Individual Flexibility Arrangements
(under the *Fair Work Act 2009*)

The Great Illusion

A Research Paper by AMMA

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EXECUTIVE SUMMARY

The current system of negotiating Individual Flexibility Arrangements (IFAs) under the *Fair Work Act 2009 i*s not delivering genuine workplace flexibility and is in urgent need of review. The Government's promise that compulsory IFAs in awards and enterprise agreements would provide employers with the flexibility to meet their enterprise specific needs is not being met with IFAs falling well short in delivering genuine flexibility for workplaces.

The inclusion of flexibility terms in all enterprise agreements from 1 July 2009 and all modern awards from 1 January 2010 is a well-intended policy initiative by the Rudd Government aimed at fostering individual negotiations between employers and employees for flexible workplace arrangements that suit them both. The requirement that IFAs leave individual workers '*better off overall*' ensures employees do not fall below the collective safety net when entering into the arrangements.

In practice, however, employers face considerable legislative and other impediments to achieving genuine flexibility under the arrangements, including having to negotiate flexibility terms collectively with recalcitrant unions before IFAs can be negotiated individually with employees. Any resulting flexibilities are generally hard-fought and in many cases illusory.

Specific deficiencies in the current system in need of urgent review are the fact that:

- The mandatory flexibility terms in enterprise agreements are not providing genuine workplace flexibility;
- While FWA applies the *better off overall* test to flexibility terms, there is no requirement to ensure that any genuine flexibility will be delivered.
- The legislation fails to stop employees from taking protected strike action while continuing to enjoy the benefits of an IFA, such as increased wages;
- There is no ability for employers to make IFAs a condition of employment, despite statutory protections in place to protect employees and prospective employees against being disadvantaged;
- The ability for an employee to unilaterally terminate an IFA at any time during the life of an enterprise agreement with just 28 days' notice severely detracts ; from its benefits and
- The 'model' FWA, IFA clause, which proliferates in modern awards and enterprise agreements, limits the scope of terms and conditions that can be individually negotiated.

AMMA notes with concern that Fair Work Australia's scheduled review of IFAs and their use in enterprise agreements and awards is set down to commence three years after the IFA provisions took effect, which for enterprise agreements is July 2012 and for modern awards is January 2013. This means it will be at least two years before the current arrangements are exposed to any systematic analysis or scrutiny.

By that time, some resource sector employers will be negotiating their second FWA agreement and will have been operating less than optimally for up to three years. This

is precisely the time at which the Australian economy will be starting to recover and the resources sector will be entering a period of high activity. In the resources sector employees have benefited from being able to implement individual arrangements with their employer; this opportunity will be lost with the approach taken by unions to oppose any real and substantial ability to allow for individual arrangements in enterprise agreements.

AMMA calls on the Federal Government as a matter of urgency to bring forward the review of IFAs so that the deficiencies in the current system can be brought to light and remedied sooner rather than later. The resources sector is now moving into an era of re negotiating its industrial agreements under the provisions of the *Fair Work Act* and there is a distinct possibility that the outcomes will lack the existing flexibilities and produce inferior benefits to both employees and employers.

1. AMMA

1.1 Established in 1918, the Australian Mines & Metals Association (AMMA) is the national employer association for the mining, hydrocarbons and associated processing and service industries. AMMA's members include most major mining and hydrocarbon operators, significant numbers of construction and maintenance companies and service companies to the resources sector including transport and catering.

1.2 AMMA has advocated the use of direct, co-operative and mutually rewarding relationships between employers and employees as the best means of achieving flexible, efficient and productive workplaces with highly engaged workforces.

1.3 The resource sector's reliance on individual statutory agreements such as Australian Workplace Agreements (AWAs) is well known. The sector has utilised individual statutory agreements from the time they were first available in Western Australia in 1993 and federally as AWAs in 1996. The Rudd Government removed the option for employers and employees to have an employment relationship based on an individual statutory agreement in March 2008[1] in the commencement of its move towards its *Forward with Fairness* system.

1.4 Up until that point, it was estimated that 67% of resource sector employers operating in the federal industrial relations system were operating under AWAs, with that figure closer to 80% in metalliferous mining[2].

1.5 The Australian Bureau of Statistics has recently revealed that the mining industry directly employed 163,800 employees as of November 2009[3]. The prospective termination of hundreds of thousands of AWAs in the industry means resource sector employers will again be reliant on awards and collective enterprise agreements for workplace flexibility.

1.6 AMMA does not believe that IFAs as they currently stand are an adequate vehicle for achieving workplace flexibility.

2. What is an IFA?

2.1 The Labor Government's *Forward With Fairness – Policy Implementation Plan* provided the first incite into IFAs under the new system:

> *Under Labor's new collective enterprise bargaining system all collective agreements will be required to contain a flexibility clause which provides that an employer and an individual employee can make a flexibility arrangement.*
>
> *The matters covered and the scope of the flexibility clause will be considered by Fair Work Australia when approving the collective agreement to ensure the clause provides for genuinely agreed individual flexibilities.*

2.2 The Government went on to make mandatory under the *Fair Work Act 2009* (the Act) the requirement to include in all enterprise agreements and awards a flexibility term.

2.3 A flexibility term must enable an employer and employee to make an individual flexibility arrangement (IFA). The required flexibility term purports to allow flexibility arrangements to be negotiated between an individual employee and their employer to vary the effect of specific terms contained in modern awards and enterprise agreements that may not otherwise meet the individual needs of an employee or employer.

2.4 All modern awards operating from January 1, 2010 have to include a flexibility term based to a large extent on the default model flexibility term, which is contained in the Act's Regulations. All enterprise agreements formalised on or after July 1, 2009 also have to include a flexibility clause, being either the default '*model*' flexibility term or an alternative term allowing individual flexibility to be negotiated between an employer and an employee. Once that individual flexibility is negotiated and agreed (according to strict requirements under the Act), it becomes an IFA.

2.5 The Government in the lead-up to its 2007 federal election victory promised employers that IFAs would be an adequate alternative to statutory individual agreements, without the undesirable ability to reduce pay and conditions. In the resources sector, reducing pay and conditions was never a function of AWAs. On the contrary, the sector has used AWAs to recruit and retain the best talent in the labour pool by offering extremely competitive wages and conditions. Genuine flexibility allows employers to continue to offer employers superior benefits to the standard terms and conditions of awards and enterprise agreements.

2.6 Despite this, the union media campaign against AWAs tarred all statutory individual agreements as exploitative. The Government, consistent with its *Forward With Fairness Policy*, abolished the ability to make new AWAs in March 2008.

2.7 In lieu of statutory individual agreements, the government began to promote to employers the ability to make IFAs.

2.8 IFAs were touted as the alternative vehicle by which employers could negotiate flexible workplace arrangements with their employees on an individual basis. Given that a flexibility term had to be included in all modern awards and enterprise agreements, it looked as if the Government was committed to fostering flexibility in all types of workplace arrangements.

2.9 The Deputy Prime Minister in February 2008[4] promised employers that:

> *…a simple, modern award system with opportunities for individual flexibilities will remove the need for any individual*

statutory agreements and the associated complexity and bureaucracy attached to those agreements.

2.10 The DPM was persistent in all her policy announcements that collective bargaining was the best way to achieve productive workplaces. It was this principle on which the Act was said to be based, with its focus on collective bargaining at the enterprise level.

2.11 IFAs were introduced as a concession to employers who were promised they would be able to use them to achieve the individual flexibility they required without undermining the collective safety net.

2.12 As set out in the Act, IFAs in modern awards and enterprise agreements must:

- include 'overall' superior terms and conditions when compared with a reference award or collective agreement;
- be in writing;
- be genuinely agreed and free from any type of duress;
- be able to be terminated by the employer or the employee with 28 day's notice; and
- not be offered to prospective employees as a condition of employment.

3. Why IFAs fall short

3.1 Flexibility around hours of work, rostering and overtime is critical to the productivity of the resource and energy sector. In order to keep pace with fluctuating demand for their products, workplaces need to operate around extremely flexible schedules that maximise production while at the same time rewarding employees for their efforts.

3.2 Despite the superior terms and conditions provided to employees in the resources sector, the experience of most employers who have attempted to negotiate IFAs is that the flexibility term that has to be included in enterprise agreements is hard fought and does not result in much, if any, added workplace flexibility. There are also significant legislative shortfalls of IFAs.

The inability of IFAs to stop employees from taking protected industrial action

3.3 A single day's downtime on a resource sector project has the potential to cost hundreds of thousands of dollars, with protracted industrial action potentially costing millions. With this in mind, one of the most significant shortfalls of IFAs is their inability to prevent employees from taking protected action while continuing to enjoy the benefits of the IFA.

3.4 Where an IFA is made under a modern award or an enterprise agreement that has passed its nominal expiry date, employees can embark on protected strike action while still enjoying the benefits of the IFA such as higher wages.

3.5 This also provides a disincentive for employers to commence bargaining under the Act until an enterprise agreement has passed its nominal expiry date

because once bargaining begins employers are exposed to protected industrial action. Recent enterprise bargaining negotiations in the maritime industry have shown just how costly such action can be, and also highlight the fact there is little recourse to FWA or the government for employers seeking to bring economically damaging industrial action to an end.

3.6 The spectre of protected industrial action during the life of an IFA is particularly unpalatable where employers have negotiated improved terms and conditions on the basis the employee will continue to honour the IFA.

3.7 The *General Protections* provisions under Chapter 3 Part 3-1 of the Act, which replace the *Workplace Relations Act's* freedom of association provisions, mean an employer could not lawfully prevent an employee from exercising the right to strike while enjoying the benefits of an IFA.

3.8 An employer and employee mutually agreeing at the time of signing an IFA that the employee would receive certain benefits in exchange for a commitment not to exercise their right to strike would on the face of it offend the Act's workplace rights provisions.

3.9 Similarly, employers exercising their right to terminate an IFA at 28 days' notice as soon as bargaining begins so as to prevent an employee from being rewarded for taking protected industrial action has potential to be considered adverse action under the Act. An employer is not able to take adverse action against an employee, such as terminating an IFA, as a result of the employee exercising a workplace right in a particular way (i.e. deciding to take protected action or otherwise bargain).

The inability for employers to make IFAs a condition of employment

3.10 Under the *Workplace Relations Act 1996*, individual statutory agreements could be offered as the sole employment instrument to prospective employees.

3.11 The *Fair Work Act 2009* specifically prohibits IFAs being offered as a condition of employment in response to intense pressure from unions (see note at paragraph 1373 in the *Fair Work Act's* Explanatory Memorandum).

3.12 The rationale for the government's decision to prohibit pre-employment IFAs was that it would stop employers from pressuring prospective employees to accept terms and conditions of employment they would otherwise not accept if they already had a job.

3.13 A June 2008 AIRC decision on award modernisation[6] confirmed it was the government's intention not to allow pre-employment IFAs:

> *Had it been intended that an agreement be permitted between an employer and a prospective employee, that could have been made clear … We recognise that this interpretation may limit the flexibility available under the [model flexibility] clause in some circumstances. On the other hand, it is*

> *consistent with the statutory concept of awards as a safety net that the parties should initially be bound by the award provisions, which then form the base from which a flexibility agreement might be made.*

3.14 The inability to offer pre-employment IFAs prevents employers that have reached agreement with existing employees on flexibilities from ensuring any new employees are working under the same flexible terms and conditions. It may also prevent employers from using enhanced benefits under an IFA to attract the best applicants.

3.15 Employers are obliged to offer the employee the choice of engagement under the award or under an IFA. While an IFA can be offered prior to employment, it cannot be a condition of employment. For instance, the employer could outline at the interview what the difference in pay would be between the award or agreement and the IFA. While in practice this would not offend the requirement not to offer an IFA as a condition of employment, it does represent uncertainty for the parties.

3.16 The inclusion of statutory protections under s.144 and s.203 of the Act ensuring that IFAs must leave workers *better off overall* in comparison with an award or enterprise agreement is more than sufficient to satisfy any genuine concerns about the exploitation of prospective employees.

The ability for parties to terminate an IFA with 28 days' notice

3.17 IFAs in awards and enterprise agreements can be terminated with 28 days' notice by either the employer or the employee. This is in contrast with statutory individual agreements under the *Workplace Relations Act 1996* which had to pass their nominal expiry date before either party could unilaterally terminate them. This had the benefit of providing certainty of arrangements for both parties.

3.18 Employers need certainty of flexible work practices in order to plan their operational strategies, and forecast budget expenditures. Employees also need certainty about their conditions of employment, pay and rosters.

3.19 For some employers in limited situations, the Act's provisions allowing IFAs to be terminated at 28 days' notice by either party will not be a major issue, particularly where the arrangements are no longer delivering benefits for the enterprise. In other situations, the effects of an employee unilaterally terminating an IFA will be more serious.

3.20 Problems resulting from unilateral employee termination of IFAs include the potential for a multitude of industrial arrangements to operate at any one time across a single enterprise. Some employees will be working under an IFA and others will have reverted to the modern award or enterprise agreement conditions after having terminated an IFA.

3.21 There is no enforceable end date for IFAs under the Act; they continue operating until a new enterprise agreement is finalised or either party decides to terminate the arrangement. This means resource sector employers could be faced with a plethora of workplace arrangements that need to be updated on a rolling basis as employees opt out of previously agreed arrangements. Given that employee wage rates may have been negotiated and calculated on the basis of an IFA operating, allowing employees to terminate IFAs will require in these circumstances an adjustment of the employee's pay.

3.22 AMMA believes that for IFAs to be a real alternative to individual statutory instruments they must not allow unilateral termination by employees with only 28 days' notice. IFAs must at least operate for a set period not exceeding three years, plus the ability for the parties to re-negotiate the arrangements at the end of that period if they choose. This would give both parties certainty that the arrangements would continue for a minimum period and would see IFAs operate with more certainty than arrangements that can be terminated on a whim.

The limited scope of the 'model' IFA clause

3.23 The Australian Industrial Relations Commission (AIRC), which has now been replaced by FWA, released its Model Flexibility Term in June 2008[7].

3.24 Leading up to its release, the DPM issued a consolidated Award Modernisation Request instructing the AIRC in how it should draft the model clause for inclusion in all modern awards[8]:

> *The Commission will prepare a model flexibility clause to enable an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and the employee. The Commission must ensure that the flexibility clause cannot be used to disadvantage the individual employee. Each modern award will include the model flexibility clause with such adaptation as is required for the modern award in which it is included.*

3.25 The model term has been adopted to a significant extent in all 122 modern awards and, according to the Federal Government, in around 75% of enterprise agreements[9]. Where the model clause is adopted, it only allows an IFA to vary the effect of terms relating to:

- Arrangements about when work is performed;
- Overtime rates;
- Penalty rates;
- Allowances; and
- Leave loading.

3.26 The Model Clause is also the default clause which is inserted into enterprise agreements in cases where no flexibility term is included in the agreement or where the term that is included falls short of the requirements of the Act.

3.27 The Model Clause is, however, only intended as a guide for bargaining parties and does not prevent negotiating broader or lesser flexibility terms for inclusion in enterprise agreements. The only pre-requisite is that the flexibility terms must relate to '*permitted*' matters, which the Act defines as:

- Matters pertaining to the relationship between an employer and its employees who will be covered by the agreement;
- Matters pertaining to the relationship between the employer and the unions that will be covered by the agreement;
- Wage deductions for any purpose authorised by an employee; and
- The way in which the agreement operates.

3.28 In September 2009, FWA clarified there was no restriction on what matters might be the subject of an IFA provided they related to permitted matters and were not unlawful terms[10].

3.29 Commissioner Whelan pointed out that while the Act provided a model flexibility term for the guidance of bargaining representatives, s.203 of the Act did not prescribe what terms of an enterprise agreement had to be subject to an IFA.

3.30 AMMA maintains that the Model Clause does not achieve the same flexible outcomes for resource and energy sector employers that were available under individual statutory agreements. There is a demonstrable need to move beyond the Model Clause.

4. The union campaign against IFAs

4.1 Unions have a natural antipathy towards IFAs no matter how generous their terms and conditions might be for employees. IFAs have the capacity to undermine unions' reason for being - the notion that collective bargaining yields better outcomes for workers than they are able to achieve individually.

4.2 The Australian Council of Trade Unions (ACTU) and the Australian Manufacturing Workers Union (AMWU) have led the campaign against IFAs by urging their members to treat them with suspicion, even going so far as to warn them that employers are seeking to use IFAs to exploit workers. This is despite the statutory protections in place that require workers to be 'better off overall' as a result of entering into an IFA. As can be seen from FWA decisions to date, the test to ensure employees are not disadvantaged in agreement-making is one FWA takes seriously and applies very generously in favour of the employee.

4.3 Notwithstanding the protections in place for employees that require them to be left better off overall, the ACTU website cites IFAs as '*an ongoing concern*

for unions, as it may allow unscrupulous employers to undermine the collective agreement'[11].

4.4 In a similar vein, the AMWU, the key union involved in the first major bargaining round under the *Fair Work Act 2009* in the manufacturing industry, has led the charge in drafting flexibility terms that in fact give very little flexibility to employers and employees.

4.5 It has posted a warning on its website accusing employers of seeking flexibility clauses '*in an attempt to undermine pay and conditions in collective agreements'*[12]. It states while the union supports flexible working arrangements that suit workers and employers, flexibility must be agreed by a majority of workers and '*not forced on individuals'*. This approach from a major resource sector union which acts as the default bargaining agent for its members in enterprise agreement negotiations is a major impediment for employers in securing workable and relevant IFAs for their enterprise agreements.

4.6 The general union stance on IFAs is at odds with a June 2008 AIRC decision on award modernisation that highlighted that the intention of the model flexibility clause was to allow negotiations on an individual basis[13]:

> *It is not intended that the clause should deal with collective agreements such as those with a majority of employees. The use of terms such as 'individual employee' and 'individual needs' and 'the individual employee' leave no room for doubt on the issue. For this reason, the model clause should not provide for agreements between an employer and a majority of employees. Nor should the ability of an employer and an individual employee to make an agreement under the clause be in any way conditional on an agreement with a majority of employees in the area concerned.*

4.7 Nevertheless, unions are approaching IFAs as instruments to be collectively negotiated and vetted despite the AIRC specifically rejecting an ACTU-drafted model flexibility clause that would have required union consent to be obtained before any IFAs could be entered into.

5. Examples of illusory IFA clauses

5.1 The flexibility terms that are being inserted into enterprise agreements are at times an insult to the concept of flexibility and a reasonable person's intelligence. However, they continue to be approved by FWA without challenge.

5.2 An agreement struck between the construction division of the CFMEU Victoria and Bam & Associates[14] and approved by FWA in March 2010 makes it clear that based on the requirements that FWA is required to apply, genuine flexibility is not a required outcome.

5.3 The Agreement has a mandatory flexibility term which outlines the requirements for any flexibility arrangements that are entered into. The Agreement then specifies only one clause that can be subject to a flexibility arrangement. That clause is the *Protective Clothing and Boots* clause which reads:

> *Consistent with current practice, protective clothing and boots will be issued to each employee on a fair wear and tear basis. Employees are required to wear and maintain the company provided clothing and to present in a tidy manner, so as to display a professional company image.*

5.4 The flexibility term in this Agreement clearly provides the employer with no enterprise-specific flexibility and is couched in a manner so that it meets the Act's mandatory approval requirements. To suggest this clause is a viable alternative to an individual statutory agreement would be a fiction.

5.5 Unfortunately, examples of token IFAs in enterprise agreements are now the norm and neither the government nor FWA are showing any concern. The *Coates Hire Operations Pty Limited National Agreement 2009*[15], an Agreement negotiated with the AMWU and CEPU, contained two separate flexibility clauses applying in different circumstances. FWA approved the Agreement in November 2009.

5.6 The first flexibility term applied generally to all employees covered by the Agreement and allowed flexibility around one clause of the Agreement:

> *The terms that may be subject to an individual flexibility arrangement are a 15-minute tea break, paid at the rate prevailing at the time, which will be granted two hours after the start of an employee's ordinary hours.*

5.7 The second flexibility term applied only to specific projects and more closely resembled the model clause.

5.8 Another flexibility clause contained in the *Emerald Reo Greenfields Enterprise Agreement 2009-12*[16] approved by FWA in August 2009 simply stated:

> *The IFA may only vary terms of the agreement relating to flexible working arrangements to assist with an employee's family responsibilities.*

5.9 The *Parmalat Rowville AMWU/ETU Enterprise Agreement 2009-12*[17] was approved in October 2009. That Agreement stated that the only term in the Agreement that an IFA was allowed to vary was one that said:

> *The employer will on an annual basis allow each employee to take up to 10 days' annual leave in single day absences.*

5.10 The clause also required the employer to provide copies of all flexibility arrangements entered into to the union upon request.

5.11 Another enterprise agreement[18] between Campbell's Soup and the AMWU was approved by FWA in December 2009 following a very public stoush between the parties over the flexibility clauses in particular. Two flexibility clauses eventually made their way into the Agreement. The first was an '*individual' flexibility* clause, the second a '*majority'* flexibility clause.

5.12 The individual clause stated that the only Agreement terms the IFA could vary were those in the *Food Preservers Award* incorporated into the Agreement. These were confined to the maximum number of single days or part of a single day's annual leave an employee could take in any calendar year.

5.13 The Agreement's majority flexibility clause was much broader, although majority support was needed to arrive at any sort of agreement. Similar to the model clause, it allowed terms to be varied including arrangements about when work is performed; overtime rates; penalty rates and allowances. A majority of employees in each department had to agree to any changes the employer proposed. The AMWU was also required to be fully consulted in developing and considering any modifications and had the right to consult with members over any proposals.

5.14 Examples abound of union-drafted flexibility clauses that pay little more than lip service to workplace flexibility but which FWA is required to approve in accordance with the legislation.

5.15 Unions have a historical aversion to individual flexibility clauses that allow employers and individual employees to benefit outside collective agreements and awards. IFAs in particular have the potential to undermine union collective bargaining and weaken a union's relevance to its members. In AMMA's experience, non-union member employees often seek flexibility outside what the union will allow, but flexibility clauses are drafted in such a way that this is difficult to achieve.

5.16 An urgent review of the usefulness of the mandatory flexibility clauses and how they are furthering the government's stated aims of workplace productivity and flexibility is warranted.

6. Confusing and contradictory decisions from FWA

6.1 Resource sector employers are already negotiating flexibility arrangements with union bargaining representatives with some caution. Given that employers generally only negotiate their industrial arrangements every three to five years, bargaining under the new Act is uncertain. This is particularly so for many resource sector employers who have not had to negotiate with unions for many years, having instead preferred to negotiate mutually beneficial outcomes directly with their employees.

6.2 Employer uncertainty is not aided by confusing and sometimes contradictory decisions from FWA.

6.3 An April 2010 Full Bench decision,[19] while not directly concerned with flexibility clauses, cast serious doubt over the ability of employers to vary overtime payments in exchange for employees working their preferred hours.

6.4 The decision upheld earlier Commissioner findings that preferred hours clauses in two separate enterprise agreements would have failed the no-disadvantage test and could not be included in an enterprise agreement (the no-disadvantage test was the test FWA applied at the time because the Agreement was made between 1 July and 31 December 2009. From January 1, 2010 and the commencement of modern awards, the applicable test is the 'better off overall test' (BOOT)).

6.5 FWA rejected the validity of the preferred hours clauses in the Agreements covering aged care provider Bupa Care Services and retail outlet Michel's Patisserie.

6.6 The clause in the proposed Bupa Agreement said, in part:

> *Where an employee requests to work additional hours on an available shift at any of the employer's facilities covered by this agreement, the employee will be paid at their ordinary hourly rate of pay (plus any applicable shift penalties). In such circumstances, overtime payments will not be payable.*

6.7 The original Commissioner in January 2010 found that, despite being endorsed by the two unions involved, it would not be approved while it contained this clause. While the Agreement overall was superior to the underpinning reference instruments, the clause which removed overtime in exchange for preferred hours was a cost-saving to the employer rather than an objective benefit to employees. This was despite the clause being premised on the fact that the employee must initiate the request for the preferred hours and could revert back to the Agreement's general terms on notice being given.

6.8 A similar clause in the *Michel's Patisserie Agreement* said, in part:

> *If you elect to work your nominated preferred hours then you will be paid at the basic hourly rate of pay … even if you may have otherwise received an additional amount for working those hours.*

6.9 The Full Bench on appeal held that the inclusion of the above clause meant the Agreement would fail the no-disadvantage test (and presumably, going forward, the BOOT). While the decision does not specifically rule on the validity of preferred hours clauses in IFAs, the Act applies the same test to flexibility arrangements and it would be a contradiction to allow the same offending clause in a flexibility term.

6.10 The emerging jurisprudence from FWA appears to be that an IFA cannot be used to vary overtime rates, contrary to the model flexibility clause specifically giving parties the ability to vary the effect of arrangements about when work is performed and overtime rates.

6.11 The Full Bench decision also seems to contradict examples given in the Act's *Explanatory Memorandum* about how IFA clauses were intended to operate[20].

6.12 Clause 144 of the *Explanatory Memorandum* states how flexibility terms can enable an IFA to meet the genuine needs of an employer and individual employee:

> *For example, an individual flexibility arrangement might provide for varied working hours to allow parents or guardians to drop off or pick up children from school where this suited the business needs of the employer.*

6.13 It cites an example that illustrates how the government expects IFAs might be used:

> *In his spare time, Josh coaches an under-12s footy team. To do this, he needs to be able to leave work at 4pm on Tuesdays and Thursdays each week. He wants to start work at 7.30am on these days, but usually this would attract a penalty under the terms of the agreement. The agreement allows the employer and an employee to make an individual flexibility arrangement that varies the terms of the agreement dealing with hours of work and penalty rates.*
>
> *Josh approaches his employer and asks whether the employer will make an IFA with him under which the employer agrees that Josh can work from 7.30am to 4pm on Tuesdays and Thursdays. Josh agrees that he will not be paid a penalty on these days, even though he starts work at 7.30am. Josh is genuinely happy to agree to this arrangement because it enables him to balance his work and personal commitments. The employer agrees to this arrangement … It is intended that, in appropriate circumstances, such an arrangement would pass the better off overall test. Because the better off overall test is being applied here to an individual arrangement, it is possible to take into account an employee's personal circumstances in assessing whether the employee is better off overall.*

6.14 Despite this explicit example in the *Explanatory Memorandum* which was drawn to FWA's attention in the Full Bench preferred hours appeal case, it seems the promise of increased flexibility, even at the employee's request and with unions' sanction, will be rejected once agreements go before FWA for approval.

7. Conclusions and the need for urgent review

7.1 As we approach the first anniversary of the introduction of the *Fair Work Act's* agreement making provisions, it is clear that flexibility terms in modern awards and enterprise agreements are not delivering the genuine flexibility that employers were promised.

7.2 Many flexibility terms currently being inserted into enterprise agreements and being approved by FWA are simply providing lip service to facilitate the agreement approval process.

7.3 As a matter of urgency, FWA's scheduled review of IFAs and how they are operating in awards and enterprise agreements, currently set down to commence on July 1, 2012 at the earliest, must be bought forward.

7.4 Specific issues to be addressed by such a review should include canvassing the need for legislative reform by:

- Removing the ability for protected industrial action to be taken during the life of an IFA where the IFA is made under a modern award or an enterprise agreement that has passed its nominal expiry date;
- Introducing the ability for employers and employees to negotiate pre-start IFAs prior to employment commencing;
- Removing the ability for employees to unilaterally terminate IFAs on 28 day's notice, with consideration given to a maximum three-year end-date for IFAs;
- Broadening the terms of the model flexibility clause to open up the possibilities for greater flexibility in the bulk of awards and enterprise agreements; and
- Introducing an obligation on FWA and the parties to enterprise agreements to ensure flexibility terms are in fact delivering genuine flexibility and productivity benefits and are not depriving employees of the benefits of these arrangements.

7.5 If the Government is serious about its stated aims of increasing enterprise flexibility and productivity, it should act immediately to address this serious deficiency in the current workplace relations system.

Footnotes

1 Workplace Relations Amendment (Transition to Forward with Fairness) Act.

2 *The case for ongoing flexibility in employment arrangement options in the Australian resources sector*, AMMA Paper, March 2004.

3 Australian Bureau of Statistics, *Forms of Employment,* Australia, November 2009. Category 6359.0.

4 Second Reading Speech, Workplace Relations Amendment (Transition to Forward with Fairness) Bill, the Hon Julia Gillard MP, February 2008.

5 Australian Bureau of Statistics, *Forms of Employment,* Australia, November 2009. Category 6359.0.

6 AIRC Full Bench decision on award modernisation [2008], AIRCFB 550. 20 June 2008.

7 AIRC Full Bench decision on award modernisation [2008], AIRCFB 550. 20 June 2008.

8 Consolidated Award Modernisation Request, the Hon Julia Gillard MP, May 2009.

9 Media Release, Individual Flexibility Arrangements, the Hon Julia Gillard MP, September 17, 2009.

10 AMWU v HJ Heinz Company Australia Ltd (Echuca Site) [2009]. FWA 322. 22 September 2009.

11 New protections and minimum standards for all Australian workers from 1 January 2010, ACTU Fact Sheet, January 2010.

12 Flexibility push by employers is about undermining collective agreements, September 22, 2009, AMWU website.

13 AIRC Full Bench decision on award modernisation [2008], AIRCFB 550. 20 June 2008.

14 Bam & Associates Pty Ltd as trustee for Bam Trading Trust and CFMEU Agreement 2009-2012. FWAA 2530.

15 Coates Hire Operations Pty Ltd t/as Coates Hire [2009]. FWAA 1366.

16 Emerald Reo Greenfields Enterprise Agreement 2009-2012 [2009]. FWA 135.

17 Parmalat Australia Limited [2009]. FWAA 664.

18 Campbell Australasia Pty Ltd t/as Campbell Soups Australia [2009]. FWAA. 1598.

19 Bupa Care Services Pty Ltd. P & A Securities Pty Ltd as trustee for the D'Agostino Family Trust t/as Michel's Patisserie Murwillumbah and others. FWAFB 2762. April 15, 2010.

20 Fair Work Act Explanatory Memorandum.