexibility	**Frequency**	**Per cent**	**Frequency**	**Per cent**
Change in start times	21	60	21	68
Change in finish times	21	60	21	68
Change in shifts	15	43	7	23
Change in days worked	14	40	17	55
Overtime rates	13	37	2	6
Penalty rates	13	37	1	3
Allowances	13	37	2	6
Reduction in number of days worked	12	34	19	61
Change in location, e.g. work from home	11	31	13	42
Increase hours	10	29	7	23
Change in averaging of hours	9	26	4	13
Leave loading	8	23	2	6
Reduce hours	8	23	15	48
Change from full-time to part-time	7	20	14	45
Maintain constant shifts/constant rostering	3	9	3	10
Other	3	9	2	6

Source: Baird, Williams, Heron & Cooper, pp. 20–22.

5.5 Reasons for making IFAs

The most common reasons for initiating an IFA are to change an employee's hours of work and to address issues with overtime and penalties that result from the change. These include:

- allowing employees to work more hours on weekends (tourism and amusement industry):
- allowing part-time employees to take extra shifts at their own request, without the employer having to pay them overtime (aged care, disability care and security industries); and
- for employees to forgo unpaid meal breaks and finish shifts early, particularly when working unsociable hours (services sector).[50]

Other common reasons were changing patterns of work to enable employees to swap shifts, to condense the working week, or to work a particular shift pattern (health and manufacturing sectors).[51]

Examples were provided where requests to work a certain shift pattern attracted penalty rates and making an IFA avoided the need to pay these rates. This was even the case in instances when flexibility was first sought under s.65. Some interviewees also mentioned that IFAs were made for annualised salaries. In the

[50] Baird, Williams, Heron & Cooper, p. 22.

[51] Baird, Williams, Heron & Cooper, p. 22.

government sector, they have been used to provide higher rates of pay or bonuses to senior executive level staff. [52]

Interviewees also discussed that some employers offer IFAs primarily for lower paid, part-time employees (both male and female).[53] Common law contracts are often used to achieve flexibility among higher-paid employees. However, IFAs are used among higher-skilled employees, often in technical roles and covered by either awards or enterprise agreements, in industries such as manufacturing, energy and the public sector.[54]

Some employees prefer using IFAs as they can terminate the instrument and return to their original conditions.

5.6 Reasons for not using IFAs

Information collected from interviewees suggested IFAs were not being made because of the following reasons:

- They tend to not be used in some areas where workers are young and transient.
- Employers mentioned that the amount of administration involved was a reason to avoid using IFAs.
- Other options were available to provide flexibility, such as common law contracts.
- Policies within companies or enterprise agreements provide flexibility so that formal options such as IFAs are not needed.
- The short timeframe to terminate an IFA (that varies an enterprise agreement) does not provide enough certainty for employers to meet their operational requirements.
- Employers lack the knowledge or understanding of IFAs, such as differentiating them from other types of requests.
- A lack of trust in a workplace leading to perceptions that IFAs will be refused.
- Philosophical opposition to IFAs and a preference for flexibility through clauses in enterprise agreements.
- Some employees do not want to 'stand out' from colleagues.[55]

5.7 Refusal

Fewer than half of respondents to the online survey (40 per cent) reported that IFAs had been refused during the reporting period. The variations refused were generally broad and although the sample size is very small (14 responses), half indicated that employers refused requests to work from home.[56]

Interviewees discussed a number of reasons as to why employers refused an IFA request. These included:

[52] Baird, Williams, Heron & Cooper, p. 22–23.

[53] Baird, Williams, Heron & Cooper, p. 25.

[54] Baird, Williams, Heron & Cooper, p. 26.

[55] Baird, Williams, Heron & Cooper, pp. 26–28.

[56] Baird, Williams, Heron & Cooper, p. 29.

- concerns of fatigue if the employee wants to work too many hours or the breaks between shifts are too short;
- financial concerns if the proposed hours require the payment of penalty rates or overtime;
- the impact on customer service; and
- the additional payroll administration required.[57]

Some interviewees mentioned that IFAs requested from employees were less desirable if they impacted on rosters but were seen to cater to flexibility among senior executives.[58]

5.8 Designated groups

Survey respondents were asked which groups of employees had signed IFAs (Table 5.5).

Table 5.5: Groups that have signed IFAs

	Signed	Per cent
Females	21	84
Males	17	68
Part-time employees	14	56
Mature aged persons (i.e. aged 55+)	11	44
Salaried employees	11	44
Persons from a non-English speaking background	7	28
Shift workers	7	28
Young persons (i.e. aged under 18)	3	12

Note: Based on 25 responses.

Source: Baird, Williams, Heron & Cooper, p. 23.

When specifically asked, respondents to the online survey were more likely to indicate that IFAs were mostly signed by females, although a similar proportion also indicated no discernible difference between females and males. There was also little difference as to whether IFAs were signed by full-time or part-time employees. IFAs were more commonly signed by Clerical and administrative workers.[59] Some interviewees indicated that whether IFAs were primarily signed by men or women depended on whether the industry was male or female-dominated.

Female employees sought to make an IFA for care reasons or to accommodate disability. Higher-paid, higher-skilled employees, often males, may seek to make an IFA to achieve higher wages. In male-dominated industries or occupations, such as energy and manufacturing, IFAs are more likely to be used by full-time workers. In occupations such as clerical and administration, part-time female workers are more likely to use IFAs.[60]

[57] Baird, Williams, Heron & Cooper, p. 30.

[58] Baird, Williams, Heron & Cooper, p. 31.

[59] Baird, Williams, Heron & Cooper, p. 24.

[60] Baird, Williams, Heron & Cooper, p. 26.

5.9 The impact of COVID-19 on IFAs

The researchers found that the use of IFAs for regulating working from home during COVID-19 was uncommon. In some circumstances, IFAs were used to facilitate extended working hours for those doing teleconsulting in evenings, and also to extend some shifts from 8 to 12 hours. One interviewee discussed how IFAs were used when employees wanted to relocate to different states while already working remotely.[61]

Perceptions about flexibility after the COVID-19 pandemic were mixed, with some indicating that it would continue without the need for new rules or formalisation, while others indicated that the formalisation of flexibility would need to be sought. There was some indication that employees wanted to formalise flexible working arrangements obtained during COVID-19. Other interviewees mentioned that it is harder for employers to resist requests for flexible work and more difficult to claim reasonable business grounds for refusals, as COVID-19 has demonstrated that flexible arrangements can work.

[61] Baird, Williams, Heron & Cooper, p. 55.

Appendix A – Model flexibility term – enterprise agreements

Fair Work Regulations 2009

Schedule 2.2—Model flexibility term

(regulation 2.08)

Model flexibility term

(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;

(v) leave loading; and

(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.

Appendix B – Model flexibility term – 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 s. 144 then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see s.145 of the 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.