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## INDIVIDUAL FLEXIBILITY ARRANGEMENTS

### Introduction

The “one size fits all” approach is outdated and increasingly irrelevant as employers and employees look for flexibility and the positive benefits that a more individualised working arrangement can bring.

Flexible work practices lead to greater job satisfaction and assist in attracting and retaining staff in a competitive job market.

One of the ways the *Fair Work Act 2009* (“Act”) addresses the issue of flexibility is by requiring all modern awards and enterprise agreements to include a “flexibility term”.

A flexibility term enables an employer and an employee to agree on an arrangement to vary the effect of the award/enterprise agreement in order to meet the genuine needs of both parties. These agreements are known as Individual Flexibility Arrangements (“IFAs”).

### Legislation

#### *Modern Awards*

Section 144 of the Act provides that all modern awards must include a flexibility term enabling the employer and employee to agree on an IFA. If such an arrangement is made, the IFA will be taken to be a term of the modern award.

Each modern award identifies the terms which may be varied. These are limited to:

- Arrangements for when work is performed such as working hours;
- Overtime rates;
- Penalty rates;
- Allowances, and
- Leave loading.

The Explanatory Memorandum to the *Fair Work Bill 2009* (“Explanatory Memorandum”) gives the following example of an IFA: where an IFA provides for varied working hours to allow parents or guardians to drop off or pick up children from school where this suits the business needs of the employer.

Importantly, an IFA can only be made after the employee has commenced employment – as a result, an employer cannot require a prospective employee to agree to an IFA as a condition of employment.

#### *Enterprise Agreements*

Section 202 of the Act provides for the same requirement in relation to enterprise agreements. As with modern awards, if such an arrangement is made, the IFA will effectively be taken to be a term of the enterprise agreement.

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If an enterprise agreement fails to include a flexibility term, the model flexibility term which is set out in Schedule 2.2 of the *Fair Work Regulations* 2009 will be taken to be a term of the agreement.

The flexibility term must set out the terms of the agreement the effect of which may be varied by an IFA.

IFAs may only be about “permitted matters”, ie:

- matters pertaining to the relationship between the employer and employees or the relationship between the employer and a union covered by the agreement;
- deductions from wages for any purpose authorised by employees;
- the operation of the agreement.

IFAs may not include unlawful terms, for example, they may not be discriminatory, objectionable or provide for unfair dismissal rights before the employee has completed the relevant minimum employment period.

### The Process

Sections 144 and 203 of the Act set out the steps that must be completed to create an IFA. They are as follows:

1. Either employee or employer can approach the other party in order to propose an IFA;
2. The arrangement must identify the term the effect of which is to be varied under the award/enterprise agreement;
3. The employer must ensure that the IFA will result in the employee being better off overall than if no IFA was agreed to;
4. The process for terminating the IFA must be set out (in the case of an IFA under an enterprise agreement, the notice period for one party to terminate an IFA may not be more than 28 days, alternatively at any time by agreement);
5. There must be a genuine agreement between the parties on the IFA;
6. The IFA must be in writing and signed by both parties (and by the employee’s parent/guardian if the employee is under 18);
7. The employer must give a copy of the IFA to the employee (this must occur within 14 days after agreement if made under an enterprise agreement).

The IFA is between the employer and employee and must not be contingent on the approval or consent of another person (subject to the consent by a parent/guardian if the employee is under 18).

An employer is not allowed to exert undue influence or pressure on an employee to agree to or terminate an IFA (section 344 of the Act). Such undue influence or pressure would result in the employer being ordered to pay a penalty of up to \$6,600 for an individual or \$33,000 for a body corporate (Section 539(2) Item 11).

If an employee and employer purport to conclude an IFA that does not comply with the requirements of the Act, sections 145 and 204 provide for the agreement to have effect as if it were an IFA. This is in order to enable the employee to retain any benefit to which they are

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entitled under the IFA. However, an employee can terminate an IFA if they believe they are being disadvantaged and may be able to take action for compensation and penalties.

If the employer fails to ensure that an IFA is properly made, it may be liable to a penalty of up to \$6,600 for an individual or \$33,000 if the employer is a body corporate.

### Better off overall test

It is the employer's responsibility to ensure that the employee is better off overall than if there was no IFA.

Usually this involves comparing financial benefits under the IFA with the financial benefits under the applicable award or enterprise agreement. However, the employee's personal circumstances and any non-financial benefits which are significant to the employee can also be considered.

For example, where an employee seeks a change in hours in order to be able to pick up children from school, the flexibility is viewed as a "non-financial benefit". In this way, the employee can agree to give up a financial benefit (such as penalty rates for working outside the spread of hours) in return for a non-financial benefit (leaving work early).

The Explanatory Memorandum provides, however, that where an employer initiates an agreement that involves an employee giving up a financial benefit in exchange for a non-monetary one, it is less likely that an employee would be considered to be better off overall. This is also the case where the monetary benefit given up "had a substantial value, or if the value of the monetary benefit was, in the view of a reasonable person, disproportionate to the non-monetary benefit for which it was exchanged".

### Decisions by Fair Work Australia

The key case so far on IFAs is *Minister for Employment and Workplace Relations* [2010] FWAFB 3552 (19 May 2010). This matter involved an appeal by Workplace Relations Minister Julia Gillard against the decision by Commissioner Ryan in *Trimas Operations Waterview Close Collective Bargaining Agreement 2009* [2010] FWAA 1485 ("Trimas").

In Trimas, the matter had involved the approval of an enterprise agreement. Both employer and employee representatives agreed that "apart from the issue over the flexibility term the agreement met all of the requirements for approval by FWA".

The issue in Trimas revolved around the wording of the particular flexibility term in the agreement and whether the IFA actually altered the terms of the agreement/award or whether the "effect" of the agreement/award was altered. The relevant term as drafted held that "the terms in clause 12.4 of the Agreement may be varied by an individual flexibility arrangement". The parties also disputed whether the effect of the term had to be set out in the agreement.

Commissioner Ryan concluded that the clause as drafted was not a flexibility term as required by the Act and as a result the model flexibility term was taken to be a term of the agreement. He held that "the Act does not permit individual flexibility arrangements made under a flexibility term in either a modern award or an enterprise agreement to vary the terms of the modern award or enterprise agreement. All that the Act permits and in fact requires is that the effect of the award or enterprise agreement terms may be varied by an individual flexibility arrangement" (our emphasis). He also held that "the requirement of a flexibility term under

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s.202 and 203 is that the flexibility term must identify the terms of the agreement the effect of which may be varied.”

On appeal, the Full Bench held that the Commissioner had erred in his decision. The Full Bench cautioned against treating IFA's as the work of experienced Parliamentary drafters and preferred an approach which takes the purpose of the provision into account. The distinction made in relation to the effect of the award/agreement was held to be “too fine a distinction and one which puts too much weight on the use of the word ‘effect’ ”. On this basis, it was concluded that “the failure of [the IFA] to refer to varying the effect of a term of an enterprise agreement does not alter its character as a flexibility term”.

The decision on appeal has caused relief in relation to the concern that a large number of IFAs already made may have been invalid on the reasoning in Trimas. In addition, employers and individual employees can once again safely attempt to reach agreement on arrangements which suit their needs and document these agreements in an enforceable way without undue focus on technicalities.

### Conclusion

While IFAs can assist employers and employees in coming to mutually beneficial arrangements that suit both parties' needs, this is largely uncharted terrain with risks and potential pitfalls, particularly for employers given their exposure to penalties if they get it wrong.

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#### **The Moores Legal Workplace Relations Team**

For further advice and guidance on any employment issue and how it may impact your business and commercial operations, contact the Workplace Relations team at Moores Legal.

**Tim Adam**  
Principal

**Tel: (03) 9843 2105**  
**Email: [tadam@mooreslegal.com.au](mailto:tadam@mooreslegal.com.au)**

**Peter Andrew**  
Special Counsel

**Tel: (03) 9843 2108**  
**Email: [andrew@mooreslegal.com.au](mailto:andrew@mooreslegal.com.au)**

**Frances Anderson**  
Senior Lawyer

**Tel: (03) 9843 2122**  
**Email: [fanderson@mooreslegal.com.au](mailto:fanderson@mooreslegal.com.au)**

**Leanne Tully**  
Senior Lawyer

**Tel: (03) 9843 2127**  
**Email: [ltully@mooreslegal.com.au](mailto:ltully@mooreslegal.com.au)**

**Emma Hughes**  
Lawyer

**Tel: (03) 9843 0431**  
**Email: [ehughes@mooreslegal.com.au](mailto:ehughes@mooreslegal.com.au)**

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