FAIR WORK COMMISSION

DECISION

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Item 6, Sch. 5—Modern awards review

Modern Awards Review 2012—Award Flexibility

(AM2012/8, AM2012/51, AM2012/172, AM2012/177, AM2012/178, AM2012/179, AM2012/180, AM2012/199, AM2012/204, AM2012/210, AM2012/228, AM2012/240, AM2012/245, AM2012/250, AM2012/287)

JUSTICE ROSS, PRESIDENT
SENIOR DEPUTY PRESIDENT WATSON
COMMISSIONER GREGORY

MELBOURNE, 15 APRIL 2013

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 - Transitional Review - award flexibility - model flexibility term varied - better off overall assessment is at the time the IFA is made - IFAs can only be entered into after employee has commenced employment - notice of termination extended from 4 weeks to 13 weeks - penalty rates and public holiday decisions distinguished on the basis that s.145 was not part of the legislative framework during the award modernisation process.

CONTENTS

ABBREVIATIONS

2012 AWALI Report	Work-Life balance in South Australia
2012 IFA Report	*General Manager's report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements: 2009-2012*
AAA	Accommodation Association of Australia
ABI	Australian Business Industrial
ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AFEI	Australian Federation of Employers & Industries
Ai Group	Australian Industry Group
AIRC	Australian Industrial Relations Commission
AMWU	Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union
BOOT	Better off overall test
Bupa decision	*Re Bupa Care Services Pty Ltd* [2010] FWAFB 2762
Business SA	South Australian Employers' Chamber of Commerce and Industry t/as Business SA
CFMEU	Construction, Forestry, Mining and Energy Union
Commission	Fair Work Commission
DEEWR	Department of Education, Employment and Workplace Relations
FW Act	*Fair Work Act 2009* (Cth)
FWA	Fair Work Australia
FWO	Fair Work Ombudsman
GFC	global financial crisis
HBIA	Hair and Beauty Industry Association
HIA	Housing Industry Association
IFA	individual flexibility arrangements
June 2008 Full Bench decision	Award modernisation decision [2008] AIRCFB 550
June 2012 Full Bench decision	Modern Awards Review 2012 - Preliminary Issues decision [2012] FWAFB 5600

Master Builders	Master Builders Australia
Master Plumbers	Master Plumbers and Mechanical Contractors Association of New South Wales
NAPSA	Notional agreement preserving State awards
NDT	no disadvantage test
NES	National Employment Standards
NRA	National Retailers Association
OECD	Organisation for Economic Co-operation and Development
On-site award	*Building and Construction General On-site Award 2010*
Panel	Fair Work Act Review Panel
Plumbing Award	*Plumbing and Fire Sprinklers Award 2010*
Qld Audit Report	*Qld - Pharmacy Industry Audit Program Report*
Restaurant Award	*Restaurant Industry Award 2010*
Review Report	*Towards more productive and equitable workplaces*
SDA	Shop, Distributive and Allied Employees Association
Transitional Provisions Act	*Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009
Transitional Review	Modern Awards Review 2012
VECCI	The Victorian Employers' Chamber of Commerce and Industry
WR Act	*Workplace Relations Act 1996* (Cth)

1. INTRODUCTION AND BACKGROUND

[1] This decision deals with 15 applications to vary the standard award flexibility provision in 10 modern awards. A list of the applications and relevant awards is set out at Attachment 1. The applications are made in the context of the review of all modern awards required by the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Provisions Act). We refer to that review as the Transitional Review.

[2] We propose to deal first with two contextual matters - the legislative context and the award modernisation process. We will then turn to deal with the broader issue of workplace flexibility and other matters which are relevant to the determination of the applications before us.

1.1 The legislative context

[3] The legislative context for the Transitional Review was comprehensively dealt with in a Full Bench decision of 29 June 2012 (the June 2012 Full Bench decision).[1] We adopt that decision and have applied it to the matters before us. For present purposes we only propose to deal with the legislative context in summary terms.

[4] The principal legislative provision in respect of the Transitional Review is Item 6 of Schedule 5 to the Transitional Provisions Act:

> **"6 Review of all modern awards (other than modern enterprise awards and State reference public sector modern awards) after first 2 years**
>
> (1) As soon as practicable after the second anniversary of the FW (safety net provisions) commencement day, FWC must conduct a review of all modern awards, other than modern enterprise awards and State reference public sector modern awards.
>
> Note: The review required by this item is in addition to the annual wage reviews and 4 yearly reviews of modern awards that FWC is required to conduct under the FW Act.
>
> (2) In the review, FWC must consider whether the modern awards:
>
> (a) achieve the modern awards objective; and
>
> (b) are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.
>
> (2A) The review must be such that each modern award is reviewed in its own right. However, this does not prevent FWC from reviewing 2 or more modern awards at the same time.
>
> (3) FWC may make a determination varying any of the modern awards in any way that FWC considers appropriate to remedy any issues identified in the review.
>
> Note: Any variation of a modern award must comply with the requirements of the FW Act relating to the content of modern awards (see Subdivision A of Division 3 of Part 2-3 of the FW Act).
>
> (4) The modern awards objective applies to FWC making a variation under this item, and the minimum wages objective also applies if the variation relates to modern award minimum wages.
>
> (5) FWC may advise persons or bodies about the review in any way FWC considers appropriate.

> (6) Section 625 of the FW Act (which deals with delegation by the President of functions and powers of FWC) has effect as if subsection (2) of that section included a reference to FWC's powers under subitem (5)."

[5] Subitem 6(1) provides that the Fair Work Commission (the Commission) must conduct a review of all modern awards[2] as soon as practicable after 1 January 2012[3]. It is important to note that the Transitional Review contemplated in Item 6 is quite separate from, and narrower in scope than, the 4 yearly reviews of modern awards provided for in s.156 of the *Fair Work Act 2009* (Cth) (the FW Act). The scope of the Transitional Review was a matter of contention in the June 2012 Full Bench proceeding.

[6] The June 2012 Full Bench decision construed Item 6 according to its terms, having regard to the legislative purpose and context. Part of that context was the award modernisation process conducted by the former Australian Industrial Relations Commission (AIRC) under Part 10A of the *Workplace Relations Act 1996* (Cth) (the WR Act). We deal with the award modernisation process in Part 1.2 of this decision. As to the scope of the Transitional Review the June 2012 Full Bench concluded as follows:

> "[91] It is important to recognise that we are dealing with a system in transition. Item 6 of Schedule 5 forms part of transitional legislation which is intended to facilitate the movement from the WR Act to the FW Act. The Review is a "one off" process required by the transitional provisions and is being conducted a relatively short time after the completion of the award modernisation process. The transitional arrangements in modern awards continue to operate until 1 July 2014. The fact that the transition to modern awards is still occurring militates against the adoption of broad changes to modern awards as part of the Review. Such changes are more appropriately dealt with in the 4 year review, after the transition process has completed. In this context it is particularly relevant to note that s.134(1)(g) of the modern awards objective requires the Tribunal to take into account:
>
> > "the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia" . . .
>
> [99] To summarise, we reject the proposition that the Review involves a fresh assessment of modern awards unencumbered by previous Tribunal authority. It seems to us that the Review is intended to be narrower in scope than the 4 yearly reviews provided in s.156 of the FW Act. In the context of this Review the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome. Having said that we do not propose to adopt a "high threshold" for the making of variation determinations in the Review, as proposed by the Australian Government and others.
>
> [100] The adoption of expressions such as a "high threshold" or "a heavy onus" do not assist to illuminate the Review process. In the Review we must review each modern award in its own right and give consideration to the matters set out in subitem 6(2). In considering those matters we will deal with the submissions and evidence on their merits, subject to the constraints identified in paragraph [99] above."

[7] Under subitem 6(3) of Schedule 5 the Commission has a broad discretion to vary any of the modern awards in any way it considers necessary to remedy any issues identified in the Transitional Review. However, subitem 6(4) provides that in making such a variation the Commission must take into account the modern awards objective in s.134 of the FW Act, and, if varying modern award minimum wages, the minimum wages objective in s.284.

[8] The modern awards objective is set out in s.134 of the FW Act:

> **"134 The modern awards objective**
>
> What is the modern awards objective?
>
> (1) FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (e) the principle of equal remuneration for work of equal or comparable value; and
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
>
> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
>
> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.
>
> This is the modern awards objective."

[9] Any variation of a modern award arising from the Transitional Review must also comply with the provisions of the FW Act which deal with the content of modern awards (see ss.136–155 of the FW Act). To the extent that any application seeks to alter the coverage of a modern award, then the requirements set out in ss.162–164 within Division 6 of Part 2-3 of the FW Act are relevant. Similarly Division 3 of Part 2-1 will be relevant if an application seeks to alter the relationship between a modern award and the National Employment Standards (NES). Section 138 of the FW Act, dealing with the content of modern awards, is also relevant and a factor to be considered in any variation to a modern award arising from the Transitional Review.

[10] In considering the legislative context we note that one of the authorities referred to in the proceedings purports to summarise the views expressed in the June 2012 Transitional Review decision. In *AMWU v Australian Business Industrial*[4] a Full Bench expressed the approach to the Transitional Review in these terms:

> "Where an evidentiary case has been presented, direct submissions have been made and the tribunal has made a determination about the relevant award provisions on the basis of that material, cogent reasons will need to be advanced for departing from the award provision."[5]

[11] In our view, this statement does not accurately reflect the approach adopted by the June 2012 Full Bench decision. The relevant passage from the June 2012 Full Bench decision states that in the context of the Transitional Review:

> "the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome."[6] [emphasis added]

[12] The approach posited by the June 2012 Full Bench decision is not qualified by reference to those instances 'where an evidentiary case has been presented'. The reason for such an omission is that evidentiary cases were rarely presented in the Part 10A award modernisation process. To adopt such a precondition to the requirement to establish cogent reasons for a particular variation materially changes the intent of the June 2012 Full Bench decision.

[13] We now turn to the award modernisation process that resulted in the inclusion of the standard award flexibility provision in all modern awards.

1.2 The award modernisation process

[14] The award modernisation process took place in the period from April 2008 to December 2009 and was conducted in accordance with a written request (the award modernisation request) made by the Minister for Employment and Workplace Relations to the President of the AIRC.[7] The process was completed in four stages, each stage focussing on different industries and occupations.

[15] The award modernisation process was governed by Part 10A of the WR Act. Section 576C of Part 10A required award modernisation to be conducted in accordance with an award modernisation request. The process involved the AIRC inviting submissions, conducting consultations with interested parties, publishing exposure drafts, accepting further written or oral submissions and then publishing a modern award. By the end of 2009 the AIRC had reviewed more than 1500 federal awards and notional agreements preserving State awards (NAPSAs) and created 122 industry and occupation based modern awards.

[16] The AIRC was required to prepare a model flexibility clause as part of the award modernisation process. The objectives of the clause were set out in the Ministerial request of 28 March 2008 and subsequently varied on 18 December 2008 and 2 May 2009. An extract from the consolidated version of the Ministerial Request is set out at Attachment 2.

[17] In a statement issued by the President of the AIRC on 29 April 2008[8] the award flexibility model clause was identified as a priority task. The statement included two draft model award flexibility clauses, one proposed by the Australian Council of Trade Unions (ACTU) and the other a joint proposal by the Australian Chamber of Commerce and Industry (ACCI) and Ai Group. At paragraph [25] of the 29 April 2008 Statement the President said:

> "The drafts attached to this statement provide a starting point for consultation. Nothing will be finalized until the consultation has been concluded and the Commission has had an opportunity to consider all of the matters that have been raised. The Full Bench should decide on the priority list, the model flexibility clause and the timetable by 20 June 2008."

[18] On 20 June 2008[9] a Full Bench decision of the AIRC dealt with the matters identified as priority tasks, including the determination of the model flexibility clause. The detailed reasons in support of the draft model clause are set out at paragraphs [155] - [192] of that decision. In the course of its reasons the Full Bench identified the differing views on a number of the features of the proposed clause. The aspects of the Full Bench decision which go to the scope of the clause and a number of ancillary matters are particularly relevant in the

context of the applications before us. As to the scope of the proposed model clause the Full Bench said:

> "[166] The next issue concerns the clauses of the award in relation to which agreements might be made under the model clause. The ACTU suggested that we should not specify the types of clauses to which the model clause could apply, leaving that matter for consideration in relation to each model award. We do not think this is a sustainable approach. If it were accepted it would leave open for debate at some future time matters which we are able to decide now and thereby unnecessarily prolong the making of modern awards. Parties are entitled to whatever certainty about the operation of the model provision we can give at this point.
>
> [167] Section 576J(1) provides that a modern award may include terms about a number of matters, as follows:
>
> *"**576J Matters that may be dealt with by modern awards***
>
> *General*
>
> *(1) A modern award may include terms about any of the following matters:*
>
> *(a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:*
>
> *(i) skill-based classifications and career structures; and*
>
> *(ii) incentive-based payments, piece rates and bonuses;*
>
> *Note: **Employee with a disability** and **junior employee** are defined in subsection (3).*
>
> *(b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;*
>
> *(c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;*
>
> *(d) overtime rates;*
>
> *(e) penalty rates, including for any of the following:*
>
> *(i) employees working unsocial, irregular or unpredictable hours;*
>
> *(ii) employees working on weekends or public holidays;*
>
> *(iii) shift workers;*
>
> *(f) annualised wage or salary arrangements that:*
>
> *(i) have regard to the patterns of work in an occupation, industry or enterprise; and*
>
> *(ii) provide an alternative to the separate payment of wages, or salaries, and other monetary entitlements; and*
>
> *(iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;*
>
> *(g) allowances, including for any of the following:*
>
> *(i) expenses incurred in the course of employment;*
>
> *(ii) responsibilities or skills that are not taken into account in rates of pay;*

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

(h) leave, leave loadings and arrangements for taking leave;

(i) superannuation;

(j) procedures for consultation, representation and dispute settlement."

[168] Dealing first with s.576J(1)(a), minimum wages, we note that there is another award matter which deals with flexibility in relation to wages. Pursuant to s.576J(1)(f) awards may include terms about annual wage and salary arrangements, including alternatives to the separate payment of wages or salaries and other monetary entitlements. Award terms made under that paragraph must include appropriate safeguards to ensure that individual employees are not disadvantaged. In light of the fact that separate provision is made for flexibility in relation to the way in which wages, salaries and other monetary entitlements may be paid it is unnecessary to include terms about minimum wages in the model clause. Indeed it may be inappropriate to do so. It is difficult to see how the trading-off of minimum wages against other benefits could meet a genuine need for individual flexibility without at the same time weakening the function of the award as a safety net in an unacceptable way. There does not appear to be any sound basis for including award terms about minimum wages within the operation of the model clause. It follows also that award terms made under s.576J(1)(f), which is itself a flexibility provision, should not be included in the operation of the model flexibility clause either. We should emphasize that by excluding minimum wages from the model clause we obviously do not intend to limit arrangements which increase wages. Our concern is to guard against minimum wages being traded off.

[169] In relation to s.576J(1)(b), type of employment, award terms made under that section may include *"the facilitation of flexible working arrangements, particularly for employees with family responsibilities."* Modern award terms about such matters will by definition provide for flexibility in the manner prescribed. For this reason there is no need to include award terms dealing with type of employment in the model clause.

[170] Award terms dealing with arrangements for when work is performed (paragraph (c)), overtime rates (paragraph (d)), penalty rates (paragraph (e)) and allowances (paragraph (g)) should all be brought within the operation of the model clause.

[171] Award terms of the kind described in s.576J(1)(h) require closer consideration. Generally speaking leave matters, although not leave loading, are dealt with in the NES. The interaction between the NES and modern awards is dealt with in cll. 28 to 46 of the Minister's request. At this stage we would not be prepared to include any of the matters to be dealt with by the NES in the model flexibility clause. There are several reasons.

[172] The first point is that it is not clear what scope there will be for variation in the operation of the NES at the modern award level. Until the NES have been dealt with in the modern award concerned there will necessarily be uncertainty in relation to a number of aspects of their operation. It would not be prudent to make any provision for variation of NES terms at this stage. But there are other cogent reasons for caution. Clause 30 of the request provides that a modern award cannot exclude the NES or any provision of the NES. Clause 31 provides that a modern award may include industry specific detail about matters in the NES. Clause 32 provides that a modern award may supplement the NES in some circumstances. Clause 33 provides that particular types of provisions are able to be included in modern awards even though they might otherwise be inconsistent with the NES. It would seem to follow from these provisions that to the extent that modern awards will include terms about the NES those terms would deal directly with any flexibility issue in relation to the relevant NES entitlement.

> [173] Returning to the terms of s.576J(1)(h), and with those considerations in mind, the only matter dealt with in that section which is appropriate for inclusion in the operation of the model clause at this stage is leave loading.
>
> [174] The remaining award matters are superannuation (paragraph (i)) and procedures for consultation, representation and dispute settlement (paragraph (j)). There is a significant degree of uncertainty about the operation of any modern award clause dealing with superannuation and its relationship with relevant legislation. This is not an area in which the scope for flexibility is immediately apparent in any event. Modern award terms dealing with consultation, etc will require to be simple and flexible since they will necessarily have application in a wide range of circumstances. To include such terms in the operation of the model clause would be likely to add complexity and unnecessary regulation rather than increase flexibility. We do not regard either of these matters as appropriate for inclusion in the scope of the model clause.
>
> [175] In summary, the award terms which might be included within the scope of the model flexibility clause are:
>
> - arrangements for when work is performed;
> - overtime rates;
> - penalty rates;
> - allowances; and
> - leave loading.
>
> [176] Before leaving the matters to be included in the model clause there is another question to be considered – whether limits should be put on the flexibility available in relation to the particular award terms we have specified. That approach has some attraction in that it would provide some additional protections for employees. The difficulty with the proposal is that the limitations might not be appropriate in all circumstances and their adoption might lead to unfairness to employers and employees in some cases. Bearing in mind that the clause will have the potential to apply in a very broad range of cases it would be undesirable to place limits on what the parties might agree as appropriate to their needs. On balance we think that additional restrictions would be too prescriptive and the other protections the clause will contain should be adequate."[10]

[19] Three things may be said about the Full Bench's decision with respect to the scope of the model flexibility clause.

[20] First, the Full Bench concluded that it was unnecessary and inappropriate to include a term about minimum wages in the model clause as s.576J(f) of the WR Act made separate provision for flexibility in relation to the way in which wages, salaries and monetary entitlements may be paid. We note that s.139 of the FW Act is in the same terms as s.576J of the WR Act (compare s.576J(1)(f) and s.139(1)(f)).

[21] Second, in relation to s.576J(1)(h) - leave, leave loading and arrangements for taking leave, the Full Bench noted that generally speaking leave matters, other than leave loading, are dealt with in the NES. At that stage the Full Bench was not prepared to include any of the matters dealt with in the NES in the model flexibility clause for the reasons stated at paragraph [172] of its decision.

[22] Flexibility in respect of leave and arrangements for taking leave are not before us and are being dealt with by another Full Bench constituted to specifically deal with Transitional Review applications relating to annual leave.

[23] The final observation in relation to the Full Bench's decision with respect to the scope of the model clause is that the Full Bench decided that it was not appropriate to include award terms dealing with superannuation, consultation, representation and dispute settlement within the scope of the model clause. The Full Bench was of the view that the inclusion of such terms in the model clause 'would be likely to add complexity and unnecessary regulation rather than increase flexibility'.

[24] The AIRC Full Bench also dealt with a number of ancillary issues which went to the practical operation of the model clause, including the question of dispute settlement, and the term or duration of flexibility agreements and the provision of guidance to parties to proposed agreements.[11] We refer to some of these aspects of the Full Bench's decision later, in our consideration of the applications before us. For present purposes it is sufficient to note that the Full Bench decided that a flexibility agreement could be terminated at any time by agreement or by one party giving four weeks' notice in writing to the other.

[25] A draft model clause was attached to the Full Bench's decision of 20 June 2008. In a subsequent statement issued on 12 September 2008[12] the AIRC slightly modified the model clause:

> "Award Flexibility
>
> [17] With one exception we have not found it necessary to modify the substance of the model award flexibility clause in any of the drafts. To put the intended operation of the clause beyond doubt we have included the words "Notwithstanding any other provision of this award" at the start of the model clause. The draft award flexibility clause in the exposure draft for the textile, clothing, footwear and associated industries contains some modifications directed to the nature of employment in that industry. They deal with translation and time for consideration of proposed agreements."

[26] The model clause was subsequently modified in December 2008[13] and 3 April 2009[14] to take account of submissions from interested parties, amendments to the Ministers Request and legislative change.

[27] The current model clause is in the following terms:

> **"7. Award flexibility**
>
> **7.1** Notwithstanding any other provision of this award, 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.

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

7.3 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 clause 7.1; and

(b) result in the employee being better off overall than the employee would have been if no individual flexibility agreement had been agreed to.

7.4 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 results in the individual employee being better off overall in relation to the individual employee's terms and conditions of employment; and

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

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

7.6 Except as provided in clause 7.4(a) the agreement must not require the approval or consent of a person other than the employer and the individual employee.

7.7 An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.

7.8 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.

7.9 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."

[28] A clause in these terms is in every modern award, as is required by s.144 of the FW Act.

[29] Before leaving the 2008 AIRC Full Bench decision it is important to note that the Full Bench itself stated that it was desirable to review the model flexibility clause after a reasonable period. At paragraph [192] the Full Bench said:

> "The model clause will not commence to operate before 1 January 2010. It is not possible to be certain about the award and legislative environment in which the clause will operate. While it is anticipated that the award modernisation process will have been completed, the content and scope of the awards is yet to be decided. In addition the details of the workplace relations system which will be operating at that time are also uncertain. While the Government has given indications of its policy on many matters the legislative process has barely begun. For a number of reasons, it is obviously desirable that there be a review of the operation of the model flexibility clause after it has been operating for a reasonable period. This review would provide an opportunity to assess whether the clause has achieved its purpose of providing flexibility to meet the genuine individual needs of employers and employees. An important related issue for consideration would be whether the provision has provided sufficient protection from disadvantage for employees. The experience of employers, employees and unions would be extremely helpful in such a review as would the views of the authority responsible for ensuring the observance of modern awards."[15]

[30] The fact that a review of the model flexibility clause was specifically contemplated by the AIRC at the time it was determined is an important factor in our consideration of the applications before us. It is also relevant to observe that aspects of the current legislative framework were not in operation at the time the 2008 AIRC Full Bench made its decision. Section 145 of the FW Act is particularly relevant in this regard and we return to this point later in our decision.

[31] The sentiments expressed by the AIRC in the extract set out at paragraph [29] above are reflected in the Explanatory Memorandum to the *Fair Work (Transitional Provisions and Consequential Amendments) Bill* 2009:

> "190. The interim review will enable FWA to examine individual flexibility clauses in modern awards to ensure they are being used for the purpose intended and not to alter industry standards on hours and shift patterns."

[32] Before turning to deal with the applications before us we propose to briefly address the broader issue of workplace flexibility and some developments since the AIRC Full Bench decision regarding the model clause. The report titled '*Towards more productive and equitable workplaces - an evaluation of the Fair Work legislation*' (the Review Report) and the '*General Manager's report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements: 2009-2012*' (the 2012 IFA Report) are particularly relevant in this regard.

2. WORKPLACE FLEXIBILITY

2.1 General

[33] The general object of the FW Act is to provide 'a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians'.[16] Balance in this context has a number of dimensions: balance between the interests of business and unions; between work and family responsibilities; and between fairness and flexibility. This balanced framework incorporates, among other things:

- a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions which cannot be undermined by statutory individual employment agreements of any kind (s.3(b) and (c)); and

- flexible working arrangements that assist employees to balance their work and family responsibilities (s.3(d)).

[34] The safety net is provided through the National Employment Standards (the NES), modern awards and national minimum wage orders. Flexible working arrangements are facilitated through provisions within the NES, the model flexibility term in modern awards and enterprise agreements. The type of flexibility afforded can be characterised as 'procedural flexibility', which Stewart defines as the 'adoption of regulatory mechanisms which facilitate change'.[17]

[35] The NES are the minimum standards that apply to national system employees and underpin what can be included in modern awards and enterprise agreements. The NES sets minimum employment standards in relation to the following matters:[18]

(a) maximum weekly hours (ss.62-64)
(b) requests for flexible working arrangements (ss.65-66)
(c) parental leave and related entitlements (ss.67-85)
(d) annual leave (ss.86-94)
(e) personal/carers' leave and compassionate leave (ss.95-107)
(f) community service leave (ss.108-112)
(g) long service leave (ss.113-113A)
(h) public holidays (ss.114-116)
(i) notice of termination and redundancy pay (ss.117-123)
(j) Fair Work Information Statement (ss.124-125)

[36] The NES provides scope for the flexible application of the prescribed minimum standards in a number of ways, such as:

- providing for the averaging of hours over a specified period (ss.63-64);
- capacity for an employee to request an extension of unpaid parental leave (s.76);
- facilitating 'keeping in touch' days while an employee is taking unpaid parental leave (s.79A);
- providing that modern awards and enterprise agreements can include terms providing for the cashing out of annual leave by an employee (subject to the requirements of s.93(2) and s.94(2)-(4)) (ss.93 and 94); and
- making provision for reasonable requests to work on public holidays (s.114(2)-(4)).

[37] Section 65 is also part of the NES and provides that an employee who is a parent, or has the responsibility for the care of a child may request the employer for a change in working arrangements to assist the employee to care for the child if the child:

(a) is under school age; or
(b) is under 18 and has a disability.

[38] There are restrictions on the entitlement to make such requests, relating to the employees' length of service and employment type (s.65(2)).

[39] A report on the Australian work and life index 2012 by Skinner, titled '*Work-Life balance in South Australia*', (the 2012 AWALI Report) assesses the impact of the right to request provisions in s.65 of the FW Act.[19] An overview of the key findings from the 2012 AWALI Report is set out below.[20]

Overview of key findings

From SA AWALI 2012, South Australian workers request flexible work arrangements, and have their requests accepted, at comparable rates to the national average:

- 1 in 5 SA workers made a request for a flexible work arrangement in the last 12 months;
- The majority – nearly 70 per cent – had this request fully accepted.

Those most likely to make a request are:

- Women with children, especially pre-school aged children;
- Workers in part-time jobs, especially women part-timers;
- Workers in sales occupations.

The most common reasons to make a flexibility request are:

- To meet child-care or family responsibilities and commitments;
- To meet study commitments;
- Because of health reasons.

Of those workers who did not make a request, the majority (around 60 per cent) are content with their current work arrangements. Other reasons cited by a minority of respondents were that flexibility is not possible in their job, they had just started their job or that they could not afford a reduction in income.

Access to flexibility is an important support for work-life balance – there is a clear association between having a flexibility request accepted and lower work-life interference.

[40] Modern awards are dealt with in Part 2-3 of Chapter 2 of the FW Act. Section 144(1) provides that each modern award must include a 'flexibility term' enabling an employee and his or her employer to agree on an individual flexibility arrangement (an IFA) varying the effect of the award in relation to the employee and the employer. The stated objective of such arrangements is 'to meet the genuine needs of the employee and employer'.

[41] An IFA has effect in relation to the employee and the employer as if the relevant modern award was varied by the flexibility arrangement. For the purposes of the FW Act the IFA is taken to be a term of the modern award (s.144(2)).

[42] Subsections 144 (4) and (5) deal with the requirements pertaining to flexibility terms:

"Requirements for flexibility terms

(4) The flexibility term must:

(a) identify the terms of the modern award the effect of which may be varied by an individual flexibility arrangement; and

(b) require that the employee and the employer genuinely agree to any individual flexibility arrangement; and

(c) require the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to; and

(d) set out how any flexibility arrangement may be terminated by the employee or the employer; and

(e) require the employer to ensure that any individual flexibility arrangement must be in writing and signed:

(i) in all cases—by the employee and the employer; and

(ii) if the employee is under 18—by a parent or guardian of the employee; and

(f) require the employer to ensure that a copy of any individual flexibility arrangement must be given to the employee.

(5) Except as required by subparagraph (4)(e)(ii), 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 another person."

[43] Section 145 of the FW Act is also relevant and we deal with it later in our decision.

[44] Modern awards and the NES provide a framework of *minimum* terms and conditions of employment. There is no statutory impediment to employers and employees agreeing to increase these minimum entitlements. In other words the workplace relations system does not limit 'upwards flexibility'. As the [2008] AIRC Full Bench observed:

> "It is evident from the scheme of the legislation that award terms prescribing wages and conditions are to operate as minimum entitlement of employees. It follows that there is no statutory restriction on employers and employees agreeing to increase those minimum entitlements and an individual flexibility provision is unnecessary for agreements of that kind. The purpose of a model flexibility provision is to permit a reduction in one or more minimum award entitlements as part of an agreement which meets the genuine individual needs of the employer and the employee without disadvantaging the individual employee. This is the underlying basis on which we have approached the drafting of the model clause."[21]

2.2 The Review Report

[45] On 20 December 2011 the Minister for Workplace Relations, the Hon. Bill Shorten MP, announced the appointment of a three member panel to review the FW Act and the Transitional Provisions Act. The terms of reference asked the Panel to examine and report on the extent to which the legislation is operating as intended, and on areas where the evidence indicated that the operation of the legislation could be improved consistent with the legislative objects.

[46] In June 2012 the Panel provided its report titled the Review Report to the Minister. The Review Report was publicly released on 2 August 2012 and can be accessed through the Department of Education, Employment and workplace Relations website at www.deewr.gov.au/fair-work-act-review.

[47] The Panel established to review the operation of the FW Act considered, among other things, whether the FW Act impedes flexibility in work patterns and the organisation of work. The Panel saw 'considerable scope for increased use of individual flexibility arrangements' and made a number of recommendations to encourage their wider adoption. We deal with that aspect of the Panel's report at section 2.2 of our decision. More broadly, the Panel observed that 'the Australian industrial relations system exhibits a reasonably high degree of flexibility and mobility'.[22] That observation was based on a number of important indicators[23]:

- Both the extended national character of the FWA and the modernisation of awards in its jurisdiction have permitted greater flexibility than was possible in the combination of state and federal systems, and under the older style of awards. The number of awards and related instruments has been reduced from 3175 to 122, and the provisions of awards have been made less prescriptive. A number of submissions to the Panel commented on the improvement in the structure that had come with the replacement of state awards by a much smaller set of national awards, and of detailed and prescriptive awards with less prescriptive awards.
- The transition from arbitration and the legislative frameworks since have evidently been compatible with increasing diversity in work patterns. In August 1992, 21 per cent of employees (excluding owner-managers of incorporated enterprises) were casual according to the ABS definition. By August 2011 the proportion had increased to 24 per cent.[24] Part-time employment has also increased, from 24 per cent of employment in 1992 to 30 per cent in 2012.[25]
- As several studies[26] have pointed out, the Australian labour market adjustment to the global downturn in 2001 and the 2009 GFC took the form of changes in hours worked more than it did changes in employment. This suggests a recent capacity to reach flexible arrangements to cope with what may be temporary downturns in output and demand.
- The Australian labour force is more mobile than the workforces of many comparable economies. OECD research based on survey data for 2007 shows Australian residential mobility over a two-year period was the second highest of the countries examined.[27] With respect to mobility between employers, the ABS measure of labour mobility is invariant to the IR framework.[28]

[48] The Review Report specifically considered the operation of IFAs (see section 5.3.2 of the Review Report) and noted that it had 'given the issue of IFAs extensive consideration and made a series of recommendations on their operation'.[29] The Panel's recommendations in relation to IFAs were intended 'to create a greater opportunity for employers and employees to make individual flexibility arrangements while ensuring adequate and appropriate protection for the employer and the employee'.[30] The specific recommendations are as follows:

Recommendation 9: The Panel recommends that the better off overall test in s. 144(4)(c) and s. 203(4) be amended to expressly permit an individual flexibility arrangement to confer a non-monetary benefit on an

employee in exchange for a monetary benefit, provided that the value of the monetary benefit foregone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate.

Recommendation 10: The Panel recommends that the FW Act be amended to require an employer, upon making an individual flexibility arrangement, to notify the FWO in writing (including by electronic means) of the commencement date of the arrangement, the name of the employee party and the modern award or enterprise agreement under which the arrangement is made.

Recommendation 11: The Panel recommends that the FW Act be amended to provide a defence to an alleged contravention of a flexibility term under s. 145(3) or s. 204(3) where an employer has complied with the notification requirements proposed in Recommendation 10 and believed, on reasonable grounds, that all other statutory requirements (including the better off overall test) had been met.

Recommendation 12: The Panel recommends that s. 144(4)(d) and s. 203(6) be amended to require a flexibility term to require an employer to ensure that an individual flexibility arrangement provides for termination by either the employee or the employer giving written notice of 90 days, or a lesser period agreed between the employer and employee, thereby increasing the maximum notice period from 28 days to 90 days.

[49] Each of these recommendations proposes that the FW Act be amended, in specified ways. The amendment of the FW Act is, of course, a matter for the Parliament. We note however that recommendation 12 is capable of implementation without legislative amendment.

[50] Recommendation 12 proposes that s.144(4)(d) be amended to ensure that an IFA may be terminated by either the employee or the employer giving 90 days written notice. It will be recalled that s.144(4)(d) provides that the flexibility term in modern awards must 'set out how any flexibility arrangement may be terminated by the employee and the employer'. On a plain reading of s.144(4)(d) it provides that a flexibility term in a modern award must include a provision which sets out *how* any IFA 'may be terminated by the employee and the employer'. Importantly, s.144(4)(d) does not specify *by what method* an IFA may be terminated, that issue being a matter for the discretion of the Commission. In this regard the requirements for flexibility terms in modern awards are quite different to those which apply to flexibility terms in enterprise agreements.

[51] The FW Act provides that a flexibility term must be included in enterprise agreements approved by the Commission (see s.202(1)). Section 203 sets out the requirements to be met by such terms. Relevantly, s.203(6) provides that the flexibility term must require the employer to ensure that any IFA agreed to under the term must be able to be terminated:

> "(a) by either the employee, or the employer, giving written notice of not more than 28 days; or
>
> (b) by the employee and the employer at any time if they agree, in writing, to the termination."

[52] If an enterprise agreement does not include a flexibility term the 'model flexibility term' in Schedule 2.2 to the *Fair Work Regulations 2009* is taken to be a term of the agreement.[31] Clause 5 of the model flexibility term deals with the termination of an IFA and is in essentially the same terms as s.203(6).

[53] It seems to us that the differences between ss.144(4)(d) and 203 are telling. If the legislature had intended to mandate the duration of a termination period in relation to IFAs made pursuant to a flexibility term in a modern award then it would have chosen language of the type used in s.203(6). It chose not to do so. The clear inference is that the notice required to effect the termination of an IFA made under a flexibility term in a modern award is to be determined by the Commission.[32] The merits of such a provision is a separate matter and we return to that issue later.

2.3 The 2012 IFA Report

[54] Section 653(1)(b) of the FW Act requires the General Manager to conduct research into the extent to which IFAs under modern awards and enterprise agreements are being agreed to and the content of those arrangements. This research is to be conducted in relation to the first three years after the commencement of the FW Act and in each subsequent three year period (see s.653(1A)). The first report under these provisions, in relation to the period 1 January 2010 to 30 June 2012, was tabled in Parliament on 13 February 2013, the 2012 IFA Report, and a copy can be accessed through the FWC website at www.fwc.gov.au/documents/IFA.

[55] In order to provide information on the extent to which IFAs were made and the content of those arrangements, a survey of employers and a survey of employees was undertaken between March and June 2012.

[56] The sample survey of 2650 national system employers was stratified according to the Australian Bureau of Statistics' definition of employer size (based on the number of employees) and industry. A survey of some 4500 employees from a range of industries and locations was also conducted. Information about the stratification and sampling methods used, and the limitations of the research is set out in section 3 of the 2012 IFA Report.

[57] Employer awareness of IFAs varied across different employer sizes.[33] About 54 per cent of all employers were 'aware that employers can have an IFA with an employee that varies the effect of the modern award or an enterprise agreement that applies to an employee'. Awareness of IFAs was lowest among smaller employers, i.e. those employing fewer than 15 employees (50 per cent) and highest amongst large employers (84 per cent). 'Large employers' were defined as those which employ 200 or more employees.

[58] About 35 per cent of employees were aware that employees who have their employment conditions set by a modern award or an enterprise agreement can agree to an IFA with their employer. Awareness was higher among full-time employees (38 per cent) than amongst part-time employees (30 per cent). There were also differences in awareness by gender, age and whether or not the employee was from an English speaking background.[34]

[59] Around eight per cent of employers reported making at least one IFA and the likelihood of having made an IFA increased with employer size. Almost 27 per cent of large

employers reported at least one IFA compared with around 12 per cent of medium sized employers and about 7 per cent of small employers. Employers indicated that IFAs had more commonly been made to vary modern awards as opposed to enterprise agreements.

[60] Section 4.2.3 of the 2012 IFA Report provides information about employers who did not make IFAs. Some 45 per cent of employers were aware of IFAs but had chosen not to make them. These employers were asked the reasons why they had chosen not to make IFAs. The results are set in Table 4.2 of the 2012 IFA Report, which is reproduced below.[35]

Table 4.2: Reasons for not making IFAs, per cent of employers aware of but who had not made IFAs

	Per cent	CI
Have not thought about it	1.9	[1.0,3.6]
No identifiable need for IFAs	51.0	[46.4,55.7]
Don't understand IFAs	1.8	[0.9,3.6]
Concern about possible penalties or risks associated with IFAs	0.7	[0.2,2.2]
Use individual agreements (such as ITEAS, AWAs or common law contracts) instead	12.7	[10.1,15.9]
Use unwritten or verbal agreements with staff to vary conditions of employment	14.7	[11.6,18.5]
Employee(s) have not requested IFAs	32.6	[28.3,37.2]
Could not agree with employee(s) about content of IFA	0.2	[0.1,0.9]
IFAs do not allow sufficient flexibility	0.9	[0.4,2.0]
IFAs are not reliable (i.e., they can be cancelled with four weeks' notice)	0.5	[0.1,1.8]
Other	1.9	[1.0,3.3]
Don't know/can't say	3.7	[2.4,5.7]

Note: Estimates are derived from the weighted sample. Figures in square brackets represent 95 per cent confidence intervals. Employers aware of, but had not made, IFAs could provide multiple reasons for not making IFAs.

[61] The most common reason, reported by just over half of employers (51 per cent), was that there had been no identifiable need for an IFA. Around one-third of employers indicated that they had not made an IFA because they had not received a request. Employers also indicated that they did not make IFAs because they varied conditions of employment with employees through other less formal arrangements (15 per cent) or by using formal individual agreements (13 per cent). Less than one per cent of employers indicated that they did not make IFAs because they could not agree with their employees about them; or that they were concerned about penalties or risks associated with IFAs; or that IFAs could be unilaterally terminated upon four weeks' notice.

[62] Employers party to only one IFA reported varying lengths of IFA operation.[36] About 31 per cent of IFAs had been in operation for six to less than 12 months and a further 27 per cent for one to less than six months. Around seven per cent of IFAs had been in operation for more than two years. When compared with single IFA employers, multiple IFA employers reported that IFAs had typically been in operation for a longer period. While around 19 per cent reported IFAs in operation for six to 12 months, about 40 per cent reported IFAs in operation for more than two years.[37]

[63] For single IFA employers, most reviews, modifications and terminations of enterprise agreement IFAs were employer-initiated (94 per cent), with only six per cent being employee-initiated. For modern award IFAs the results were more evenly split: 50 per cent of reviews, modifications and terminations were employer-initiated and 47 per cent were employee-initiated, with an additional two per cent initiated by both parties.[38]

[64] Multiple IFA employers reported that most reviews, modifications and terminations of IFAs were employer-initiated (around 70 per cent). Around 21 per cent were reportedly initiated by an employee or employee representative and around eight per cent by both employer and employee.[39] These results are not disaggregated so the proportion of modern award IFAs that were terminated at the initiative of multiple IFA employers is unknown.

[65] The survey data also provides some insight into the content of matters dealt with by IFAs. The employee survey data reveal that the modern award terms most frequently varied related to arrangements for when work is performed (identified by 59 per cent of employees with an IFA), as shown by Table 5.11 of the 2012 IFA Report.

Table 5.11: Matters varied by IFAs, per cent of employees with an IFA

	Per cent
Arrangements for when work is performed	58.5
Penalty rates	17.9
Overtime rates	15.4
Allowances	12.2
Leave loading	13.0
Other variations	45.5

Note: Employees could provide multiple responses.

[66] A relatively large proportion of IFAs related to 'other' terms (45 per cent). Table 5.12 in the 2012 IFA Report provides an overview of some of the other terms and conditions of employment that IFAs were reported to vary. An increase in the base rate of pay was the most common variation identified (representing 11 per cent of all other variations) followed by an increase in flexibility in the hours worked (nine per cent). Around 20 per cent of these variations could not be categorised into these groups.

[67] The employer survey data showed a similar pattern. The table below is derived from Tables 5.2 and 5.3 from the 2012 IFA Report.

Matters varied by Modern Awards IFAs

Element modified	Single IFA Employers %	Multiple IFA Employers %
Arrangements for when work is performed	55.8	36.8
Overtime	27.0	44.2
Penalty rates	12.4	23.6
Allowances	17.6	28.9

Leave loading	7.9	17.5
Other variations	30.6	33.6

[68] The employers surveyed also identified a range of benefits to employees resulting from agreeing to an IFA[40]. The most common benefits identified by single IFA employers were more flexible working hours (37 per cent) and increased take-home pay (33 per cent). Around a quarter of single IFA employers identified more consistent take-home pay, increased job security and improved work-life balance as benefits.

[69] Multiple IFA employers most commonly suggested that the benefits to the employee were more flexible working hours (40 per cent) and increased take-home pay (41 per cent). More flexible working hours was a benefit identified by 30 per cent of employers with enterprise agreement IFAs and 50 per cent of employers with modern award IFAs. Increased take-home pay was reported by 29 per cent and 43 per cent of employers with enterprise agreement IFAs and modern award IFAs respectively. A greater proportion of employers with enterprise agreement IFAs indicated that 'other parenting or family reasons' had been a benefit to the employee than employers with modern award IFAs (41 per cent compared with 13 per cent).[41]

[70] Employers also identified benefits to the business/organisation arising from their IFA(s).[42] For single IFA employers, the benefits most commonly indicated were the creation of benefits and incentives to attract or retain staff (34 per cent) and clarity about conditions for both the employer and employee (30 per cent). Around nine per cent suggested there was no benefit to the employer.

[71] For multiple IFA employers, the benefits most commonly identified were formalising existing arrangements (43 per cent); clarity about conditions (36 per cent); staff being able to work more or less hours as needed by the employer (34 per cent); and increased flexibility with rostering (34 per cent).

[72] Multiple IFA employers with modern award IFAs were more likely to have cited that formalising existing arrangements was a benefit to the employer (43 per cent) compared with employers with enterprise agreement IFAs (16 per cent). Some 60 per cent of multiple IFA employers with enterprise agreement IFAs identified that the creation of benefits and incentives to attract or retain staff was a benefit to the employer, while this was reported by 28 per cent of employers with modern award IFAs.[43]

[73] We also note that there is some evidence that IFAs are being used in a manner which is inconsistent with the model flexibility term and the requirements of the FW Act.

[74] In the employer survey conducted as part of the 2012 IFA Report employers were asked whether the employee was required to sign IFA documentation in order to continue or commence employment. A majority of single IFA employers (69 per cent) with modern award IFAs required the employee to sign the IFA documentation to either commence or continue their employment.[44] Just over half of multiple IFA employees (54 per cent) required all employees to sign IFA documentation to either commence or continue their employment.[45] On its face such conduct is inconsistent with the requirement in clause 7.2 of the model flexibility term that the employer and individual employee must have 'genuinely agreed' to

make the IFA, without coercion or duress. The making of an IFA prior to the commencement of employment is inconsistent with the June 2008 AIRC Full Bench decision in which it was decided that an IFA was to be made available only *after* the commencement of employment:

> "We next consider whether the model clause ought permit an agreement to be made prior to the commencement of employment. The terms of cl.10 suggest that an agreement ought be available only after employment has commenced. Had it been intended that an agreement be permitted between an employer and a prospective employee that could have been made clear. By way of contrast to the language of cl.10, s.326(5) specifically provides that an interim transitional employment agreement may be made prior to the commencement of employment. The absence of such direct language in cl.10 is telling. We recognise that this interpretation may limit the flexibility available under the 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."[46]

[75] The intention of the AIRC Full Bench is reflected in the reference to 'employee' in the model flexibility clause, rather than 'prospective employee'.

[76] Section 341(3) of the FW Act is also relevant in this context, it states:

> "(3) A prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.
>
> Note: Among other things, the effect of this subsection would be to prevent a prospective employer making an offer of employment conditional on entering an individual flexibility arrangement."

[77] The Review Report also gave consideration to this issue and concluded as follows:

> "The Panel is not persuaded that it is appropriate or desirable for the employer and employee to enter an IFA at the time of the engagement of the employee. This is important. An essential underpinning of our recommendations is that the arrangement is genuinely agreed to by the employee. At the point of engagement, it is extremely unlikely that the employee will genuinely agree by engaging in an assessment of the potential worth of benefits foregone with the benefits gained. At this point, a potential employee may feel he or she has no real choice other than to accept employment on the terms offered. These circumstances would not involve genuine agreement of the type we consider must be associated with IFAs. For the sake of clarity, the Panel considers that ss.144 and 203 should be amended to include the prohibition currently under s.341(3) preventing a prospective employer making an offer of employment conditional on entering into an IFA."[47]

[78] There is also at least one reported instance of a penalty being imposed on an employer for using coercion and duress to compel an employee to agree to an IFA. *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd*[48] was such a case. In that matter, Logan J observed at [36]:

> "It is axiomatic and each party acknowledges that employees should not be subject to duress, coercion, undue influence or pressure in the workplace. Parliament has expressly so provided in the Fair Work Act. The manifest intention of that legislation is that individual flexibility arrangements should be negotiated openly and freely at arms length between employer and employee without outside interference and without either party being deceived or misled. There is no suggestion, on the facts of this case, of any misleading or deceptive conduct. There

> is, though, as is acknowledged, evidence of other types of conduct to which I have made reference."

[79] The final observation in relation to the practical implementation of the model flexibility term relates to the '*Qld - Pharmacy Industry Audit Program Report*' (the Qld Audit Report). In that report the Fair Work Ombudsman (FWO) raises some concerns about the use of IFAs in the retail pharmacy sector in Queensland. The Qld Audit Report was the result of a program conducted by the FWO to assess the level of compliance in the sector with rates of pay, minimum hours of engagement, meal break entitlements, time and wages record keeping and pay slip obligations. FWO Inspectors assessed the records of 575 employers operating pharmacies throughout Queensland. Of the 575 audits completed, 320 employers (56 per cent) were found to be compliant and 255 employers (44 per cent) to be in contravention. One of the findings made in the Qld Audit Report related to the use of IFAs in the sector:

> "During the audit program inspectors noted some employers utilising Individual Flexibility Arrangements (IFAs) . . .
>
> Fair Work Inspectors involved in the program reported the use of what appeared to be a 'standardised' or template-driven IFA being used by a small number of employers. A 'template approach' raises the question as to whether the IFA was produced following genuine negotiations."[49]

[80] A copy of the Qld Audit Report can accessed through the FWO website: http://www.fairwork.gov.au/campaignresults/QLD/Qld-Pharmacy-Industry-Campaign-Final-Report.pdf

3. CONSIDERATION OF THE APPLICATIONS

[81] As we have mentioned, this decision deals with 15 applications to vary the standard award flexibility provision in 10 modern awards.

[82] A set of draft directions in relation to these matters was published on the Commission's website on 21 January 2013. A Directions Hearing was held on 31 January 2013 to provide interested parties the opportunity to comment on the draft directions. Final directions were issued by the Full Bench on 4 February 2013 and posted to the Commission's website. Applicants and interested parties were directed to file comprehensive written submissions, relevant documentary material and comprehensive witness statements for any witness evidence in support of their position on any application within the timeframe set out in the directions.

[83] Two background documents prepared by the Commission's staff were placed on the website for the information and assistance of interested parties, the first was a summary of the applications and supporting submissions received, and the second was a history of the model award flexibility clause. We do not propose to repeat that material but note that we have had regard to all of the submissions. An annotated model flexibility clause setting out the variations proposed is set out at Attachment 3 to this decision.

[84] Oral submissions were heard by the Full Bench on 27 March 2013.

[85] The applications can be broadly categorised as going to the scope and operation of the model flexibility term. We propose to deal first with the applications going to the scope of the model flexibility term.

3.1 Scope

[86] As we have noted, s.144(4) of the FW Act provides that the flexibility term must identify the terms of the modern award the effect of which can be varied by an individual flexibility arrangement. Subclause 7.1 of the model flexibility term provides that the employer and employee may agree to vary the application of award terms concerning:

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

[87] A number of applications seek to vary the scope of the model flexibility term.

[88] Some applications seek the deletion of clause 7.1 in its entirety and the insertion of a provision which would allow IFAs in respect of each and every term of a modern award.[50] For example the VANA and Hair and Beauty Australia both propose the deletion of clause 7.1 in its entirety and its replacement by a new clause 7.1 in the following terms:

> "**7.1** Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of any term of this award to meet the genuine individual needs of the employer and the individual employee."

[89] The Housing Industry Association (HIA) seeks to add a new paragraph (h) to subclause 7.1 as follows:

> "(h) any other matter within the award"

[90] Other applications seek more limited variations to the scope of the model flexibility term. For instance in relation to clause 7.1(a), 'arrangements for when work is performed', the Baking Industry Association of Queensland - Union of Employers, the National Retailers Association (NRA) and the Hair and Beauty Industry Australia (HBIA) seek to include the words *"including the minimum duration of shifts."*[51] In its application, the Australian Retailers Association[52] seeks to reword 7.1(a) as follows: "*arrangements for when work is performed, including minimum shift engagements*". In its subsequent submission dated 25 February 2013, the NRA appears to have changed its proposed rewording of 7.1(a) to: "*arrangements for when work is performed (including minimum shift engagement)*".

[91] The Victorian Employers' Chamber of Commerce and Industry (VECCI) seeks the insertion of two new award terms which may be varied by an IFA, namely minimum shift lengths and 'preferred hours' arrangements.[53]

[92] The HIA seeks to vary clause 7.1 to provide that award terms dealing with frequency of payment may be varied by an IFA.

[93] It is convenient to deal first with those applications which seek to vary the scope clause of the model flexibility term such that an IFA may vary the application of any term of a modern award.

[94] We note that no evidence was advanced in support of such a variation and little was put by way of merit argument. Those organisations that supported such a variation were unable to identify any particular issues which have arisen from the current scope of the model term save in respect of frequency of payment and minimum engagement periods.[54] We deal later with those particular issues. The most common complaint about the scope clause of the model term was the ambiguity and uncertainty said to arise from the use of the expression 'arrangements for when work is performed' in subclause 7.1(a).

[95] The written submission by Australian Business Industrial (ABI) makes this point at paragraph 4.5:

> "The current wording of the flexibility clause in modern awards is making access to flexible arrangements desired by employees more difficult and uncertain. Many members report spending more time on their human resources achieving compliance and dealing with higher levels of uncertainty (uncertainty about entitlements, uncertainty about processes and uncertainty about outcomes) than in the past for no benefit to the business. ABI supports the applications seeking clarity on the scope of what award terms can be varied in IFAs as it will assist in meeting the Modern Award Objective."[55]

[96] In its submission Australian Federation of Employers and Industries (AFEI) says:

> "AFEI agrees with the submissions that the term 'arrangements for when work is performed' is ambiguous. Consequently, the award flexibility provisions in modern awards are not operating effectively and have failed to achieve the modern award objectives."[56]

[97] To similar effect Business SA submitted:

> "It would be beneficial to users of an Award if further guidance is provided on what constitutes 'arrangements for when work is performed' as this will ensure that mistakes are eliminated and breaches to the Award are avoided. The broad terms in relation to a user's interpretation of arrangements for when work is performed leaves room for error, is inflexible and is inconsistent with the Modern Award objective."[57]

[98] Mr Barkatsas, on behalf of VECCI, submitted:

> ". . . in a nutshell we submit that as the clause stands at the moment does not so identify with any amount of certainty what can be subject to an IFA . . . We submit that that ambiguity is something that ought to be clarified within this review . . ."[58]

[99] We are not persuaded to vary the scope of the model flexibility term such that an IFA may vary the application of any term of a modern award.

[100] Division 3 of Part 2-3 of Chapter 2 of the FW Act deals with the terms of modern awards. Sections 143-149 deals with certain terms that must be included in each modern award:

- coverage terms (ss.143, 143A, 143B);

- flexibility terms (ss.144-145);
- terms about settling disputes (s.146);
- ordinary hours of work (s.147);
- base and full rates of pay for pieceworkers (s.148); and
- automatic variation of allowances (s.149).

[101] No case has been advanced as to why these particular award terms should be able to be varied by an IFA.

[102] Section 139 of the FW Act sets out the terms that may be included in a modern award:

> **139 Terms that may be included in modern awards—general**
>
> (1) A modern award may include terms about any of the following matters:
>
> (a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:
>
> (i) skill-based classifications and career structures; and
>
> (ii) incentive-based payments, piece rates and bonuses;
>
> (b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;
>
> (c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;
>
> (d) overtime rates;
>
> (e) penalty rates, including for any of the following:
>
> (i) employees working unsocial, irregular or unpredictable hours;
>
> (ii) employees working on weekends or public holidays;
>
> (iii) shift workers;
>
> (f) annualised wage arrangements that:
>
> (i) have regard to the patterns of work in an occupation, industry or enterprise; and
>
> (ii) provide an alternative to the separate payment of wages and other monetary entitlements; and
>
> (iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;
>
> (g) allowances, including for any of the following:
>
> (i) expenses incurred in the course of employment;
>
> (ii) responsibilities or skills that are not taken into account in rates of pay;
>
> (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;
>
> (h) leave, leave loadings and arrangements for taking leave;
>
> (i) superannuation;

(j) procedures for consultation, representation and dispute settlement.

(2) Any allowance included in a modern award must be separately and clearly identified in the award.

[103] The June 2008 AIRC Full Bench gave careful consideration to the terms of s.576J and decided to limit the scope of the model flexibility term to those matters specified in clause 7.1. In doing so, the 2008 AIRC Full Bench specifically addressed award terms dealing with minimum wages by reference to s.576J(1)(a) and concluded that there was no sound basis for including such terms within the operation of the model clause. The AIRC Full Bench expressed the view that it was unnecessary to include such terms having regard to the separate provision that was made for flexibility in relation to the way in which wages, salaries and other monetary entitlements may be paid (referring to s.576J(1)(f) of the WR Act) and, further, it was 'inappropriate' to include minimum wages terms within the model clause because:

> "It is difficult to see how the trading-off of minimum wages against other benefits could meet a genuine need for individual flexibility without at the same time weakening the function of the award as a safety net in an unacceptable way."[59]

[104] In our view, these observations remain apposite and we note that s.139(1)(f) of the FW Act is in the same terms as s.576(1)(f) of the WR Act.

[105] The 2008 AIRC Full Bench also concluded that the inclusion of award terms dealing with superannuation, consultation, representation and dispute settlement within the scope of the model clause would be likely to add complexity and unnecessary regulation rather than increase flexibility. No cogent reasons have been advanced for departing from this aspect of the 2008 AIRC Full Bench decision and we do not propose to do so.

[106] We also note that the *Fair Work Amendment Act 2012* (Cth) inserted a number of provisions in the FW Act dealing with the inclusion of a default superannuation fund term in modern awards and requiring the Commission to conduct 4 yearly reviews of such terms. The variations to modern awards flowing from these new legislative provisions should be dealt with before consideration is given to including award terms dealing with superannuation within the scope of the model flexibility term.

[107] The instances of inappropriate use of IFAs referred to earlier provide a further reason for declining to expand the scope of the flexibility term to cover any term of a modern award.

[108] While we are not persuaded to vary the scope of the model flexibility term in the manner sought we acknowledge that subclause 7.1 has given rise to some ambiguity and uncertainty, particularly in relation to the scope of the expression 'arrangements for when work is performed'. It is appropriate that this ambiguity and uncertainty be addressed.

[109] As to how this matter may be addressed a number of parties agreed with the proposition that one way of providing clarification would be to identify the specific provisions within each modern award that fall within the expression 'arrangements for when work is performed' in clause 7.1.[60] As we noted earlier (see paragraphs [65]-[67] above) the award terms most frequently varied by an IFA related to arrangements for when work is performed.

[110] The starting point in resolving the existing uncertainty is to ascertain the intention of the 2008 AIRC Full Bench when it determined the scope of the model clause. In deciding that award terms dealing with arrangements for when work is performed would be within the scope of the model clause the AIRC Full Bench made reference to paragraph 576J(1)(c) of the WR Act.[61] A provision in the same terms is now in s.139(1)(c) of the FW Act and it provides:

> "(1) A modern award may include terms about any of the following matters:
>
> . . . (c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours."

[111] It is tolerably clear that the AIRC Full Bench intended that the reference to 'arrangements for when work is performed' would include the matters specifically identified in s.576J(1)(c), of the WR Act (now s.139(1)(c) of the FW Act), that is 'hours of work, rostering, notice periods, rest breaks and variations to working hours'.

[112] VECCI, and others, contended that minimum engagement provisions in modern awards fall under the head of power in s.139(1)(c) and accordingly fall within the expression 'arrangements for when work is performed' and hence within the scope of the model flexibility term. Indeed, VECCI submitted that s.139(1)(c) was the only head of power which supported the inclusion of a minimum engagement term in a modern award and hence it must follow that such a term is within the scope of the model flexibility term.

[113] We do not accept VECCI's analysis, for two reasons.

[114] First, contrary to VECCI's submission, s.139(1)(c) is not the only source of power for minimum engagement periods in modern awards. Properly understood such provisions deal with minimum wages (s.139(1)(a)) or are incidental (within the meaning of s.142) to casual employment (s.139(1)(b)). This characterisation is apparent from a consideration of the minimum engagement term in the *Clerks—Private Sector Award 2010*, which is the award VECCI is seeking to vary. The relevant clause is clause 12.4 and appears under the heading, Casual Employment:

> "12.4 Casual employees are entitled to a minimum payment of three hours' work at the appropriate rate." [emphasis added]

[115] This provision is clearly dealing with minimum wages for casual employees, it is not dealing with arrangements for when work is performed.

[116] The second reason for rejecting VECCI's contention flows from a plain reading of the expression 'arrangements for when work is performed' [emphasis added]. A minimum engagement term says nothing about 'when work is performed', it simply prescribes the minimum payment to be made to casual employees for each engagement.

[117] Having rejected the contention that minimum engagement terms fall within the meaning of the expression 'arrangements for when work is performed', the task remains to provide greater clarity as to the award terms that do fall within that expression. In our view, this is best done on an award by award basis, on application by an interested party. In the event such an application is made we will publish draft variations which will identify the specific clauses in the relevant modern award which fall within the purview of the expression 'arrangements for when work is performed'.

[118] We also note that the application by the Master Plumbers and Mechanical Contractors Association of NSW (the Master Plumbers) sought to identify specific award clauses in the *Plumbing and Fire Sprinklers Award 2010* in relation to overtime rates, penalty rates and allowances. On the material before us we are not persuaded that such a variation is necessary. We have had regard to the survey advanced in support of the Master Plumbers' application but we are not persuaded that it establishes that there is any ambiguity in relation to these matters. The relevant survey question asked: 'Are you in favour of inserting a new clause to clarify and potentially expand the scope of making Individual Flexibility Agreements (IFAs)?'. No information was provided to survey respondents as to *how* the new clause would clarify the making of IFAs and nor does the survey assist in identifying any ambiguity in the current clause.

[119] We now turn to deal with those applications which seek more limited variations to the scope of the award matters which may be dealt with by IFAs.

[120] As mentioned previously, these applications seek to include 'minimum shift arrangements' (or words to that effect), frequency of payment and 'preferred hours options'. It is convenient to deal with the last matter first.

[121] VECCI is seeking to vary clause 7.1 of the C*lerks - Private Sector Award 2010* to insert an additional paragraph in the model flexibility term:

> "(c) preferred hours option".

[122] There does not appear to be any generally accepted definition of 'preferred hours arrangements' and none is proferred by VECCI. In a recent academic article Cameron dealt with this definitional issue, as follows:

> "The concept is that the employee elects to work different or additional hours - hours that would ordinarily trigger penalty and overtime payments - but is paid at a lower rate ... because the employee volunteers or prefers to work those hours ...
>
> ... two general types of clauses can be discerned. Under the first type ('different hours'), the employee elects to work different hours to his or her usual work pattern (ie. as set out in a roster or contract). These different hours, such as ordinary hours worked on a Saturday, Sunday or at night during the week or hours worked outside the spread of ordinary hours, would typically attract penalty or overtime rates. Under the second type ('additional hours'), the employee elects to work hours in excess of their maximum ordinary hours prescribed in the [relevant industrial instrument], hours which would ordinarily attract overtime rates. The common feature of both types of clauses is that the employee is paid at a lower rate than what would otherwise be paid under the [relevant industrial instrument] because he or she volunteers or prefers to work the additional or different hours."[62]

[123] In our view, VECCI's application is misconceived. Clause 7.1 provides that the employer and the individual employee may agree to vary the application of '*certain terms of this award*'. The award terms which may be the subject of such an arrangement are then identified as those concerning:

> "(a) arrangements for when work is performed;
> (b) overtime rates;

(c) penalty rates;
(d) allowances; and
(e) leave loading."

[124] There is no award term which concerns 'preferred hours option'. Hence even if we were minded to grant VECCI's application, which we are not, it would be ineffective in any event.

[125] Preferred hours arrangements of the type described by Cameron in the extract at paragraph [122] above concern the variation of the application of award terms dealing with arrangements for when work is performed, overtime rates and penalty rates. It follows that such arrangements can be agreed within the scope of the existing model flexibility clause. But there is a real issue as to whether such arrangements would result in the individual employee being better off overall in relation to their terms and conditions of employment (as required by clause 7.4(d)).

[126] Preferred hours arrangements were considered by a Full Bench of the Commission in *Re Bupa Care Services Pty Ltd* (the Bupa decision).[63] The Bupa decision dealt with a number of appeals in respect of decisions refusing to approve the Bupa Care Services, ANF and HSU Enterprise Agreement 2009 and a number of retail industry agreements. Each of the enterprise agreements was made prior to 1 January 2010 and as a consequence the 'no disadvantage test' (the NDT) in Item 10 of Schedule 7 of the Transitional Provisions Act applied. The 'preferred hours arrangements' in the agreements in question were of the type described by Cameron in the extract above.

[127] The Full Bench in the Bupa decision cited with approval the decision of the majority in *Re MSA Security Officers Certified Agreement 2003* (MSA Security).[64] In MSA Security the majority rejected a clause enabling an employee to work overtime at ordinary rates by agreement with the employer on the basis that the comparison under the NDT was between the terms and conditions of employment in the relevant agreement and the relevant award. The possibility that the employer would provide an employee with additional work hours was irrelevant because the applicable award made no distinction between voluntary working hours and hours directed by the employer.

[128] In the Bupa decision, the Full Bench characterised the NDT in these terms:

> "the 'no-disadvantage test' does not involve an analysis of matters other than the terms and conditions of the enterprise agreement against those in any relevant reference instrument. The effect the terms and conditions may have on the actions of an employer or employee is not relevant to the 'no disadvantage test'."[65]

[129] The agreements in question failed the NDT because the preferred hours clause represented at least one term or condition of employment that was less beneficial than the awards that applied to the employees.

[130] However, as observed in *Black Crow Organics,*[66] the effect of the Bupa decision is not that an agreement which provides for hours which would otherwise be payable at overtime rates, to be paid at ordinary rates, because an employee voluntarily works those hours at a particular time, will *automatically* fail the NDT:

> "There is nothing in that decision to indicate any change to the longstanding approach with respect to the application of the no-disadvantage test. Essentially, that approach is that the no-disadvantage test is applied on a global, rather than a line by line basis. Thus an agreement provision which considered alone may be less beneficial to an employee when compared with an equivalent provision in a relevant reference instrument, will not result in the agreement failing the no-disadvantage test, if there are other more beneficial provisions in the agreement, which on balance, offset the less beneficial provision. For example, an agreement which provides for employees to be paid a flat hourly rate for all hours worked, may not disadvantage those employees if the flat hourly rate is higher than the base rate in the relevant reference instrument. The payment of a loaded rate for all hours worked is an advantage that may offset the disadvantage associated with the entitlement of the employee under a reference instrument to be paid overtime rates for some hours worked. It may also be relevant for the purposes of the no-disadvantage test that a flat hourly rate feeds into leave entitlements under an agreement, so that those entitlements are paid in a way that is more beneficial than the terms of the relevant reference instrument.
>
> The decision in *Bupa* does make it clear however, that the application of the no-disadvantage test does not involve an analysis of matters other than the terms and conditions of the enterprise agreement, against those in any relevant reference instrument, and the effect that the terms and conditions may have on the actions of the employer or employees, is not relevant. Thus it is not relevant to the application of the no-disadvantage test that the employee may prefer to work at particular times. It is also not relevant that if the employer would be required to pay overtime rates for particular hours, the employer would not have scheduled work to be done during those hours, or that the employer would have allocated the hours among additional employees, so that no employees would have been entitled to overtime payments."[67]

[131] The NDT applied to all agreements made between 1 July 2009 and 31 December 2009.[68] This was the period between the repeal of Work Choices and the commencement of the remaining elements of the FW Act (i.e. minimum wages, NES and modern awards).

[132] Under the NDT the Commission had to be satisfied that the 'agreement does not, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees who are covered by the agreement under any reference instrument relating to one or more employees'.[69]

[133] Agreements made on or after 1 January 2010 must pass the 'better off overall test' (the BOOT). Under the BOOT the Commission must be satisfied that each employee 'would be better off overall if the agreement applied to the employee than if the relevant award applied to the employee'.

[134] While the BOOT is expressed in different terms to the NDT, each involves a global assessment. In *Armacell Australia Pty Ltd* a Full Bench of the Commission described the BOOT in these terms:

> "The BOOT, as the name implies, requires an overall assessment to be made. This requires identification of terms which are more beneficial to an employee, terms that are less beneficial and an overall assessment of whether an employee would be better off under the agreement."[70]

[135] While the Bupa decision involved the application of the NDT the same approach has been taken to the BOOT in a number of first instance decisions. For example, in *Jellifish!! Pty Ltd* where the Commission said:

> "An enterprise agreement that provides for hours that would otherwise be paid at overtime rates if the employee was covered by a modern award, to be paid at a base or ordinary rate that is less than the overtime rate under the modern award, contains a provision that is less beneficial than the modern award. In order for that agreement to pass the BOOT, it is necessary for the Tribunal to be satisfied, that at the test time, the Agreement contains provisions that are more beneficial than equivalent terms in the modern award or are not conferred by the modern award, that offset those provisions that are less beneficial, so that on balance, employees are better off overall if the agreement applied to them than they would be if the modern award applied.
>
> Thus an agreement that provides for a loaded hourly rate payable for all hours worked, may result in employees being better off overall notwithstanding that they are working some hours that would be paid at overtime rates if they were covered by a modern award. This is because the loaded rate is payable for all hours worked and not just those payable at overtime rates. There may also be a cut off point where employees work so many hours that the loaded rate ceases to result in employees being better off overall than they would be if the award applied."[71]

[136] It follows from the foregoing that on the basis of the current authorities a purported IFA which contains a preferred hours arrangement would not, of itself, result in the individual employee being better off overall. The IFA would need to contain a corresponding benefit that outweighs the detriment of the preferred hours arrangement in order to meet the requirements of the BOOT.

[137] To the extent that the VECCI application is seeking some general endorsement of preferred hours arrangements, we decline to give such an endorsement. As we mention later, such matters are best considered in an appropriate context, rather than in the abstract (see paragraph [158]).

[138] We now turn to those applications which seek to include minimum engagement periods and frequency of pay within the scope of the model flexibility term.

[139] A number of the employer organisations who supported the inclusion of minimum engagement periods within the scope of the model flexibility term relied on Commission decisions which provided reduced minimum engagement periods for secondary school students in the *General Retail Industry Award 2010* (the General Retail Award)[72]and in the *Animal Care and Veterinary Services Award 2010*[73]. These decisions are clearly distinguishable from the matters before us, in particular:

- the variations in those matters did not facilitate a general change to minimum engagement periods but were confined to circumstances after school on weekdays for full-time secondary school students;

- the variation to the General Retail Award was supported by evidence as to the particular circumstances pertaining to that award and the variation to the Animal Care and Veterinary Services Award was unopposed; and

- both variations incorporated a number of requirements by way of additional conditions before the reduced minimum engagement period may operate.

[140] In relation to the variation to the General Retail Award referred to above it is also important to note that the Commission had earlier rejected an application to *generally* reduce the minimum engagement period.[74]

[141] We are not persuaded that it is appropriate to include 'minimum engagement periods' within the scope of the model flexibility term. As we have noted these provisions relate to minimum wages and for many employees are an important aspect of the modern award safety net. As Vice President Watson observed in Secondary School Students case:

> "There is a long history of minimum engagement periods for part time and casual employees providing protection for employees from employer expectations of working short periods where the cost and inconvenience of attending the workplace outweighs the benefits received from the engagement."[75]

[142] Any variation to minimum engagement periods in modern awards should only be by application to vary the relevant modern award or by enterprise agreement. This will ensure that the variation is subject to appropriate scrutiny. It is not appropriate to permit such variations by IFAs, which are effectively self-executing. In our view, the inclusion of such terms within the scope of the model flexibility term would not be consistent with the modern awards objective.

[143] We now turn to the proposal to include 'frequency of payment' within the scope of the model clause.

[144] In support of its proposed variation the HIA says:

> "[the] variation seeks to address a continual source of frustration for employers that being the mandatory requirement to pay wages on a weekly cycle under clause 31 of the Onsite Award. HIA submits that such a requirement is inflexible and unnecessarily impacts on productivity, employment costs and the regulatory burden of employers."[76]

[145] Clause 31 of the *Building and Construction General On-site Award 2010* (the On-site Award) deals with the payment of wages:

> "**31. Payment of wages**
>
> **31.1** All wages, allowances and other monies must be paid in cash, or by cheque, bank cheque, electronic funds transfer (EFT) or similar transfer or any combination.
>
> **31.2** An employee paid by cheque must be allowed reasonable time, as agreed between the employer and the employee, to attend the branch of the employee's bank nearest the workplace to cash cheques during working hours.
>
> **31.3** Payments must be paid and available to the employee not later than the end of ordinary hours of work on Thursday of each working week. Where an employer made payment less frequently in compliance with a relevant award or award-based transitional instrument, prior to the making of this award on 1 January 2010, or where an employer made payment less frequently in compliance with a Division 2B State award, prior to 1 January 2011, the employer may continue to make payment at that frequency, subject to the agreement of employees and/or a majority of employees if required by the relevant award, award-based transitional instrument or Division 2B State award.

> **31.4** When notice is given, all monies due to the employee must be paid at the time of termination of employment. Where this is not practicable, the employer will have two working days to send monies due to the employee by registered post (or where paid by EFT the monies are transferred into the employee's account).
>
> **31.5** If an employee is paid wages by cash or cheque and is kept waiting for their wages more than a quarter of an hour after the usual time of finishing work on pay day (for reasons other than circumstances beyond the control of the employer), the employee is to be paid at overtime rates after that quarter of an hour for the period they are kept waiting, with a minimum payment of a quarter of an hour."

[146] Issues in respect of frequency of payment have generally been dealt with on an award by award basis. For example in *Re Simpson Personnel Pty Ltd*[77] Senior Deputy President Watson rejected an application to vary clause 31 of the On-site Award to generally make provision for the payment of wages on a weekly or fortnightly basis by mutual agreement. His Honour said:

> "I am not satisfied that making a determination varying the 2010 Modern Award generally, as sought by the applicant or its supporters, is necessary to achieve the modern awards objective. I am, however, satisfied that a variation permitting employers, who were availing themselves of a longer frequency of payment permitted by a relevant award or award-based transitional instrument applying to them immediately before the making of the 2010 Modern Award, to continue to do so is necessary to achieve the modern awards objective. Accordingly, I will make a determination varying the 2010 Modern Award in those more limited terms. Any broader review of clause 31 of the 2010 Modern Award should await the 4 yearly reviews of the modern awards.
>
> The determination will vary the *Building and Construction General On-site Award 2010* by replacing the current clause 31.3 with the following:
>
> '**31.3** Payments must be paid and available to the employee not later than the end of ordinary hours of work on Thursday of each working week. Where an employer made payment less frequently in compliance with a relevant award or award-based transitional instrument, prior to the making of this award on 1 January 2010, the employer may continue to make payment at that frequency, subject to the agreement of employees and/or a majority of employees if required by the relevant award or award-based transitional instrument.'[78]

[147] It should be noted that this application was made outside the Transitional Review and hence s.157 of the FW Act applied. Such a variation can only be made if the Commission is 'satisfied that making the determination . . . outside the system of 4 yearly reviews of modern awards is *necessary* to achieve the modern awards objective'.

[148] In the context of the Transitional Review, Senior Deputy President Hamberger varied the frequency of payment provision in the *Graphic Arts, Printing and Publishing Award 2010.*[79] At paragraphs [25] and [26] of his decision the Senior Deputy President said:

> "There are very few modern awards that require wages to be paid weekly. The great majority of awards, including those which cover a greater number of low paid employees than this award, allow at least for fortnightly pay. The manufacturing award, which covers very similar employees to those covered by the Award, provides for wages to be paid weekly or fortnightly. Where there is agreement between the employer and the majority of employees in the relevant enterprise, or with an individual employee, wages may be paid three weekly, four

> weekly or monthly. I am satisfied that it is anomalous and unduly prescriptive for the Award to require that wages must be paid weekly. Varying the Award to bring it broadly into line with the manufacturing award will ensure that the Award meets the modern award objectives. In particular it is consistent with the need to promote flexible modern work practices.
>
> Accordingly, Clause 28.1 will be deleted and replaced with a new clause:
>
> > 'Wages must be paid weekly or fortnightly as determined by the employer. Wages may be paid four weekly or monthly if agreed with an individual employee.'[80]

[149] In our view the issue of frequency of payment is best dealt with on an award by award basis in the context of either the Transitional Review or the 4 yearly review of modern awards. The relevant award history and the circumstances pertaining to each award are likely to vary and should be dealt with on a case by case basis. The inclusion of such a term within the scope of the model flexibility term would not be consistent with the modern awards objective.

3.2 Machinery matters

[150] In addition to the scope of the flexibility term in modern awards the applications before us raise four issues which may be described as machinery matters:

- the operation of the 'better off overall test';
- termination provisions;
- external approval of IFAs; and
- annual review of IFAs.

(i) *The 'better off overall test'*

[151] The model flexibility term provides that an IFA must 'result in the employee being better off overall than the employee would have been if no individual flexibility agreement had been agreed to' (clause 7.3(b)). Two observations may be made about this requirement.

[152] The first relates to the meaning of the expression 'being better off overall'. No party in the proceedings before us contended that this expression in the model flexibility term meant anything other than a reference to the BOOT. Section 193 sets out the circumstances in which an enterprise agreement passes the BOOT, relevantly:

> "... if FWC is satisfied, as at the test time, that each award covered employee ... for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee' (s.193(1)).

[153] The second observation is that the employee must be "better off overall" at the time the IFA is made. In other words the requirement to meet the BOOT is not a continuing obligation over the life of the IFA. The 2008 AIRC Full Bench dealt with this issue at paragraph [180]:

> "The no-disadvantage test should be applied as at the time the agreement commences to operate. We are not satisfied that the test should be continuously applied over the life of the agreement. This would add an extra process requirement to agreement-making and introduce an element of ongoing uncertainty. It is relevant to point out that the provision for termination

> on notice, which we deal with later, provides some additional protection against disadvantage arising during the life of the agreement. Some parties suggested that we should include provision for a public interest test in the model clause. We have decided not to do so because of the uncertainty which would result."

[154] A number of employer submissions supported varying the current model flexibility term to 'provide greater clarity on the treatment of non-monetary benefits' in the assessment of the BOOT.[81] In his oral submission Mr Mammone, on behalf of ACCI, pointed to some uncertainty in relation to the proper interpretation of the BOOT.[82]

[155] The uncertainty referred to relates to the treatment of what are described as 'non-monetary benefits' in the application of the BOOT. In this context reference was made to the apparent inconsistencies between the illustrative example on p.137 of the Explanatory Memorandum to the *Fair Work Bill 2009*; the *FWO Best Practice Guide 3: 'Use of individual flexibility arrangements*'; and the Bupa decision.[83]

[156] We have already referred to the Bupa decision in the context of dealing with VECCI's application to expand the scope of the model flexibility term to include the expression 'preferred hours option' (see paragraphs [126]-[136] of this decision).

[157] We acknowledge that there is a degree of tension between the illustrative example in the Explanatory Memorandum, the FWO Best Practice Guide and the Bupa decision (albeit that the Bupa decision dealt with the NDT, not the BOOT). But we are not persuaded that it is appropriate for us, in these proceedings, to address that issue.

[158] Observations about the application of the BOOT and the matters which can be taken into account in making such an assessment are best made in the context of a particular case, rather than in the abstract. Any reconsideration of the Bupa decision should be in an appropriate context, such as an application to approve an enterprise agreement, and any party seeking such a reconsideration should make application to have the matter referred to a Full Bench, pursuant to s.615A of the FW Act.

[159] We do, however, think that the model flexibility term should be amended to make it clear that the reference to 'the employee being better off overall' in clause 7.3(b), refers to when the IFA is made.

(ii) *Termination provisions*

[160] Clause 7.8 of the model flexibility term in modern awards provides that an IFA may be terminated by consent (clause 7.8(b))[84] or by the employer or the individual employee giving four weeks' written notice of termination (clause 7.8(a)). The IFA ceases to operate at the end of the notice period.

[161] In these proceedings Greater Union and Birch, Carroll & Coyle have sought to vary clause 7.8(a) of the model flexibility term by deleting the reference to "four weeks' notice" and inserting "sixteen weeks notice." The application received general support from employer organisations and was opposed by the ACTU and the unions who made submissions in the proceedings.

[162] AFEI and Business SA supported the variation sought. Ai Group supported the proposition that the notice period should be extended and, in particular, supported the Review Report's recommendation that the notice period be extended to 90 days.[85] ABI took a similar position.[86] ACCI provided general support for the proposition that a period of more than 28 days should be provided before a party can unilaterally terminate an IFA, but did not proffer a view in support of any particular notice period.[87]

[163] The ACTU and a number of unions opposed any extension to the period of notice of termination.[88] The ACTU submitted:

> "No cogent reason has been put forward to support these variations, the effect of which would be to significantly dilute a critical safeguard for employees currently contained in the model flexibility term. Nor has any persuasive evidence been presented to why the current requirement does not meet the modern awards objective."[89]

[164] The ACTU contends that the applications seeking to extend the notice of termination are reagitating an issue that was comprehensively dealt with during award modernisation and that the variations sought are inconsistent with the modern awards objective.[90] It is also submitted that the capacity for either party to terminate an IFA on four weeks' notice is consistent with the legislative intent with respect to how IFAs should operate, in the following respects:

- IFAs are intended to be mutually beneficial for both parties hence if an IFA no longer meets this requirement then there should be some capacity for a party to unilaterally terminate the arrangement, with notice; and
- the capacity to terminate an IFA with four weeks' notice is an important safeguard and helps prevent abuse of IFAs.

[165] In relation to the last point, the ACTU advanced the following submission:

> "the capacity for a party to terminate an agreement with four weeks' notice constitutes an important safeguard and helps prevent abuse of individual flexibility arrangements. This is particularly important given that the process by which agreement is reached and the content of any such agreements are generally not subject to external scrutiny. The importance of this consideration was underscored by the Full Bench of the Commission, which emphasised that the capacity of a party to terminate a flexibility agreement with four weeks' notice was also important given that the no-disadvantage test (subsequently amended to the BOOT) applies at the time the agreement commences rather than continuously over the life of the agreement:
>
> > 'It is relevant to point out that the provision for termination on notice, which we deal with later, provides some additional protection against disadvantage arising during the life of the agreement.'[91]
>
> Unlike collective agreements made under the FW Act, there is also no process for ensuring that the employee has genuinely agreed to enter into a flexibility arrangement. This means that all but the most egregious abuses are likely to go undetected."[92]

[166] The ACTU rejected the employer contentions that the safeguards in ss.144 and 145 sufficiently protect an employee from being disadvantaged by an IFA and did not accept the submissions to the effect that the current capacity to terminate an IFA with four weeks' notice

provides a high level of uncertainty for employers such as to justify a variation of the model flexibility term.

[167] The termination provisions in the model flexibility term were determined by a Full Bench of the AIRC in June 2008 as part of the award modernisation process. We have earlier referred to aspects of that Full Bench decision. In relation to the termination provisions, the Full Bench said:

> "[184] There was significant debate concerning the term or duration of flexibility agreements, how they might be brought to an end and related matters. It would not be appropriate that the model clause prescribe the duration of flexibility agreements. On the other hand it would not be right to leave these matters entirely to the parties. Unforeseen developments can render a flexibility agreement not only unacceptable to one of the parties but also substantially unfair. If that circumstance occurs the agreement ceases to be one which meets the needs of the parties. We shall provide that an agreement might be terminated at any time by agreement or by one party giving 4 weeks' notice in writing to the other. The provision for termination on notice will provide some protection for employees who through ignorance or for some other reason make an agreement which materially disadvantages them. In this way the provision will also assist in ensuring that employees are not disadvantaged by the operation of the model clause. We are conscious of employer concerns that provision for termination of the agreement on notice will lead to an unsatisfactory level of uncertainty for employers. We have balanced that consideration against the other matters to which we have just referred. Given the individual nature of the arrangements that are contemplated we do not think the problem will be too onerous. Where significant numbers of employees are involved the employer can obtain greater certainty by entering into a collective agreement should that course be a practical one."[93] [emphasis added]

[168] The emphasised parts of the above extract highlight the rationale for the decision to permit IFAs to be unilaterally terminated by giving four weeks' notice in writing.

[169] Those supporting a notice period of more than four weeks contend that the current notice period acts as a disincentive for employers to enter into IFAs. As ABI put it:

> "The current provisions essentially mean that individual flexibility arrangements simply live on month to month only. For many employers (and employees) it is clear that the creation of such arrangements, especially if they relate to working patterns in the organisation, need to operate with greater longevity and certainty."[94]

[170] Similarly, Business SA submitted:

> "The existing requirement for an employer or an employee to provide four weeks' notice to terminate an IFA does not meet the Modern Award objectives because it:
>
> (i) does not promote flexible work practices;
> (ii) creates an administrative and financial burden by requiring the employer to change the documentation, rearrange the organisation's operational requirements ie. staffing levels etc;
> (iii) would be of no value to both the employer and employee if the IFA arrangement was terminated in the early stages of an IFA which adds uncertainty to an employer's operational needs."[95]

[171] The 2012 IFA Report provides little support for the contention that the four weeks' notice period acts as a disincentive for employers to enter into IFAs. As shown in Table 4.2

(see paragraph [60] above) less than one per cent of employers who were aware of, but did not report making IFAs, cited the four weeks' notice period as the reason why they had not entered into an IFA. The most common reason, reported by just over half of employers, was that there had been no identified need to enter into an IFA. The survey data does, however, have some limitations. It does not distinguish between employers covered by enterprise agreements and those whose principal industrial instrument was a modern award. Hence, we do not know the proportion of surveyed employers who were operating under a modern award and who had an identified need, but chose not to make an IFA because it could be terminated upon four weeks' notice. However, based on the published survey data this is unlikely to be a large proportion of this group of employers.

[172] It is also relevant that employer organisations have consistently identified the four weeks' notice period as a disincentive to employers entering into IFAs. In addition to their submissions in these proceedings, employer organisations advanced similar contentions to the FW Act Review Panel. At page 107 of the Review Report the Panel states:

> "The capacity for an employee to unilaterally terminate an IFA with 28 days notice was cited by many as a key disincentive to use IFAs."

[173] Further, after giving the issue extensive consideration, the Panel recommended that the four weeks' notice period be extended to 90 days.

[174] For our part, we accept that the provision of a longer unilateral termination notice period would provide greater certainty to the employer and individual employee parties to IFAs. A longer notice period would also reduce an existing disincentive for employers entering into IFAs.

[175] But these considerations need to be balanced against the factors cited by the 2008 AIRC Full Bench in support of their adoption of a four week notice period, that is:

- unforeseen developments can render an IFA unacceptable to one of the parties and substantially unfair; and
- it provides some protection for employees who through ignorance or for some other reason make an IFA which materially disadvantages them.

[176] Hence, while a longer notice period provides greater certainty it also reduces the ability of parties to adapt to changing circumstances, such as those identified by the 2008 AIRC Full Bench. In other words a longer notice period increases certainty but reduces flexibility.

[177] Nor is it any answer to say that an IFA can be terminated by consent at any time. A change in circumstances may not impact on each party in the same way. It may disadvantage one party but have a neutral effect on, or actually advantage, the other party. A change in circumstances will not always result in creating a mutual incentive to vary or terminate the IFA. In this context, it needs to be remembered that the survey data in the 2012 IFA Report suggests that reviews, modifications and terminations of modern award IFAs were initiated by employers as often as employees.

[178] The central issue for us is the balance between the considerations identified by the 2008 AIRC Full Bench (see paragraph [175] above), that is:

- employer concerns that provision for termination on notice will lead to an unsatisfactory level of uncertainty for employers; and
- providing some protection for employees who make an agreement which materially disadvantages them.

[179] Section 145 of the FW Act is also relevant in this context:

> **145 Effect of individual flexibility arrangement that does not meet requirements of flexibility term**
>
> *Application of this section*
>
> (1) This section applies if:
>
> (a) an employee and employer agree to an arrangement that purports to be an individual flexibility arrangement under a flexibility term in a modern award; and
>
> (b) the arrangement does not meet a requirement set out in section 144.
>
> Note: A failure to meet such a requirement may be a contravention of a provision of Part 3-1 (which deals with general protections).
>
> *Arrangement has effect as if it were an individual flexibility arrangement*
>
> (2) The arrangement has effect as if it were an individual flexibility arrangement.
>
> *Employer contravenes flexibility term in specified circumstances*
>
> (3) If subsection 144(4) requires the employer to ensure that the arrangement meets the requirement, the employer contravenes the flexibility term of the award.
>
> *Flexibility arrangement may be terminated by agreement or notice*
>
> (4) The flexibility term is taken to provide (in addition to any other means of termination of the arrangement that the term provides) that the arrangement can be terminated:
>
> (a) by either the employee, or the employer, giving written notice of not more than 28 days; or
>
> (b) by the employee and the employer at any time if they agree, in writing, to the termination.

[180] In effect s.145(4) imports a termination provision into an award flexibility term which is *in addition* to any other means of termination of an IFA that the flexibility term provides. Subsection 145(4) states that flexibility term is taken to provide that the purported IFA can be terminated by agreement or by either the employee, or the employer, giving written notice of not more than 28 days.

[181] As previously mentioned, s.145 was not part of the legislative framework at the time of the 2008 AIRC Full Bench decision. This legislative change constitutes a 'significant change in circumstances' within the meaning of the June 2012 Transitional Review decision. The change is significant because it provides a legislative safeguard which addresses the central rationale for the 2008 AIRC Full Bench decision. The fact that a review of the model flexibility clause was specifically contemplated by the AIRC at the time it was determined is also an important factor. These matters clearly distinguish the circumstances in these proceedings from those which applied in the Transitional Review Penalty Rates case[96] and the Transitional Review Public Holidays case[97].

[182] It will be recalled that one of the factors which led the AIRC Full Bench to adopt a four week notice period was that such a provision provided some protection for employees who made an IFA which materially disadvantaged them. This consideration no longer has the same force as it has now been addressed by the legislative safeguard in s.145.

[183] Contrary to the ACTU's submissions we are persuaded that s.145 (in conjunction with s.144) sufficiently protects an employee from being disadvantaged by an IFA.

[184] Section 145 only applies in the circumstances set out in s.145(1), that is, an employee and employer have agreed to an arrangement that purports to be an IFA, under a flexibility term in a modern award and the arrangement does not meet a requirement set out in s.144.

[185] One of the requirements in s.144 is that the IFA must result in the employee being better off overall than the employee would have been if no IFA were agreed to (s.144(4)(c)). If an employee party to a purported IFA is not better off overall then s.145(4) applies and the IFA may be unilaterally terminated in accordance with s.145(4). The same situation pertains in the event that the employee and employer have not 'genuinely agreed' to the IFA (see s.144(4)(b) or where the IFA has not been signed by the employee and employer parties (see s.144(4)(e)) or where the employer has failed to ensure that a copy of the IFA is given to the employee (s.144(4)(f)).

[186] We accept that s.145 does not apply in all circumstances. For example, it would not give rise to a right of termination if circumstances changed after the IFA was made such that it no longer operated to the mutual benefit of both parties. But, as we have noted earlier, this consideration needs to be balanced against the greater certainty afforded to both parties by a longer notice period.

[187] We are persuaded that it is appropriate to increase the period of notice specified in clause 7.8(a) of the model flexibility term. No particular rationale was advanced in support of the 16 week notice period proposed by Greater Union and Birch, Carroll & Coyle. A period of 16 weeks equates to 112 days, which is greater than the 90 day period recommended by the Panel in the Review Report. In our view it is appropriate to give effect to the Panel's recommendation. However, we think it is simpler and easier to understand and administer a notice period which is expressed in weeks rather than days. Accordingly, we propose to vary clause 7.8(a) of the model flexibility term by deleting the reference to 'four weeks' and inserting a reference to '13 weeks'. We are satisfied that such a variation has merit, will enhance the operational effectiveness of the model term and is consistent with the modern awards objective.

[188] In order to ensure that parties to IFAs are aware of the termination provisions in s.145(4) we will insert an appropriate note at the end of clause 7.8 of the model flexibility term.

(iii) *External approval of IFAs*

[189] The model flexibility term provides that IFAs are not subject to any external approval process. Indeed clause 7.6 provides that where the individual employee concerned is 18 years of age or over:

> "... the agreement must not require the approval or consent of a person other than the employer and the individual employee."

[190] Where the individual employee is under 18 years of age clause 7.4(a) provides that a parent or guardian may sign the IFA on their behalf.

[191] These aspects of the model terms (i.e. clauses 7.4(a) and 7.6) are now reflected in the statutory requirements for flexibility terms in modern awards. In particular, s.144(4)(e) and s.144(5) provide:

> "(4) The flexibility term must:
>
> ... (e) require the employer to ensure that any individual flexibility agreement must be in writing and signed:
>
> (i) in all cases - by the employee and the employer; and
>
> (ii) if the employee is under 18 - by a parent or guardian of the employee; ...
>
> (5) Except as required by subparagraph (4)(e)(ii), the flexibility term must not require that any individual flexibility agreement agreed to by an employer and employee under the term be approved, or consented to, by another person." [emphasis added]

[192] The reference to 'another person' in s.144(5) includes 'a body politic or corporate as well as an individual'.[98] The legislative intent appears to be to prevent unions, other employees or employer associations being able to veto IFAs. Paragraph 575 of the Explanatory Memorandum to the Fair Work Bill evidences this statutory intention:

> "A Flexibility term must not require that any individual flexibility arrangement be approved, or consented to, by another person (eg. the flexibility term could not require any individual flexibility agreement to be approved by a trade union or employer association) (subclause 144(5)). This subclause operates subject to subparagraph (4)(e)(ii) which requires a flexibility arrangement to be signed by a parent or guardian of an employee who is under 18."

[193] In determining the model term the 2008 AIRC Full Bench gave consideration to the insertion of additional process or approval requirements:

> "[185] A number of suggestions were made for the provision of guidance of various kinds to parties to proposed agreements. These suggestions included the provision of information about award rights and obligations and the negotiation and operation of flexibility agreements either through a letter, a fact sheet or a code of conduct. Some suggestions involved procedural requirements relating to the bargaining process, such as a requirement to bargain in good faith. We are reluctant to include process requirements in the clause unless it is strictly necessary to do so because such requirements can unnecessarily complicate what should be a relatively simple and informal negotiation. Nevertheless there is merit in many of these suggestions. While we do not intend to make any provision in the model clause, we encourage the major employer and union parties to jointly give consideration to the development of such material. An agreed best practice guide to the negotiation of individual flexibility agreements, for example, would be highly desirable. In due course the appropriate statutory body might also provide relevant information of a similar kind so that parties would have ready access to information and advice about agreement-making under individual flexibility provisions in modern awards.
>
> [186] Another suggestion was that the Commission might give a private ruling or advice as to whether a proposed agreement complied with the model clause. As we understand the

> proposal it would give parties comfort that a particular agreement did not disadvantage the individual employee concerned. We think this approach also has merit, provided it were to operate on a voluntary basis. But we do not think we should include this matter in the model clause. This is because of the uncertainty, mentioned earlier, about the legislative context in which the model clause will operate. No doubt the matter could be reconsidered at some future time."[99]

[194] The approval process relating to IFAs was also addressed in the Review Report in which the Panel said:

> "Some parties proposed a registration or approval system with FWA or the FWO, either compulsory or optional, to provide certainty that a proposed IFA would not be considered invalid in future. Some unions also proposed that IFAs should be registered with or recorded by FWA including for the purpose of allowing data as to their use and abuse, and to allow an objective assessment to inform stakeholders of their efficacy and areas of concern. The Australian National Retailers' Association (ANRA), in its supplementary submission, suggested a proper analysis would need to be conducted to determine whether FWA has the capacity to take on this massive administrative task ...
>
> The Panel believes that to create a greater opportunity for employers and employees to make individual flexibility arrangements while ensuring adequate and appropriate protection for the employer and the employee the following should be done:
>
> ...
>
> - Employers should be required to notify the FWO in writing of any IFA entered into at the time this occurs, providing particulars of the name of the employee, the date of entry and the relevant award or enterprise agreement. The notification could be by email. This would enable the FWO to investigate, as and when required at its absolute discretion, whether the opportunity afforded by the FW Act to make these arrangements was being abused by a particular employer or employers in a particular industry. Notification would have the additional benefit of providing data about the incidence of IFAs. It would be desirable for the FWO to maintain an electronic database of these notifications.
>
> - An employer should have a statutory defence to any claim for underpayment and penalties made after entering into an IFA, namely that the employer had notified the FWO, believed the arrangement satisfied the statutory preconditions (including the BOOT) and there was a reasonable basis for this belief."[100]

[195] The Panel's observations find expression in recommendations 10 and 11 of the Review Report, set out at paragraph [48] above. The Panel did <u>not</u> recommend that IFAs be approved by the FWA (now the Fair Work Commission).

[196] Application AM2012/204 by the Accommodation Association of Australia (the AAA) seeks to amend the model term by deleting clause 7.6 in its entirety and replacing it with a provision in the following terms:

> "7.6 In addition and separate to any consent required as provided in clause 7.4, if the employer and the employee reach agreement in accordance with this clause 7, then they will submit the agreement to Fair Work Australia or the Fair Work Ombudsman for approval which is the only other body or person whose approval to the agreement is required."

[197] The AAA did not advance any written submissions in support of its proposal, nor did it attend the oral hearing on 27 March 2013. In its application, the AAA simply asserts that the variation is sought as its members have been reluctant to use IFAs on the basis that they may inadvertently breach the award by entering into IFAs which do not pass the better off overall test.

[198] No participant in these proceedings advanced any submissions in support of the AAA proposed variation. A number of organisations opposed the AAA's application. In its written submission Business SA submits that the variation should be rejected, for the following reasons:

> "3.1.9 The substance of AAA's variation is to prescribe that an IFA be approved by an external authority has already been dealt with by the Full Bench. However, no cogent reasons have been provided why the Decision by the Full Bench, [2009] AIRCFB 345, finalising the Award Flexibility Clause should be departed from.
>
> 3.1.10 There is no evidence that the current wording of the clause is the result of an anomaly or technical error for the purposes of item 6(2)(b) of Schedule 5, Part 2 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.
>
> 3.1.11 Nor is there any evidence that the variation is necessary to achieve the Modern Awards objective in section 134(1). While AAA in their application refers to aspects of the Modern Awards objective in 134(1) (f), (g) and (h) it is unclear to what extent these aspects have any relevance to this variation.
>
> 3.1.12 Business SA submit that the variation sought by AAA would be contrary to the Modern Awards objective as it would impose a heavier regulatory burden on employers with corresponding compliance costs. In addition, no evidence has been provided by AAA to demonstrate that the award flexibility provision in its current form fails to achieve the Modern Awards objective."[101]

[199] Ai Group and ACCI also opposed the AAA's application. In her oral submission Ms Vaccaro, on behalf of Ai Group, submitted that the primary reason the application was opposed was because it would 'impose an onerous regulatory burden that was never intended to be there'.[102] Ms Vaccaro also submitted:

> "Firstly if we focus on the Accommodation Association of Australia, so the one about approval processes. The Australian Industrial Relations Commission when developing the flexibility term looked at this issue and decided against it on the basis that it would impose too much regulatory burden and they also identified that. I think at the time it was a no disadvantage test and employees would be protected by the no disadvantage test. Also if employees do have concerns about IFAs and whether their agreement does meet the better off overall test, there is always that option to contact either their union or go to the FWO and if that IFA is invalid it can be acted upon and the issues can be rectified in that way."[103]

[200] ACCI also opposed AAA's application and in the course of oral submissions Mr Mammone, on behalf of ACCI, submitted that the application was contrary to the modern awards objective.[104]

[201] We have decided to reject the AAA's application. No substantive argument has been advanced in support of the variation proposed and, in our view, the application lacks merit and would increase the regulatory burden on business, contrary to the modern awards objective (see s.134(1)(f)).

[202] We also note that there is a real question as to whether such a variation would be compatible with the legislative intent of s.144(5).

(iv) *Annual review of IFAs*

[203] In application AM2012/287 Hair and Beauty Australia seeks to amend the model term by adding an additional paragraph, as follows:

> "7.10 The employer will be responsible to conduct an annual review of the terms of the Individual Flexibility Agreement in line with the Annual Wage Review and changes in the Award in order to ensure that the individual remains better off overall under the agreement in relation to the employee's terms and conditions of employment in comparison to that of the Award."

[204] Hair and Beauty Australia did not advance any written submissions in support of its proposal, nor did it attend the oral hearing on 27 March 2013.

[205] No participant in these proceedings advanced any submissions in support of this proposal and a number of organisations submitted that the variation proposed should be rejected.[105] ACCI and Ai Group opposed the variation on essentially the same grounds as they opposed the external approval process proposed in AM2012/204 (see paragraphs [199]-[200] above). In its submission opposing the application the ACTU noted[106] that the 2008 AIRC Full Bench decision rejected submissions to the effect that IFAs should be subject to a no disadvantage test on an ongoing basis because such a provision would 'add an extra process requirement to agreement making and introduce an element of ongoing uncertainty'.[107]

[206] We have decided to reject the application by Hair and Beauty Australia. No argument has been advanced in support of the variation proposed and in our view the application lacks merit and would increase the regulatory burden on business, contrary to the modern awards objective (see s.134(1)(f)).

4. CONCLUSION

[207] As previously mentioned, s.145 was not part of the legislative framework at the time of the 2008 AIRC Full Bench decision. This legislative change constitutes a 'significant change in circumstances' within the meaning of the June 2012 Transitional Review decision. The fact that a review of the model flexibility clause was specifically contemplated by the AIRC at the time it was determined is also an important factor. These matters clearly distinguish the circumstances in these proceedings from those which applied in the Transitional Review Penalty Rates case[108] and the Transitional Review Public Holidays case[109].

[208] The model flexibility term will be varied in the following respects:

- insert the words 'at the time the agreement is made' into clause 7.3(b)
- delete 'four weeks' from clause 7.8(a) and insert '13 weeks'
- insert a note at the end of clause 7.8:

> Note: If any of the requirements of s.144(4), which are reflected in the requirements of this clause, are not met then the agreement may be terminated by either the employee or the employer, giving written notice of not more than 28 days (see s.145 of the *Fair Work Act 2009* (Cth)).

[209] In addition to these variations one further variation is proposed in order to improve the level of compliance with the requirements of the model flexibility term. As we have mentioned the evidence suggests that a significant proportion of IFAs are entered into before the individual employee has commenced employment, contrary to the intent of the model flexibility term and the FW Act (see paragraph [73]-[77] above). To address this issue we propose to insert the following words at the end of clause 7.2:

> 'An agreement under this clause can only be entered into after the individual employee has commenced employment with the employer.'

[210] The proposed new model flexibility term is set out below, with the variations highlighted:

7. Award flexibility

7.1 Notwithstanding any other provision of this award, 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 as set out in:

[*particular award clauses to be specified on an award-by-award basis on application by an interested party*];

(b) overtime rates;

(c) penalty rates;

(d) allowances; and

(e) leave loading.

7.2 The employer and the individual employee must have genuinely made the agreement without coercion or duress. An agreement under this clause can only be entered into after the individual employee has commenced employment with the employer.

7.3 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 clause 7.1; and

(b) result in the employee being better off overall at the time the agreement is made than the employee would have been if no individual flexibility agreement had been agreed to.

7.4 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 results in the individual employee being better off overall in relation to the individual employee's terms and conditions of employment; and

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

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

7.6 Except as provided in clause 7.4(a) the agreement must not require the approval or consent of a person other than the employer and the individual employee.

7.7 An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.

7.8 The agreement may be terminated:

(a) by the employer or the individual employee giving ~~four weeks'~~ 13 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. Note: If any of the requirements of s.144(4), which are reflected in the requirements of this clause, are not met then the agreement may be terminated by either the employee or the employer, giving written notice of not more than 28 days (see s.145 of the *Fair Work Act 2009* (Cth)).
7.9	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.

[211] The variations proposed are necessary to remedy the issues identified in the Transitional Review and to ensure that the model award flexibility term and modern awards are operating effectively, without anomalies or technical problems arising from the award modernisation process. We are also satisfied that the variations proposed are 'necessary' (within the meaning of s.138) to achieve the modern awards objective and will ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions having regard to the matters set out at paragraphs 134(1)(a)-(h). In particular, the variations proposed will provide flexible modern work practices and reduce regulatory burden while taking into account the needs of the low paid and making the model flexibility term simpler and easier to understand.

[212] The determinations giving effect to our decision will be settled by Senior Deputy President Watson, with recourse to the Full Bench if necessary. After the Full Bench dealing with the annual leave aspects of the model award flexibility term has decided the applications before it, a statement will be issued setting out the process of implementing our decision (and the decision of the Annual Leave Full Bench insofar as it deals with the model award flexibility term) in all modern awards.

PRESIDENT

Appearances:

S. McIvor for Australian Business Industrial.
B. Tkalcevic for the Australian Council of Trade Unions.
D. Mammone for the Australian Chamber of Commerce and Industry and for the Australian Federation of Employers and Industries.
G. Vaccaro for the Australian Industry Group.
J. Nucifora for the Australian Municipal, Administrative, Clerical and Services Union.
Z. Angus for The Australian Workers' Union.
G. Starr and J. Moriarty for the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union
H. Wallgren and E. West for the SA Employers' Chamber of Commerce and Industry Inc t/as Business SA.
A. Borg for the Construction, Forestry, Mining and Energy Union.
M. Adler for the Housing Industry Association.
S. Kraemer for The Master Plumbers' and Mechanical Services Association of Australia.

K. Yu for The Master Plumbers and Mechanical Contractors Association of New South Wales.
S. Elliffe for the National Retailers Association.
D. De Martino for the Shop, Distributive and Allied Employees Association.
N. Barkatsas for the Victorian Employers' Chamber of Commerce and Industry.

Hearing details:

Before Justice Ross:
2013.
Melbourne, Sydney, Brisbane, Canberra, Adelaide (video hearing):
31 January.

Before the Full Bench:
2013.
Melbourne, Sydney and Adelaide (video hearing):
27 March.

Final written submissions:

Australian Council of Trade Unions and Shop, Distributive and Allied Employees' Association, 5 April 2013.

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[1] [2012] FWAFB 5600.

[2] Other than modern enterprise awards and State reference public sector modern awards.

[3] Being the second anniversary of the Fair Work (Safety Net Provisions) Act commencement day.

[4] [2013] FWCFB 580.

[5] Ibid at paragraph [12], adopting the formulation from the review of the Oil Refining and Manufacturing Award 2010 [2012] FWA 7212 at [20].

[6] [2012] FWAFB 5600 at paragraph [99].

[7] The original award modernisation request under s.576C(1) of the *Workplace Relations Act 1996* was made on 28 March 2008 and was varied on a number of occasions. A consolidated version of the Request is available from the FWC website.

[8] [2008] AIRC 387.

[9] [2008] AIRCFB 550.

[10] [2008] AIRCFB 550.

[11] [2008] AIRCFB 550 at paragraphs 183-186.

[12] [2008] AIRCFB 717.

[13] [2008] AIRCFB 1000 at paragraph 35.

[14] [2009] AIRCFB 345 at paragraph 8.

[15] [2008] AIRCFB 550 at 192.

[16] Section 3 of the *Fair Work Act 2009.*

[17] Stewart A. (1992), '*Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation*' 5 AJLL 101 at 102.

[18] s.61(2).

[19] The 2012 AWALI Report does not comment on award flexibility or IFAs and hence is of limited relevance to the applications in these proceedings.

[20] 2012 AWALI Report at p39.

[21] [2008] AIRCFB 550 at 163.

[22] Review Report at p 78.

[23] Ibid.

[24] ABS Cat. No. 6310.0 (various issues) and unpublished data purchased from the ABS. The incidence of casual employment (defined as the percentage of casual employees in all employees, excluding owner-managers of incorporated enterprises) rose sharply from the early to mid-1990s and rose slowly after that to peak at 25.7 per cent in 2004. While falling slightly since then, it has remained at around or just below 25 per cent. The incidence of casual employees in particular years was:
1992: 21.3%
1998: 24.2%
2004: 25.7%
2007: 24.7%
2009: 24.4%
2011: 24.2%

[25] ABS, *Labour force, Australia, April 2012*, ABS Cat. No. 6202.0, downloaded from www.abs.gov.au.

[26] M Plumb, M Baker & G Spence, 'The labour market during the 2008–09 downturn', *RBA Bulletin*, March quarter 2010, Reserve Bank of Australia, Sydney; and Borland, *The Australian labour market in the 2000s: the quiet decade*, Reserve Bank of Australia.

[27] CA Sánchez & D Andrews, *To move or not move: what drives residential mobility rates in OECD countries?* Economics Department Working Papers No. 846, OECD, 2011. The calculations of residential labour mobility are based on data collected from various surveys from member countries. The dataset does not allow for distinguishing between local residential moves and long distance residential moves.

[28] ABS, *Labour mobility, Australia* (Cat. No. 6209.0), various issues.

[29] Review Report at p 106.

[30] Ibid at p 108.

[31] See s.202(4) of the FW Act and Reg. 2.08 of the Fair Work Regulations 2009.

[32] As Irvine CJ observed in *Scott v Commercial Hotel Merbein Pty Ltd* [1930] VLR 75 at [30]: '[T]hough it is not to be conclusive, the employment of different language in the same Act may show that the Legislature had in view different objects'. Also see *CFMEU v Hadgkiss* (2007) 248 ALR 169.

[33] See Figure 4.1 on p 31, 2012 IFA report.

[34] See section 4.1.2 2012 IFA Report.

[35] General Manager, Fair Work Australia, Employer Survey 2012.

[36] Figure 4.10 on p 44 2012 IFA Report.

[37] Ibid, Figure 4.11 on p 50.

[38] Ibid, at p 43.

[39] Ibid, Table 4.7 on p 49.

[40] Ibid, Table 5.9.

[41] Ibid, Table D.8, Appendix D.

[42] Ibid, Table 5.10.

[43] Ibid, Table D.8, Appendix D.

[44] 2012 IFA Report p 42.

[45] Ibid at p 46.

[46] [2008] AIRCFB 550 at paragraph 165.

[47] Review Report at p 109.

[48] [2011] FCA 1064.

[49] Qld Audit Report at pp 11-12.

[50] AM2012/250; AM2012/287.

[51] AM2012/177, AM2012/178, AM2012/179, AM2012/180, AM2012/8, AM2012/240 and AM2012/172.

[52] AM2012/245.

[53] AM2012/210.

[54] HIA at Transcript paragraphs [152]-[153] and [158]; Ai Group at Transcript PN 387-388.

[55] Also see Mr McIvor's oral submission at Transcript paragraphs 228-234.

[56] February 2013 AFEI submission at paragraph 7.

[57] Business SA written submission at paragraph 5.4.

[58] Transcript at paragraphs 174-175.

[59] [2008] AIRCFB 550 at paragraph 168.

[60] VECCI at Transcript paragraphs 184-185; NRA at Transcript paragraphs 209-212.

[61] [2008] AIRCFB 550 at paragraph 70.

[62] Cameron C (2012) 'Oxymoronic or Employer Logic? Preferred Hours under the Fair Work Act', 25 AJLL 43 at 43-45.

[63] [2010] FWAFB 2762.

[64] AIRCFB, PR93765 per Watson SDP, Blain DP and Lewin C, 15 September 2003.

[65] [2010] FWAFB 2762 at 25.

[66] [2010] FWAA 5060.

[67] [2010] FWAA 5060 at 21-22.

[68] Transitional Provisions Act, Schedule 7, Part 2, Item 2(1).

[69] Ibid at Item 4(1).

[70] [2010] FWAFB 9985 at paragraph 41. Also see *Topend Consulting Pty Ltd* [2010] FWA 6442 and *Solar Systems Pty Ltd* [2012] FWAFB 6397.

[71] [2012] FWA 9640 at paragraph 54-55.

[72] [2011] FWA 3777; [2011] FWAFB 6251.

[73] [2011] FWA 3974.

[74] [2010] FWA 5068; [2010] FWAFB 7838.

[75] [2011] FWA 3777 at paragraph 40.

[76] HIA submission 26 February 2013 at paragraph 3.1.3; also see paragraphs 3.1.12 - 3.1.19.

[77] [2010] FWA 2894.

[78] Ibid at paragraphs 50-51.

[79] [2012] FWA 8726; [2013] FWAFB 580.

[80] [2012] FWA 8726 at 25-26.

[81] ABI written submissions 25 February 2013 paragraphs 4.8 - 4.15.

[82] Transcript PN 253-271 and 275-280; also see the oral submissions of Ms Yu, on behalf of the Master Plumbers and Mechanical Contractors Association of NSW, Transcript PN 479.

[83] [2010] FWAFB 2762.

[84] Clause 7.8(b) provides that an IFA may be terminated at any time, by written agreement between the employer and the individual employee.

[85] Transcript at PN 390-391.

[86] Transcript paragraphs 216 - 223.

[87] Transcript at PN 272-273.

[88] ACTU written submission 20 March 2013 at paragraph 61-70.

[89] Ibid at paragraph 63.

[90] Ibid at paragraphs 37-60.

[91] [2008] AIRCFB 550 at paragraph 180.

[92] ACTU written submission 20 March 2013 at paragraphs 66-67.

[93] [2008] AIRCFB 550 at paragraph 184.

[94] ABI written submissions of 25 February 2012 at paragraph 4.3.

[95] Business SA written submission at paragraph 4.3.

[96] [2013] FWCFB 1635.

[97] [2013] FWCFB 2168.

[98] *Acts Interpretation Act* 1901 (Cth), s.2C(1).

[99] [2008] AIRCFB 550 at paragraphs 185-186.

[100] Review Panel pp 106 and 108-109.

[101] Business SA submission in reply (AM2012/204).

[102] Transcript at paragraph 381.

[103] Transcript at paragraph 385.

[104] Transcript at paragraph 489.

[105] ACTU's written submission of 20 March 2013 at paragraphs 113-114; Ai Group Transcript at PN 381 and 386; ACCI Transcript PN 489.

[106] Ibid, at paragraph 114.

[107] [2008] AIRCFB 550 at paragraph 180.

[108] [2013] FWCFB 1635.

[109] [2013] FWCFB 2168.

ATTACHMENT 1 - LIST OF APPLICATIONS

Matter no.	Applicant	Modern award title	Award ID
AM2012/51	Greater Union and Birch Carroll & Coyle	Broadcasting and Recorded Entertainment Award 2010	MA000091
AM2012/228	HIA	Building and Construction General On-site Award 2010	MA000020
AM2012/210	VECCI	Clerks - Private Sector Award 2010	MA000002
AM2012/179	Baking Industry Association of Queensland - Union of Employers	Fast Food Industry Award 2010	MA000003
AM2012/240	NRA	Fast Food Industry Award 2010	MA000003
AM2012/178	Baking Industry Association of Queensland - Union of Employers	Food, Beverage and Tobacco Manufacturing Award 2010	MA000073
AM2012/177	Baking Industry Association of Queensland - Union of Employers	General Retail Industry Award 2010	MA000004
AM2012/245	ARA	General Retail Industry Award 2010	MA000004
AM2012/250	VANA Limited	General Retail Industry Award 2010	MA000004
AM2012/8	NRA	General Retail Industry Award 2010	MA000004
AM2012/172	Hair and Beauty Industry Association	Hair and Beauty Industry Award 2010	MA000005
AM2012/287	Hair and Beauty Australia	Hair and Beauty Industry Award 2010	MA000005
AM2012/204	Accommodation Association of Australia	Hospitality Industry (General) Award 2010	MA000009
AM2012/199	Master Plumbers and Mechanical Contractors Association of NSW	Plumbing and Fire Sprinklers Award 2010	MA000036
AM2012/180	Baking Industry Association of Queensland - Union of Employers	Restaurant Industry Award 2010	MA000119

ATTACHMENT 2

EXTRACT FROM CONSOLIDATED VERSION OF THE MINISTERIAL REQUEST

10. 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.

11. Each modern award will include the model flexibility clause with such adaptation as is required for the modern award in which it is included.

11AA. The Commission must ensure that the flexibility term:

- identifies the terms of the modern award that may be varied by an individual flexibility arrangement;
- requires that the employee and the employer genuinely agree to an individual flexibility arrangement;
- requires the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall;
- sets out how any flexibility arrangement may be terminated;
- requires the employer to ensure that any individual flexibility arrangement by in writing and signed:
  (a) in all cases – by the employee and the employer;
  (b) if the employee is under 18 – by the parent or guardian of the employee;
- requires the employer to ensure that a copy of the individual flexibility arrangement be given to the employee;
- prohibits an individual flexibility arrangement agreed to by an employer and employee from requiring the approval or consent of another person, other than the consent of a parent or guardian where an employee is under 18; and
- where an employee genuinely agrees with an employer to make an individual flexibility arrangement but is either unable to read and/or sign that arrangement, a parent, guardian or representative may sign that agreement on their behalf.

11AB. The Commission can also require any appropriate additional protections for employees or groups of employees of Australian Disability Enterprises.

The applicants seek the following amendments:

7. Award flexibility

7.1 Notwithstanding any other provision of this award, 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 (including the minimum duration of shifts) (Baking Industry Association of Queensland - Union of Employers - AM2012/177, AM2012/178, AM2012/179, and AM2012/180; NRA - AM2012/8 and AM2012/240; Hair and Beauty Industry Association - AM2012/172);

The ARA, in its application AM2012/245, seeks to reword 7.1(a) as follows: "*arrangements for when work is performed, including minimum shift engagements*". In its subsequent submission to the Tribunal dated 25 February 2013, at clause 16, the NRA appears to have changed its proposed rewording of 7.1(a) as follows: "*arrangements for when work is performed (including minimum shift engagement)*".

(b) minimum engagement period; (VECCI - AM2012/210 - also consequential renumbering below)

(c) preferred hours option; (VECCI - AM2012/210 - also consequential renumbering below)

(b) overtime rates;

(c) penalty rates;

(d) allowances; ~~and~~

(e) leave loading~~.;~~

(f) frequency of payment; (HIA - AM2012/228)

~~**(g)** industry specific redundancy provisions; and (HIA - AM2012/228).~~ HIA, in its submission to the Tribunal dated 25 February 2013, at clause 3.1.20, stated it no longer wished to pursue this variation.

(h) any other matter within this award (HIA - AM2012/228)

provided that the terms of the agreement are not inconsistent with the National Employment Standards within the *Fair Work Act 2009*. (HIA - AM2012/228)

VANA Limited - AM2012/250 proposes to delete clause 7.1 in its entirety and replace it with the following:

> "**7.1** Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of any term of this award to meet the genuine individual needs of the employer and the individual employee."

Hair and Beauty Australia - AM2012/287 proposes to delete clause 7.1 in its entirety and replace it with the following:

> "**7.1** Notwithstanding any other provision of this award 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 employer and employee may mutually agree in writing to a fixed term period for the Individual Flexibility Agreement to be effective. This Agreement may be fixed for a term of any length mutually agreed to by the employer and employee up to a maximum 4 year period."

Master Plumbers and Mechanical Contractors Association of NSW - AM2012/199, in relation to the *Plumbing and Fire Sprinklers Award 2010* [MA000036], proposes to delete clause 7.1 in its entirety and replace it with the following:

> **7.1** Notwithstanding any other provision of this award, 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 (without limiting the matters subject to individual arrangement this can include the averaging of work hours);
>
> **(b)** overtime rates (without limiting the matters subject to individual arrangement this can include shiftwork and call-out);
>
> **(c)** penalty rates (without limiting the matters subject to individual arrangement this can include Saturday, Sunday and Public holiday work);
>
> **(d)** allowances (without limiting the matters subject to individual arrangement this can include all purpose allowances in Clause 21.1, expense incurred allowances in Clause 21.2, fares and travelling allowances in Clause 21.8, leading hand allowances in Clause 21.5 and other allowances in Clauses 21.6 and 21.7); and
>
> **(e)** annual leave loading.

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

7.3 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 clause 7.1; and~~ (Hair and Beauty Australia - AM2012/287)

(b) result in the employee being better off overall than the employee would have been if no individual flexibility agreement had been agreed to.

(c) have the benefits to the employee documented by the employee and these benefits may include monetary and/or non-monetary benefits. (Baking Industry Association of Queensland - Union of Employers - AM2012/177, AM2012/178, AM2012/179, and AM2012/180)

7.4 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 results in the individual employee being better off overall in relation to the individual employee's terms and conditions of employment; and

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

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

~~**7.6** Except as provided in clause 7.4(a) the agreement must not require the approval or consent of a person other than the employer and the individual employee.~~

7.6 In addition and separate to any consent required as provided in clause 7.4(a), if the employer and the employee reach agreement in accordance with this clause 7, then they will submit the agreement to Fair Work Australia or the Fair Work Ombudsman for approval which is the only other body or person whose approval to the agreement is required. (Accommodation Association of Australia - AM2012/204)

7.7 An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.

7.8 The agreement may be terminated:

(a) by the employer or the individual employee giving ~~four~~ sixteen (Greater Union and Birch Carroll & Coyle - AM2012/51) 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.

7.9 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.

7.10 The employer will be responsible to conduct an annual review of the terms of the Individual Flexibility Agreement in line with the Annual Wage Review and changes to the Award in order to ensure the individual employee remains better off overall under the agreement in relation to the employee's terms and conditions of employment in comparison to that of the Award. (Hair and Beauty Australia - AM2012/287)

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