



FAIR WORK  
AUSTRALIA

## Issues Paper 1/12

Making submissions to the General Manager's report into the operation of the first three years of the *Fair Work Act 2009* (Cth) individual flexibility arrangements

Bernadette O'Neill, General Manager

9 March 2012



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|   |           |
|---|-----------|
| <b>Abbreviations</b> .....  | <b>ii</b> |
| <b>1 Introduction</b> .....   | <b>3</b>  |
| 1.1 General Manager’s individual flexibility arrangements report and issues paper ..... | 3         |
| 1.1.1 Guide to making a submission .....  | 4         |
| 1.1.2 Timetable .....   | 4         |
| <b>2 Individual flexibility arrangement legislative provisions</b> .....                | <b>4</b>  |
| 2.1 Requirements for flexibility terms .....  | 5         |
| 2.1.1 Modern awards .....   | 5         |
| 2.1.2 Enterprise agreements .....   | 6         |
| 2.1.3 Effect of an individual flexibility arrangement .....                             | 7         |
| 2.2 Lodgement of individual flexibility arrangements .....                              | 7         |
| <b>3 Model individual flexibility terms in awards and agreements</b> .....              | <b>7</b>  |
| <b>4 Types of individual flexibility arrangements</b> .....                             | <b>8</b>  |
| 4.1 Arrangements for when work is performed.....  | 8         |
| 4.2 Overtime rates .....  | 8         |
| 4.3 Penalty rates.....  | 9         |
| 4.4 Allowances.....   | 10        |
| 4.5 Leave loading .....   | 10        |
| 4.6 Other conditions.....   | 11        |
| <b>5 Research on individual flexibility arrangements</b> .....                          | <b>11</b> |
| <b>6 Consolidated list of questions</b> .....   | <b>12</b> |
| <b>Appendix 1 - Modern award model flexibility clause</b> .....                         | <b>13</b> |
| <b>Appendix 2 - Enterprise agreement model flexibility term</b> .....                   | <b>15</b> |

## Abbreviations

Fair Work Act

*Fair Work Act 2009 (Cth)*

Transitional Act

*Fair Work (Transitional Provisions and Consequential Amendments)  
Act 2009 (Cth)*

# 1 Introduction

Fair Work Australia is the national workplace relations tribunal established by the *Fair Work Act 2009* (Cth) (Fair Work Act). It is an independent body which performs a range of functions including maintaining a safety net of modern award wages and conditions, facilitating enterprise bargaining, supervising the taking of industrial action, approving enterprise agreements, settling industrial disputes, granting remedies for unfair dismissal, regulating industrial organisations and determining appeals.

Fair Work Australia is required by the Fair Work Act to perform its functions and exercise its powers in a manner that:

- is fair and just;
- is quick, informal and avoids unnecessary technicalities;
- is open and transparent; and
- promotes harmonious and cooperative workplace relations.<sup>1</sup>

The tribunal consists of members of Fair Work Australia (all statutory appointees) and is headed by a President. The President is assisted by a General Manager, also a statutory appointee, who oversees the administration of Fair Work Australia staff. Fair Work Australia staff provides administrative support to the tribunal and its members. Together the General Manager and Fair Work Australia staff constitute a statutory agency with the General Manager as the head of the agency. Further information about Fair Work Australia's constitution and functions can be found on the Fair Work Australia website: [www.fwa.gov.au](http://www.fwa.gov.au).

## 1.1 General Manager's individual flexibility arrangements report and issues paper

Under s.653 of the Fair Work Act, the General Manager of Fair Work Australia must:

- 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
- in conducting the review and research, the Act specifies that the General Manager must consider the effects that the matters referred to have had on the employment (including wages and conditions of employment) of the following persons:
  - (a) women;
  - (b) part-time employees;
  - (c) persons from a non-English speaking background;
  - (d) mature age persons;
  - (e) young persons;
  - (f) any other persons prescribed by the regulations.<sup>2</sup>

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<sup>1</sup> Fair Work Act, s.577

The first review is of the three year period from May 2009 to May 2012.<sup>3</sup> The IFA provisions commenced on 1 January 2010. The General Manager must give the Minister a written report of the review within six months following the review,<sup>4</sup> and the Minister will then table the report in each House of Parliament.<sup>5</sup>

This review provides an opportunity for interested stakeholders and the public to provide their views and experiences of the operation of the system to inform this report. To assist submissions the issues paper provides questions and information on the Fair Work Act and, in particular, on individual flexibility arrangements.

### **1.1.1 Guide to making a submission**

Anyone can make a submission to Fair Work Australia, and the General Manager encourages submissions from a wide range of individuals and organisations with experience with individual flexibility arrangements.

This issues paper provides a number of questions to assist in drafting submissions on the operation of individual flexibility arrangements since their commencement on 1 January 2010.

Submissions do not necessarily have to address all sections of this paper or respond to all questions and need not be lengthy. Submissions may contain facts, arguments and opinions. Where possible, submissions should provide evidence to support the views put forward.

The General Manager will publish all submissions, unless it contains information of a confidential or commercially sensitive nature.<sup>6</sup>

### **1.1.2 Timetable**

The timetable for making a submission to the General Manager on the operation of the individual flexibility arrangements is:

- Issue paper released: 9 March 2012
- Submissions open: 12 March 2012
- Submissions close: 12 April 2012.

All submissions must include a cover sheet available from the Fair Work Australia website: [www.fwa.gov.au](http://www.fwa.gov.au). Submissions must be sent to [gmreport@fwa.gov.au](mailto:gmreport@fwa.gov.au).

## **2 Individual flexibility arrangement legislative provisions**

The Fair Work Act states that one object of the Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by providing, among other things, workplace relations laws that

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<sup>2</sup> Fair Work Act, s.653(2).

<sup>3</sup> Fair Work Act, s.653(1A). The first review must be of the three year period from when s.653 commenced and each later 3 year period.

<sup>4</sup> Fair Work Act, s.653(3)

<sup>5</sup> Fair Work Act, s.653(4).

<sup>6</sup> If a submission made by a person or body includes information that is claimed to be confidential or commercially sensitive, and the General Manager is satisfied that the information is confidential or commercially sensitive, the General Manager may decide not to publish the information.



are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations.<sup>7</sup>

All modern awards must include a flexibility term enabling an employee and his or her employer to agree on arrangements (an individual flexibility 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.<sup>8</sup> The arrangement is taken to be a term of the modern award.

Similarly, the Act requires that flexibility terms must be included in all enterprise agreements.<sup>9</sup> That is, the enterprise agreement must include a term that enables an employee and his or her employer to agree to an arrangement (an individual flexibility arrangement) varying the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer. The arrangement is taken to be a term of the agreement. If an agreement does not contain a flexibility term, the model flexibility term<sup>10</sup> is taken to be a term of the agreement.<sup>11</sup>

An individual flexibility arrangement does not change the effect a modern award or agreement has in relation to the employer and any other employee.<sup>12</sup>

1. Were you aware that employers and employees are able to make individual flexibility arrangements than can vary, for an individual employer and employee, the conditions of employment as contained in a modern award or enterprise agreement?

## 2.1 Requirements for flexibility terms

### 2.1.1 Modern awards

For modern awards a flexibility term must:<sup>13</sup>

- identify the award provisions (for example an overtime provision) which may be varied by an individual flexibility arrangement;
- require that the employee and the employer genuinely agree to any individual flexibility arrangement;

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<sup>7</sup> Fair Work Act, ss. 3 and 3(a).

<sup>8</sup> Fair Work Act, s.144.

<sup>9</sup> Fair Work Act, s.202.

<sup>10</sup> Fair Work Regulations, reg 2.08, Schedule 2.2; see Appendix 1 for the Model Flexibility Term.

<sup>11</sup> Fair Work Act, s.204(4).

<sup>12</sup> Fair Work Act, s. 144(3), s. 202(3).

<sup>13</sup> Fair Work Act, ss. 144(4).

- require the employer to ensure that any individual flexibility arrangement results in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to;
- set out how any individual flexibility arrangement may be terminated by the employee or the employer;
- require the employer to ensure that any individual flexibility arrangement is in writing and signed: in all cases - by the employee and the employer; and if the employee is under 18 - by a parent or a guardian of the employee; and
- require the employer to ensure that a copy of any individual flexibility arrangement is given to the employee.<sup>14</sup>

The flexibility term must not require that any individual flexibility arrangement agreed to by an employer and employee under the term must be approved, or consented to, by any third party.<sup>15</sup>

### **2.1.2 Enterprise agreements**

For enterprise agreements a flexibility term must:<sup>16</sup>

- identify the agreement provisions (for example an overtime provision) which may be varied by an individual flexibility arrangement;
- require the employer to ensure that any individual flexibility arrangement agreed to under the flexibility term must be about matters that would be enterprise agreement permitted matters, and must not include a term that would be an unlawful term if the arrangement were an enterprise agreement;
- require that the employee and the employer genuinely agree to any individual flexibility arrangement;
- require the employer to ensure that any individual flexibility arrangement results in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to;
- contain provisions which enable a flexibility arrangement to be terminated by the employee or the employer giving written notice of not more than 28 days; or by the employee and the employer at any time if they agree, in writing, to the termination;
- require the employer to ensure that any individual flexibility arrangement agreed to under the term must be in writing and signed by the employee and employer; and, if the employee is under 18—by a parent or guardian of the employee;
- require the employer to ensure that a copy of any individual flexibility arrangement is given to the employee; and
- not require any individual flexibility agreement to be approved or consented to by any third party.

The requirement that an employee be 'better off overall' does not necessarily require the employee to be better off in financial terms. Where an individual is trading off terms and conditions for other

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<sup>14</sup> Fair Work Act, s.144(4).

<sup>15</sup> Fair Work Act, s.144(5).

<sup>16</sup> Fair Work Act, s.203.

benefits, the individual's personal circumstance may be taken into account in assessing whether the employee is better off overall.<sup>17</sup>

### 2.1.3 Effect of an individual flexibility arrangement

If an employee and an employer agree to an individual flexibility arrangement under a flexibility term in a modern award or an enterprise agreement<sup>18</sup>:

- the modern award or agreement has effect in relation to the employee and the employer as if it were varied by the arrangement; and
- the arrangement is taken to be a term of the modern award or agreement.

To avoid doubt, the individual flexibility arrangement:

- does not change the effect the modern award or agreement has in relation to the employer and any other employee; and
- does not have any effect other than as a term of the modern award or agreement.

#### Extent of individual flexibility arrangements

2. To what extent have IFAs been agreed to? What types of employers and employees are agreeing to IFAs? What factors are influencing this?
3. Are IFAs being asked for, but not agreed upon, or agreed upon after some variation? If so, what are the reasons for this?
4. Who is initiating IFAs? What have been the reasons given for doing so?

## 2.2 Lodgement of individual flexibility arrangements

There is no legislative requirement that IFAs be lodged with Fair Work Australia or any other agency. It is the employer's responsibility to ensure that the IFA is made correctly, and meets all of the requirements of the Fair Work Act.

## 3 Model individual flexibility terms in awards and agreements

The modern award model flexibility clause, as determined by the Australian Industrial Relations Commission, provides for the following conditions of employment to be varied through an IFA:

- arrangements for when work is performed;
- overtime rates;
- penalty rates;

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<sup>17</sup> Fair Work Bill 2008, Explanatory Memorandum, pp 137 - 138.

<sup>18</sup> Fair Work Act s. 144 and s. 202.

- allowances; and
- leave loading.

The model clause is at Appendix 1.

The *Fair Work Regulations 2009* provide a model flexibility term for enterprise agreements that provides for the variation of the same conditions (see Appendix 2).<sup>19</sup>

## 4 Types of individual flexibility arrangements

The *Manufacturing and Associated Industries and Occupations Award 2010* and the *General Retail Industry Award 2010* are used here as examples of modern awards to illustrate some of the types of individual flexibility arrangements that can be made.

### 4.1 Arrangements for when work is performed

Arrangements for when work is performed are found in Clause 36 of the *Manufacturing and Associated Industries and Occupations Award 2010*.

#### 36.2 Ordinary hours of work—day workers

(a) Subject to clause 36.5, the ordinary hours of work for day workers are an average of 38 per week but not exceeding 152 hours in 28 days.

(b) The ordinary hours of work may be worked on any day or all of the days of the week, Monday to Friday. The days on which ordinary hours are worked may include Saturday and Sunday subject to agreement between the employer and the majority of employees concerned. Agreement in this respect may also be reached between the employer and an individual employee.

(c) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 6.00am and 6.00pm. The spread of hours (6.00am to 6.00pm) may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned, or, in appropriate circumstances, between the employer and an individual employee.

...

An IFA can vary one or more of these provisions, for example, the employee and employer may choose to include Saturday or Sunday as ordinary hours of work.

### 4.2 Overtime rates

Overtime is frequently defined in awards as time worked in excess of, or outside of, 'ordinary hours' (e.g. 38 hours per week for full-time employees). It may however be defined differently in particular instruments.

Overtime provisions appear together under clause 40 of the *Manufacturing and Associated Industries and Occupations Award 2010*.

#### 40.1 Payment for working overtime:

<sup>19</sup> Fair Work Regulations, reg 2.08, Schedule 2.2; see Appendix 1 for the complete Model Flexibility Term.

(a) Except as provided for in clauses 10.1(d), 40.1(e), 40.8 and 40.9, for all work done outside ordinary hours on any day or shift, as defined in clauses 36.2, 36.3 and 36.4, the overtime rate is time and a half for the first three hours and double time thereafter until the completion of the overtime work. For a continuous shiftworker the rate for working overtime is double time.

(b) For the purpose of clause 40—Overtime, ordinary hours means the hours worked in an enterprise, fixed in accordance with clause 36—Ordinary hours of work and rostering.

...

(d) An employee may elect, with consent of the employer, to take time off instead of payments at a time or times agreed with the employer provided that:

(i) Overtime taken as time off during ordinary hours must be taken at the ordinary time rate, that is an hour or each hours worked....

An IFA can vary this provision, for example, by the employee taking time off instead of receiving payment for each additional hour or hours worked.

### **4.3 Penalty rates**

Penalty rates are higher rates of pay above an employee's base rate of pay that are payable for work that is performed outside of 'ordinary working hours'. Penalty rates may be payable for work performed early in the morning, late at night, on weekends or public holidays.

Some provisions for penalty rates in the *General Retail Industry Award 2010* are:

#### **29.4 Penalty payments**

##### **(a) Evening work Monday to Friday**

A penalty payment of an additional 25% will apply for ordinary hours worked after 6.00pm. This does not apply to casuals.

##### **(b) Saturday work**

A penalty payment of an additional 25% will apply for ordinary hours worked on a Saturday. This does not apply to casuals.

##### **(c) Sunday work**

A penalty payment of an additional 100% loading will apply for all hours worked on a Sunday. This penalty payment also applies to casual employees instead of the casual loading in clause 13.2.

##### **(d) Public holidays**

Work on a public holiday must be compensated by either:

(i) payment at the rate of an additional 150%;

(ii) an equivalent day or equivalent time off instead without loss of pay;

Or

(iii) an additional day or equivalent time as annual leave.

An IFA can vary this provision, for example, by the employee taking additional time off instead of receiving extra payment at the 25 per cent of standard rate that is payable on Saturday.

#### 4.4 Allowances

Allowances are additional payments made to an employee for doing certain tasks, working in certain locations, using a special skill, or for expenses incurred in performing his or her job. Examples of allowances include:

- tool allowances (lump sum payment to purchase tools required to perform tasks);and
- industry allowances (available to all employees in an industry to compensate for the nature of the work performed).

Allowances appear under clause 20 of the *General Retail Industry Award 2010*:

#### **20. Allowances**

##### **20.1 Meal allowance**

(a) An employee required to work more than one hour of overtime after the employee's ordinary time of ending work, without being given 24 hours' notice, will be either provided with a meal or paid a meal allowance of \$15.71. Where such overtime work exceeds four hours a further meal allowance of \$14.22 will be paid.

(b) No meal allowance will be payable where an employee could reasonably return home for a meal within the period allowed ...

An IFA can vary one or more of the allowance provisions, for example, employees could be reimbursed after expenses have been incurred rather than being paid an allowance in advance.

#### 4.5 Leave loading

Leave loading is a proportion of an employee's basic rate of pay that is payable to an employee while the employee is on leave. The historical premise is that when an employee is on leave they do not have the opportunity to work overtime or hours that attract penalty rates. The employee is entitled to receive a loading in addition to the basic rate of pay for the hours that they are on leave.

Leave loading provisions appear under Clause 41.5 in the *Manufacturing and Associated Industries and Occupations Award 2010*.

#### **41.5 Annual leave loading**

(a) During a period of annual leave an employee must also be paid a loading calculated on the wages prescribed in clause 41.4.

(b) The loading must be as follows:

##### **(i) Day work**

An employee who would have worked on day work only had they not been on leave must be paid a loading equal to 17.5% of the wages prescribed in clause 41.4 or the relevant weekend penalty rates, whichever is the greater but not both.

**(ii) Shiftwork**

An employee who would have worked on shiftwork had they not been on leave must be paid a loading equal to 17.5% of the wages prescribed in clause 41.4 or the shift loading including relevant weekend penalty rates, whichever is the greater but not both.

An IFA could vary this provision. For example, the 17.5 per cent of the appropriate rate that is payable when the employee is on annual leave could be rolled into their weekly or fortnightly wages over twelve months instead.

**4.6 Other conditions**

Conditions that may be varied under a modern award or enterprise agreement must be specified in the flexibility term. Flexibility terms may be different depending on the award or agreement. Other conditions that may be included in a flexibility term are:

- the number of days of annual or personal leave available to the employee (consistent with the National Employment Standards);
- the time of year an employee may request or take annual leave or a portion of annual leave. For example, a portion of leave may be required over a Christmas-period shut down;
- the length of time for a trial or probationary period, for example, a shorter period for employees performing specific tasks; or
- the amount of notice provided for a redundancy and/or dismissal; for example, notice may be shortened or lengthened.

**Content of individual flexibility arrangements**

5. What conditions have been varied as part of IFAs? Examples may include: arrangements for when work is performed; overtime rates; penalty rates; allowances; and leave loadings? How are these conditions being varied?
6. Are IFAs establishing new workplace practices or formalising existing practices?
7. Where IFAs have been agreed upon, how are employees better off overall than if no IFA had been agreed to? What processes were used to ensure that this was the case?
8. What have been the outcomes from IFAs? For firms? For employees?

**5 Research on individual flexibility arrangements**

As a result of consultation conducted to date, a research program is currently being undertaken in relation to IFAs, which includes surveys of employers and employees.

The surveys of employers and employees are being conducted using a two-stage survey process. As information on individual flexibility arrangements is difficult to obtain, pilot surveys of employers and employees were conducted to assess the quality and nature of information that can be obtained through survey instruments. These surveys were undertaken between April and June 2011. The main set of surveys is scheduled to be conducted from April to May 2012.

Information on the surveys is available from the General Manager's reporting requirements section of the Fair Work Australia website:

<http://www.fwa.gov.au/index.cfm?pagename=admingmreporting#Researchprogram>

In finalising the report to the Minister Fair Work Australia will draw upon submissions that have been made to the Australian Government's Fair Work Act Review.

## 6 Consolidated list of questions

1. Were you aware that employers and employees are able to make individual flexibility arrangements than can vary, for an individual employer and employee, the conditions of employment as contained in a modern award or enterprise agreement?

### **Extent of individual flexibility arrangements**

2. To what extent have IFAs been agreed to? What types of employers and employees are agreeing to IFAs? What factors are influencing this?
3. Are IFAs being asked for, but not agreed upon, or agreed upon after some variation? If so, what are the reasons for this?
4. Who is initiating IFAs? What have been the reasons given for doing so?

### **Content of individual flexibility arrangements**

5. What conditions have been varied as part of IFAs? Examples may include: arrangements for when work is performed; overtime rates; penalty rates; allowances; and leave loadings? How are these conditions being varied?
6. Are IFAs establishing new workplace practices or formalising existing practices?
7. Where IFAs have been agreed upon, how are employees better off overall than if no IFA had been agreed to? What processes were used to ensure that this was the case?
8. What have been the outcomes from IFAs? For firms? For employees?



## Appendix 1 - Modern award model flexibility clause

[2008] AIRCFB 550

*Workplace Relations Act 1996*  
s.576E - Procedure for carrying out award modernisation process

### **Request from the Minister for Employment and Workplace Relations – 28 March 2008**

#### **The form of the model clause**

[187] We have attempted to develop a model flexibility clause which is simple to understand and easy to apply, provides a reasonable level of protection for employees and gives due weight to the matters listed in s.576A(2). The clause we have decided on is as follows:

*1. [Notwithstanding any other provision of this award]<sup>20</sup> an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:*

*(a) arrangements for when work is performed;*

*(b) overtime rates;*

*(c) penalty rates;*

*(d) allowances; and*

*(e) leave loading.*

*2. The employer and the individual employee must have genuinely made the agreement without coercion or duress.*

*3. The agreement between the employer and the individual employee must:*

*(a) be confined to a variation in the application of one or more of the terms listed in sub-clause 1; and*

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<sup>20</sup> Modification inserted 12 September 2008 [2008] AIRCFB 717 - Statement

*(b) not disadvantage the individual employee in relation to the individual employee's terms and conditions of employment.*

*4. For the purposes of sub-clause 3(b) the agreement will be taken not to disadvantage the individual employee in relation to the individual employee's terms and conditions of employment if:*

*(a) the agreement does not result, on balance, in a reduction in the overall terms and conditions of employment of the individual employee under this award and any applicable agreement made under the Workplace Relations Act 1996 (Cth), as those instruments applied as at the date the agreement commences to operate; and*

*(b) the agreement does not result in a reduction in the terms and conditions of employment of the individual employee under any other relevant laws of the Commonwealth or any relevant laws of a State or Territory.*

*5. The Agreement between the employer and the individual employee must also:*

*(a) be in writing, name the parties to the agreement and be signed by the employer and the individual employee and, if the employee is under 18 years of age, the employee's parent or guardian;*

*(b) state each term of this award that the employer and the individual employee have agreed to vary;*

*(c) detail how the application of each term has been varied by agreement between the employer and the individual employee;*

*(d) detail how the agreement does not disadvantage the individual employee in relation to the individual employee's terms and conditions of employment; and*

*(e) state the date the agreement commences to operate.*

*6. The employer must give the individual employee a copy of the agreement and keep the agreement as a time and wages record.*

*7. The agreement may be terminated:*

*(a) by the employer or the individual employee giving four weeks' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or*

*(b) at any time, by written agreement between the employer and the individual employee.*

*8. The right to make an agreement pursuant to this clause is in addition to, and is not intended to otherwise affect, any provision for an agreement between an employer and an individual employee contained in any other term of this award.*

## Appendix 2 - Enterprise agreement model flexibility term

### FAIR WORK REGULATIONS 2009 - SCHEDULE 2.2

(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.