

## INDIVIDUAL FLEXIBILITY AGREEMENTS

As of 1 January 2010, most farming work in Australia is governed by the modern Pastoral Award 2010, which lays down terms and conditions that employers must follow when employing workers.

These award terms include such things as overtime, public holiday pay, higher rates for weekend work and annual leave loadings. These entitlements apply, and employees can take action for payment of them (now or in the future), even if the common law employment contract between the employer and the employee does not include payment for them.

Some farmers find that these award terms are inflexible and do not take account of busy times or the non-standard hours involved in farming work.

However, every modern award must include a 'flexibility term' which enables employers and employees to agree to vary the effect of some award terms and put in place conditions of work which are tailor made to suit the needs of their business and their employees. This is called an Individual Flexibility Agreement (IFA).

Because Individual Flexibility Agreements stand in the place of the award terms, which they modify, employers cannot be liable in the future for payment of those award entitlements.

The Fair Work Act ensures these arrangements do not undermine minimum employee entitlements by requiring the employer to ensure the employee covered by the IFA is Better Off Overall (BOOT) on the IFA compared to the modern award. You can read more about Better Off Overall at [www.thepeopleindairy.org.au/eski/ifa.htm#Boot?](http://www.thepeopleindairy.org.au/eski/ifa.htm#Boot?)

### HOW ARE IFAS MADE?

Either the employee or the employer can make a request for an IFA. If the employer wishes to enter into an IFA with an employee they must put the request in writing. It is suggested that at this stage a draft of the proposed IFA be given to the employee.

It is the employer's responsibility to ensure that the employee is Better Off Overall than if there was no IFA. This will usually involve comparing the employee's financial benefits under the IFA with the financial benefits under the award.

The employee's personal circumstances and any non-financial benefits which are significant to the employee can also be considered.

### FORMAL REQUIREMENTS

Unlike enterprise agreements, IFAs do not need to be approved by Fair Work Australia.

It is the employer's responsibility to ensure that the IFA is made correctly, and meets all of the requirements of the Fair Work Act.

An IFA must be in writing and signed by the employer and employee. If the employee is under 18 years of age, it must also be signed by the employee's parent or guardian.

An IFA can also only be made after the employee has commenced employment and is entitled to the minimum award conditions contained in the relevant modern award.

This means an employer cannot ask a prospective employee to agree to an IFA as a condition of employment.

An employee or employer must not be forced or coerced into entering into an IFA and a person must not be treated adversely or discriminated against for refusing to agree to an IFA.

For more information, read the *General Protections* resource at [www.thepeopleindairy.org.au/LiteratureRetrieve.aspx?ID=60093](http://www.thepeopleindairy.org.au/LiteratureRetrieve.aspx?ID=60093)

It is the employer's responsibility to ensure that an employee has genuinely agreed to an IFA. This means that the employer should take steps to ensure that the employee fully understands the effect of the agreement as compared to the award entitlements. It is important that you ensure that the employee has a copy of the award to enable them to compare the entitlements under the award with the IFA.

In addition, when making an IFA, an employer should keep in mind any language or cultural differences that might affect the employee's understanding of the terms of the IFA or their choice to agree to an IFA.

Once an IFA has been made, it is the employer's responsibility to ensure that a copy of the IFA is given to the employee.

The employer must also keep a copy with the employee's employment records.

#### WHAT CAN BE INCLUDED IN AN IFA?

Individual Flexibility Agreements can only vary the following award terms:

- arrangements for when work is performed such as working hours;
- overtime rates;
- penalty rates;
- allowances, and
- leave loading.

Award entitlements relating to any of these five award matters can be varied by agreement between an employer and an individual employee provided that, overall, the employee is 'better off' under the IFA.

## WHAT ABOUT SUPERANNUATION?

Superannuation is only paid on ‘ordinary time earnings’. The taxation laws make a distinction between ordinary hours and overtime hours and superannuation is not payable on overtime if it can be ‘separately identified’ from ordinary hours.

However, if you are paying a flat rate of pay and formalising this by using an IFA whereby the overtime hours are rolled up in the calculation of the flat rate of pay, then the overtime hours are not considered by the ATO to be ‘separately identifiable.’ This means that you have to pay superannuation on all hours worked.

However, the ATO has recently issued an Administratively Binding Advice which states that if the hours which are **ordinary time hours** are **clearly specified in the IFA** then superannuation need only be paid on these hours, not on all of the hours worked.

This is because the ATO accepts that the IFA does not alter the hours which are ordinary hours of work but rather varies the rate of pay for the overtime hours and those hours. The following clause meets the ATO requirements and should be contained in the IFA - e.g. (text as per [IFA template](#)).

*The weekly hours of work will be <insert total weekly hours> which is made up of 152 hours over 4 weeks of ordinary time (as defined in the Pastoral Award 2010) at \$<insert \$ rate for ordinary hours> and <insert number of overtime hours> at \$<insert \$ rate for overtime hours>.*

The Administratively Binding Advice is on the ATO Register of Private Binding Rulings number 1012597896867 and can be found on the [ATO website](#)

## HOW IS AN IFA TERMINATED?

The IFA should include information about how the IFA may be terminated.

IFAs made under the Pastoral Award 2010 may be terminated at any time by written agreement between both parties or by either party giving the other party thirteen weeks written notice.

Once the notice period has ended the agreement automatically ceases to operate and the award terms apply again.

The 13 week notice period has been increased from 4 weeks and only applies to new IFAs made after 4 December 2013.

Use our template to create an IFA available for download at [www.thepeopleindairy.org.au/LiteratureRetrieve.aspx?ID=60119](http://www.thepeopleindairy.org.au/LiteratureRetrieve.aspx?ID=60119)