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The AMMA Workplace Relations Research Project – A Survey Based Analysis

Second Report

A research report prepared by

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Executive Summary

The overall workplace relations environment experienced by businesses in the minerals and resources sector deteriorated in the six months between April and October 2010. As the Fair Work Act becomes more familiar and more entrenched in the workplaces of Australia's resources sector, employers are becoming more, not less, concerned about key aspects of its operation.

While some improvement has been shown in some areas during that six months, the key indicator on overall satisfaction with the industrial relations (IR) environment showed a substantial fall in this second and latest survey of the ongoing *AMMA Workplace Relations Research Project*.

The satisfaction index fell from 75.9 for the survey period ending in April 2010 to 65.1 for the survey period ending in October 2010. This indicates that greater familiarity with the new system has led to a much lower level of satisfaction with the workplace relations (WR) system than had existed during the previous survey period when the Fair Work Act was first introduced[1].

While the data in the latest survey provide the framework for understanding this fall in satisfaction, the comments from those who attended the project's focus group and who commented as part of their response to the survey make clear there is a rising sense of anger and frustration at the system as it evolves.

As one would expect, individual companies and industries have experienced different outcomes and have reached their own conclusions about the adequacy of the new IR system. Moreover, the general view amongst the respondents in the resources sector was that WR conditions during the latest survey period were generally positive, with 26.4% stating their WR environment was "good" and a further 5.6% stating it was "excellent". In contrast, only 7.0% in total said their workplace relations environment was "poor", "slightly poor" or "extremely poor".

The most important result in this latest report is the comparison with the results from the first survey six months ago. However, all of the results in this latest survey must be seen within the context of the fall in the index figure from 75.9 to 65.1 in terms of respondents' overall WR environment.

[1] See Section 16 of this report dealing with the Methodology of this survey for an explanation of this index measure. Note, however, that the highest possible index level is 100.0 and the lowest is 0.0. The higher the index level, the greater has been the general respondent agreement with the issue raised by the relevant question.

What the survey covered

The latest survey was divided into a number of sections including:

- union involvement in the workplace;
- labour productivity;
- direct engagement with the workforce;
- unfair dismissal;
- right of entry;
- workplace flexibility;
- the National Employment Standards;
- modern awards;
- industrial action;
- enterprise bargaining and agreement making;
- adverse action (the general protections); and
- a set of supplementary questions.

While there are some areas where improvement has occurred in these areas during the latest survey period, the data nevertheless show an overall deterioration relative to what existed six months earlier.

The biggest IR concerns facing employers in the resources sector

The concerns with the Fair Work Act most commonly cited as major concerns by survey respondents were two in number. There was, first, the increased presence of union representatives at the worksite and the implications this was having on the WR arrangements of the business such as right of entry arrangements. And then, second, but equally important, were issues associated with bargaining for new enterprise agreements including greenfield agreements.

In the previous survey, enterprise bargaining was far and away the single biggest concern of respondents during the first eight months of the Fair Work Act's introduction.

Other issues raised by respondents to the latest survey when asked about their major IR concerns over the past six months (in order of frequency) were:

- inflated wage and condition claims and outcomes;
- the prospect of protected or unprotected industrial action;
- termination of employment/redundancy concerns including the prospect of unfair dismissal claims;
- staff performance management issues; and
- the transition to modern awards.

Other concerns cited less frequently were:

- staff shortages;
- a lack of workplace flexibility;
- issues with the Fair Work Act's transfer of business and adverse action provisions;

- issues with contractor arrangements; and
- union demarcation disputes.

Key findings

Key findings of the survey include:

- There is a high level of dissatisfaction about the remedies available to employers to stop or prevent both protected and unprotected industrial action;
- Union involvement in the workplace is perceived to have been largely unhelpful in fostering a productive WR environment;
- Achieving increased workplace flexibility is challenging but possible;
- Labour productivity, although still relatively good, has eroded;
- Bargaining under the Fair Work Act is more difficult than bargaining under the Workplace Relations Act;
- Direct engagement with employees remains at acceptable levels although has also become more challenging to achieve in the face of increased union involvement in the workplace;
- Unfair dismissal claims remain a problem for employers, in particular the prospect of having to reinstate a worker whom they believe they have justifiably dismissed;
- There is growing concern over the consequences of the Fair Work Act's right of entry provisions; and
- Adverse action claims are becoming a more prominent concern and one that is likely to grow as employees become increasingly aware of their ability to bring claims in this area. It is worth noting that 10% of survey respondents had received an adverse action claim during the six-month survey period.

While the survey reveals that resource sector management has a good understanding of the nature of the IR system as it now exists, there are nevertheless serious misgivings about the new arrangements.

At present, only around half of the employers in the sector have tested the new IR system and its ability to deliver higher productivity and workplace flexibility in the heat of negotiations for a new agreement. It will be the outcome of such negotiations that demonstrates the utility of the arrangements going forward. However, the experience thus far shows serious reasons for concern.

Employers' evident unease over the consequences of the Act's right of entry provisions, and the greater role that unions are being allowed to play in the workplace as a result, is having undesirable consequences for employers that the report will discuss in detail.

As one participant in the latest focus group for the research project said:

> *"I think it's a lull before the storm and I do think there's been a little testing time going on with the legislation and the shift in right of entry and there has been a 'shoring up' of union opportunity."*

As a result of this latest survey, AMMA again calls on the Federal Government, the Opposition and the Australian Greens to examine further changes to the legislative/regulatory framework

that are needed to improve IR outcomes and consequently the performance of the industry and the Australian economy. This is all the more urgent since it is likely that the experience the resources sector has had with the IR system to date has been replicated in other industry sectors across Australia.

1 Introduction

The findings in this report are based on a survey of 76 member companies of the Australian Mines & Metals Association (AMMA), the peak employer body representing the WR interests of the resources, construction and associated industries. The survey was conducted during late September through to the third week of October 2010 and was supplemented by a focus group of AMMA members held on 20 October 2010 in Perth.

This survey is a follow-up to the initial survey undertaken in March and April 2010, which was designed to look at what was then the new IR system and compare it with the system as it had been under the predecessor legislation – the Workplace Relations Act.

The aim of the initial survey was to establish a benchmark at a time when the differences between the current and former IR systems were still fresh in the minds of respondents.

This second survey has been conducted within an IR environment entirely shaped by the operation of the Fair Work Act and asks respondents to compare their experiences of the legislation in the past six months with their experience of the period immediately after the Fair Work Act took effect. (Note: Because the project commenced when the Fair Work Act had already been operating for more than six months, the first survey asked for members' experiences during the first eight months of the Act's introduction. Each subsequent survey will cover a successive six-month period to see how employers' experiences with the legislation evolve).

Respondents to the latest survey were asked to assess the circumstances they had encountered in a number of areas of significance. After more than 12 months of operation of the Fair Work Act, it can be assumed there is now a reasonable degree of understanding on the part of employers of the Act's contours and, with that deeper understanding, an ability to make judgements about its operation. That being said, around half of AMMA's membership are yet to embark on good faith bargaining under the Fair Work Act, so while they have their concerns about that framework, they are yet to directly experience it.

It may also still be the case, as it was six months ago, that this is a study amongst those who are trying to operate within a system that is in many respects novel. It is nevertheless likely that most respondents have come to terms with the new IR structure and possess a reasonably sound understanding of its strengths and weaknesses. Whatever else, respondents have had to conduct their workplace activities within the setting provided by the Fair Work Act for more than 12 months now.

A range of industries within the resources sector were captured in the responses to the latest survey, including:

- oil and gas;
- maritime (offshore and onshore);
- hydrocarbons;
- construction (onshore, offshore and resource);
- gold mining;
- metalliferous mining;

- coal mining;
- iron ore mining;
- mineral processing;
- mining services;
- catering; and
- transport.

Of the 76 respondent companies:

- 69% employed 200 or more people;
- 29% employed between 20 and 199 people; and
- 2% employed less than 20 people.

The point of the *AMMA Workplace Relations Research Project* and its twice-yearly reports is to examine the impacts of the Fair Work Act to determine whether the approach of the new legislation is conducive to greater workplace performance and productivity. The research into AMMA member companies is a landmark study since the new IR legislation only came into operation a little more than 12 months ago (the bulk of the Act having come into force on 1 July 2009 and the remainder on 1 January 2010).

By discovering the effects the Fair Work Act is having on the resources sector, the aim is to assess what kind of changes to the legislative/regulatory framework are needed to improve the IR environment.

Now that the results of two surveys have been reported, there is a clear case for legislative reform.

The issues of most importance to this project concern the relationship between IR structures and workplace productivity. Productivity growth is a major requirement for economic growth and underpins improvements in our communal standard of living. Introducing appropriate IR standards is an important factor in raising productivity since at the heart of any IR system is the need to harness the willingness of employees to undertake their work to their greatest ability.

On a practical level, the aim of this research is to guide policy development in an area that has been plagued with difficulty. The aim has been to ascertain which aspects of the legislation are negatively affecting productivity growth and workplace performance, and which aspects of the legislation are the most damaging to overall performance from an industry point of view.

One technical matter should be noted in regard to the statistics themselves. The percentages recorded in the tables throughout this report are, unless otherwise specified, based on the number of respondents that answered that particular question. Most questions were answered by all respondents, but there were some exceptions which are clearly marked. For instance, if a respondent had not yet embarked on enterprise bargaining under the Fair Work Act, they did not answer the questions asking about their experience of enterprise bargaining.

In each question, total percentage figures add up to 100% unless otherwise specified, with exceptions being because respondents were permitted to tick more than one response to a question. Individual percentages have also been rounded up to the nearest decimal point, which can, on occasion, cause the totals not to sum to 100%.

2 Overall workplace relations environment

This first set of survey questions was designed to get a general sense of how WR conditions within the resources sector had changed since the previous survey six months ago. This is the first set of data that relate entirely to the period since the Fair Work Act has been in effect.

How would you describe your current workplace relations environment?

	Extremely poor	Poor	Slightly poor	Barely acceptable	Acceptable	Good	Excellent	
Survey date	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**Index**
April 2010	0.0	0.0	2.9	4.4	38.2	42.6	11.8	**75.9**
Oct 2010	1.4	1.4	4.2	29.2	31.9	26.4	5.6	**65.1**

As the data show, there has been a clear deterioration in the WR environment in the experience of AMMA members. In the report on the previous survey, it was noted that "the results show that across the industry the WR environment is relatively strong". This can no longer be said. There has been an unmistakable deterioration in the WR environment since the first survey was undertaken. This deterioration is shown by the fall in the index from 75.9 to 65.1, which is merely a reflection of the downward shift in the data themselves.

In the earlier survey, no respondent indicated that the WR environment was either "extremely poor" or "poor". In the most recent survey, 2.8% of respondents fell into those two categories. In the earlier survey, the largest single response category was "good", which was chosen by 42.6% of respondents, while in this latest survey this category was chosen by only 26.4%. While 11.8% of respondents in the earlier survey indicated the IR environment was "excellent", this number deteriorated to 5.6% in the latest survey. The number of respondents choosing either "good" or "excellent" this time around has clearly declined.

This downward shift in sentiment is reflected in the comments of respondents in describing their current IR environment. These comments include:

> *"There is more of an 'us and them' mentality. This is something that did not exist under Work Choices. Also there are more employees talking to unions when something does not go their way."*
>
> *"There is more union involvement through right of entry; employees have a lack of understanding of the Fair Work Act's legislative changes and of the bargaining process in enterprise agreements."*
>
> *"We are noticing greater flexing of muscles by the unions."*
>
> *"Modern awards have complicated labour provision. Unions are less inclined to follow the law. Direct relationships are inhibited by the 'collective' constraints of the Act."*

"Greater timeframes are required for greenfield agreement making; it is taking longer to finalise these types of agreements."

"There has been increased agitation by unions wanting to get onsite. Unions are trying to gain right of entry without following the legislative steps required. Due to increased union activity, we have been asked to ensure there are workplace delegates in place."

"Unions are competing for territory in areas that they have not traditionally had coverage."

"There have been some challenges in finalising EBA negotiations. We have recently had our first right of entry matter at a remote site."

As noted by one participant in the focus group discussion, "the Fair Work Act is becoming more used by unions as they get used to the legislation", which is adding to the drain on resources that employers are having to devote to WR.

While the survey also revealed some successes with the legislation, these were scattered and few in number. Relevant comments in this regard included:

"There were a lot of 'start-up' problems associated with the union, but most of these have now been resolved and the operations have proceeded smoothly over the past three months."

"Remuneration adjustments have occurred. There is a continued focus on direct interactions with employees."

"There is a significantly larger focus on IR within our business due to the change in legislation and union activity."

3 Union involvement in the workplace

Amongst the most important changes brought about by the Fair Work Act are the changes to the roles that unions play in workplaces.

This section of the survey looked at the effects of those changes at the workplace level since the relevant provisions of the Act came into force. The aim of this set of questions was to ascertain the current level of union involvement at workplaces in the mining and resources sector and compare that to what had existed six months earlier.

What percentage of your workforce belongs to a trade union?

Interestingly, 47.8% of respondents to this latest survey did not know the answer to the above question. This is almost exactly the same percentage of respondents to the first survey who did not know how many people in their workforce belonged to a trade union (47.0%).

One participant in the latest focus group said, on the issue of trade union membership in resource sector workplaces:

> *"There's been this general shift away from 'I have to be in the union to protect myself'… There's not that feel of a need to be a unionist these days as there used to be."*

That person went on to say:

> *"I think management's grown as well in the sense that … it does take its responsibility more seriously than it used to [to manage its own workforce] … You've got to put in a lot more effort and a lot more time and you have to provide a lot more upskilling of your management group to be able to do that effectively."*

Are unions currently actively involved in your workplace(s)?

	Yes	No
Survey date	**(%)**	**(%)**
April 2010	58.8	41.2
October 2010	69.1	30.9

The latest survey responses showed that unions were actively involved in 69.1% of workplaces in the sector. This was an increase on the 58.8% of respondents who said unions were actively involved in their workplaces in the previous survey.

If unions have been actively involved at your workplace(s) during the past six months, how would you rate their level of influence over your industrial relations arrangements?

	No influence whatsoever	Very little	Little	Some	Moderate	High	Extremely high	
Survey date	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**Index**
April 2010	2.5	7.5	10.0	27.5	20.0	20.0	12.5	**60.8**
Oct 2010	22.8	8.8	7.0	24.6	12.3	15.8	8.8	**46.3**

What is most notable about the above figures is that union influence at those workplaces where unions are actively involved has fallen between this survey and the previous one.

Even so, the data show that unions have "some" influence or greater in 61.5% of respondents' workplaces, with unions having either a "high" or "extremely high" level of influence in 24.6% of worksites in which they have a presence. Whether this is a positive or negative feature of the WR environment depends on how that influence is applied, but that unions do have such influence is evident from the data.

How would you describe your current level of concern with union involvement at your workplace(s)?

Non-existent	Slight	Moderate	High	Extremely high
(%)	**(%)**	**(%)**	**(%)**	**(%)**
13.2	32.4	41.2	11.8	1.5

The data show that 13.3% of respondents have either a "high" or "extremely high" concern with union involvement at the workplace, with the bulk of respondents (41.2%) having expressed a "moderate" concern with union involvement.

How helpful to the needs of the enterprise was union involvement at your workplace(s) over the past six months?

	Extremely helpful	Helpful	Neither helpful nor unhelpful	Unhelpful	Extremely unhelpful
Survey date	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**
April 2010	2.5	5.0	47.5	35.0	10.0
October 2010	0.0	10.8	53.8	33.8	1.5

The question of paramount importance, of course, is whether union activity was helpful in achieving business goals or whether it prevented the business from achieving its aims. With the presumed aim of management being to create a productive and safe working environment, the fact that 35.3% of respondents with active unions on-site indicated in the latest survey that unions had been "unhelpful" or "extremely unhelpful" is cause for concern.

Comparing the latest survey results with the results from the previous survey, we can see that zero respondents now rate union involvement in the workplace as "extremely helpful", down from 2.5% last time, but also that only 1.5% now rate union involvement as "extremely unhelpful", down from 10.0% last time. The bulk of respondents in the latest survey, as with the previous survey, rated union involvement in the workplace as "neither helpful nor unhelpful", which is itself a concern given the time and resources that need to be devoted to negotiating with unions and facilitating their entry to the workplace.

In the past six months, have you found that problems with managing your workplace(s) due to union actions have:

Decreased	Stayed the same	Increased	Can't say
(%)	**(%)**	**(%)**	**(%)**
1.4	63.8	18.8	15.9

In terms of the Fair Work Act's impact on union behaviour, the question here is whether workplaces have changed for the better or worse as a result of union actions. The data show an unmistakable deteriorating trend, with 18.8% of respondents saying problems with managing their workplaces due to union actions had increased, while just 1.4% said problems due to union actions had decreased.

If union actions have led to increased or decreased problems with managing your workplaces, briefly describe the ways in which this has happened.

Survey respondents who indicated a positive or negative impact from union actions upon managing their workplaces were asked to give further details of what had been taking place during the past six months.

On the negative side, the following comments add anecdotal colour to the statistical results:

> *"Extortionate claims in greenfield construction project negotiations and the use of 'blackmail' to drive other agenda issues affecting maintenance contractors and the in-house workforce."*
>
> *"Unauthorised industrial action."*
>
> *"Unions creating more major issues from minor matters"*
>
> *"Greater contact on trivial issues. Actions without all of the facts."*
>
> *"Unnecessary disputes and issues."*
>
> *"People are seeking advice from the union before talking to their employer about their issue or concerns. I think most things can be worked out between the employer and employee if we have the opportunity to sit down and talk without third-party influence."*
>
> *"There might have been a slight increase [in union interference] with respect to disciplinary processes and involvement."*
>
> *"The union has encouraged members to take inappropriate 'stoppage' action when this was not necessary."*
>
> *"Previously, we were protected from unlawful disruptions. That protection has been removed and unions have an incredible amount of power that far outweighs their purpose and usefulness."*

Even amongst the more positive replies about union involvement at AMMA members' worksites there is a sense of impending disputation and a deterioration in the WR environment:

> *"There are not necessarily problems at this stage, but certainly their involvement requires more time and effort in planning and conducting agreement-making. There is an increased risk of future problems/complications arising."*
>
> *"It has been quieter of late. However, next year we start negotiations for our enterprise agreements so we expect problems will increase."*
>
> *"This has not occurred directly but is more of an issue relating to potential union involvement in any workplace contract negotiations or any unprotected union action."*
>
> *"Now that the EBA's registered, they have gone quiet."*
>
> *"We have a solid relationship with the union and often find they back our position and not the employees!"*

It is clear from many of the above comments and findings that the growing power of unions at the workplace remains a threat to the productivity of the sector. The Fair Work Act, insofar as the early evidence shows, has increased rather than diminished concerns about union involvement in the management of worksites.

4 Labour productivity

The following are responses to questions seeking information about the impact the Fair Work Act has had on labour productivity since its introduction.

Labour productivity for the purposes of this research is defined as the ratio between output at a particular site or organisation and the total input of labour required to achieve it. While other factors will obviously impact on productivity, this survey is only concerned with the legislation's perceived impact on labour productivity.

What is your perception of the current level of labour productivity at your worksite(s)?

	Extremely low	Quite low	Low	Acceptable	High	Quite high	Extremely high	
Survey date	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**Index**
April 2010	0.0	4.6	7.7	16.9	30.8	33.8	6.2	**66.7**
Oct 2010	0.0	0.0	8.8	38.2	30.9	20.6	1.5	**61.3**

The issue of labour productivity is of major importance for the resources and construction sectors, as it is for all sectors of the economy. Both for individual firms and the economy as a whole, it is essential that productivity remains as high as possible, particularly in an industry so important to the national economy.

The survey data show that labour productivity, although remaining reasonably good across the industry, has deteriorated over the period since the first survey was conducted. Respondents have, in general, perceived a deterioration in the productivity of their workplaces, with the overall index of labour productivity having fallen from 66.7 to 61.3.

Most respondents in the latest survey (53.0%) indicated that labour productivity was "high" or better but this must be contrasted with the 70.8% who were in the "high" or better range in terms of perceptions of labour productivity in the previous survey.

Also in the latest survey, a proportionately smaller number of respondents were found at the lower end of the scale. Only 8.8% of respondents in the latest survey indicated that productivity was either "low", "quite low" or "extremely low", down from 12.3% in the previous survey. However, as the index shows, this relative improvement at the lower end of the scale has been overridden by the deterioration at the higher end. The aim must be to improve on these levels as time goes by, not to stand by and allow further erosion in labour productivity.

Does your organisation currently formally measure labour productivity?

Yes	No	Don't know
(%)	(%)	(%)
38.8	47.8	13.4

The latest survey shows that 38.8% of respondents have a formal measure of labour productivity in place at their worksites, while 47.8% do not. A further 13.4% of respondents didn't know if such formal measures were in place. There would, of course, be a larger proportion of respondents that would have informal methods of measuring productivity.

In the past six months, to what extent have any of the following had an impact on labour productivity?

	None	Some	Major
	(%)	(%)	(%)
Increased administrative costs associated with complying with the new IR system	37.9	56.1	6.1
Broader application of unfair dismissal laws	59.1	36.4	4.5
Lost time due to industrial action	84.8	12.1	3.0
Union visits	50.0	47.0	3.0
An attitude on the part of workers that they can be less productive without consequence	66.7	31.8	1.5

There were a number of factors that were assessed for their effect on labour productivity as listed in the table above. The largest impact in the latest survey period has occurred via increased administrative costs associated with complying with the new IR system, cited as having an impact on labour productivity by 62.2% of respondents. This will hopefully be a temporary factor as IR managers become used to the new framework and appropriate systems are put in place. But with right of entry becoming more intrusive, there is no certainty that this will be the case.

The second most significant threat to labour productivity is related to union visits, with 47.0% of respondents indicating this had had "some" impact on labour productivity and another 3.0% saying it had had a "major" impact. Each of the issues listed should be seen as a factor reducing productivity but at this stage none seems to be a "major" factor other than in a small proportion of worksites. It is notable that lost time due to industrial action has had the least impact on labour productivity of any of the factors listed. This will, however, be an area to monitor going forward as more companies embark on enterprise bargaining.

Comments by respondents provide additional insight into the issues that are of concern at a workplace level in terms of the Fair Work Act's perceived impacts on productivity. On the negative side, responses included:

> *"Productivity has started to slip due to poor morale which is fuelled by union members' influence."*

> *"High turnover of truck drivers at the start of the year meant a lot of trainees were coming on board - this has now stabilised."*

"We are beginning to be impacted by skills shortages and labour turnover."

"New employees are coming on board."

"Negotiations for an interim EBA are being complicated by new requirements on content such as flexibility clauses and 'union friendly' clauses now able to be included."

"There is a lack of any productivity aspect to wage claims."

"From a management perspective relating to efficiencies, a sound interpretation of the Fair Work Act is imperative. Time can be wasted on misinterpretation and explanation to the workforce causing some potential unrest."

"The conditions in EBAs give employees a lot more entitlements, which adds to our operational costs with no further return."

There were, however, these positive comments in relation to labour productivity under the Fair Work Act that should be noted:

"We have improved our processes."

"We have focused on efficiencies and workplace consultation regarding a systematic approach to elevating productivity."

"We have improved our management practices."

"Strike ballot requirements were positive during EBA negotiations. We have had no other concerns about the Act or reference to it since."

It is through productivity improvements that higher earnings and a stronger economy are made possible. To the extent that the Fair Work Act encourages this, it will be contributing to a better economic future. To the extent that the Act is eroding productivity or even the perception of it, it is making a higher standard of living more difficult to attain.

5 Direct engagement with the workforce

The two surveys in this research project to date have sought to identify the potential for IR arrangements and legislation to impact on employers' direct engagement with their employees. For the purposes of both surveys, "direct engagement" is defined as employers' ability to engage with employees at the workplace without the involvement of third parties such as unions. As with many other facets of a WR system, direct engagement with an enterprise workforce is critical to the maintenance of high productivity levels.

How would you describe the current level of direct engagement with your workforce?

	Extremely low	Quite low	Low	Acceptable	High	Quite high	Extremely high	
Survey date	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**Index**
April 2010	0.0	1.6	3.1	29.7	20.3	32.8	12.5	**69.5**
Oct 2010	0.0	1.5	4.5	34.3	19.4	32.8	7.5	**66.7**

As in the first survey, the vast majority of respondents to the second survey said the level of direct engagement they had with their workforce was "acceptable" or better, although it would obviously be better if the overall results were more towards the "quite high" and "extremely high" end of the table. Nevertheless, as the index shows, in the period between the first and second surveys there has been a slight falling off in the degree of satisfaction with employers' engagement levels with their workforces. The index has fallen from a level of 69.5 to 66.7, reflecting the general shift to the left (the lower end of the scale) on the table above.

The comments provided by respondents provide some indication of the workplace changes that are causing this distancing between employers and employees, but which in some cases are causing an improvement in direct engagement levels. On the negative side were comments such as these:

> *"There has been no major change but last-minute external influence of some union organisers is detrimental to the positive work done with our own workforce and offshore delegates."*
>
> *"Direct engagement has deteriorated due to a drop in morale."*
>
> *"There has been growing union interference in the workplace."*
>
> *"Due to currently under way good faith bargaining, direct employee engagement has been affected."*

There have, however, been some improvements noted by respondents in this area although, as with other facets of the survey, these have come in the form of management finding ways to deal with unions rather than a more positive environment overall. Positive comments include:

> *"Greater management resources and training for mid-level managers has led to greater engagement."*

"The creation of employee consultative committees has increased direct engagement levels."

"There has been limited union interference during this time."

A productive workplace is dependent on building a harmonious relationship between management and employees. To the extent that the Fair Work Act becomes an obstacle to this aim, the greater the difficulty will be in achieving the kind of IR environment that employers need and can operate most effectively within.

6 Unfair dismissal

The Fair Work Act's unfair dismissal laws took effect on 1 July 2009, extending statutory protections to all award-covered employees with more than six months' continuous service with an employer (including regular and systematic casuals).

For employees of small businesses (those employing fewer than 15 people), the qualifying period for unfair dismissal protection is now 12 months' continuous service.

Tribunal reviews of management decisions to dismiss employees is costly in terms of workplace productivity and performance as well as managerial time, not to mention the payments of compensation that often accompany successful unfair dismissal claims.

However, a major issue for employers is the prospect of being ordered to reinstate a dismissed employee after the employment relationship is no longer salvageable. It is to probe these issues that answers have been sought from AMMA member companies in the unfair dismissal area.

Please describe your level of satisfaction with the current unfair dismissal legislation.

	Totally dissatisfied	Very dissatisfied	Somewhat dissatisfied	Neither satisfied nor dissatisfied	Somewhat satisfied	Very satisfied	Totally satisfied	
Survey date	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**Index**
April 2010	1.6	15.9	14.3	60.3	4.8	3.2	0.0	**43.4**
Oct 2010	6.0	10.4	16.4	58.2	6.0	1.5	1.5	**43.1**

The high level of dissatisfaction with the Fair Work Act's system of unfair dismissal recorded in the first survey has been almost identically reflected in the results of this second survey. The index for satisfaction with the current unfair dismissal legislation has remained low in the latest survey at 43.1 out of a potential 100.0, unchanged for all practical purposes from the 43.4 in the previous survey.

Just 9.0% of respondents to the latest survey described themselves as being in any way "satisfied" with the current unfair dismissal arrangements, almost unchanged from the 8.0% recorded in the previous survey. Another 58.2% took a middle position in the latest survey, being "neither satisfied nor dissatisfied", which again is virtually unchanged from the 60.3% in the previous results. Finally, there were the 32.8% of respondents in the latest survey who described themselves as being in some way "dissatisfied" with the current unfair dismissal arrangements, slightly higher than the 31.8% that said they were in some way "dissatisfied" in the previous survey.

Has your organisation dismissed any employees in the past six months?

Yes	No
(%)	(%)
86.6	13.4

The latest survey results indicated that 86.6% of employers had dismissed employees during the six-month survey period. The question, therefore, was whether those dismissals had led to an unfair dismissal claim being brought.

Of those dismissed, approximately what proportion has filed an unfair dismissal claim?

None	Some	Most	All
(%)	(%)	(%)	(%)
64.5	32.3	3.2	0.0

As the results show, in almost two-thirds of respondent businesses there were no unfair dismissal claims lodged even though employees had been dismissed. And while in around one-third of businesses an unfair dismissal claim was lodged, in no respondent firm did it happen in all cases.

What has happened to the number of unfair dismissal claims at your organisation in the past six months?

Declined	Stayed the Same	Increased	Don't Know
(%)	(%)	(%)	(%)
4.6	72.3	20.0	3.1

As the data show, the number of unfair dismissal claims has risen in 20% of respondent businesses (which is not the same as there having been a 20% increase in unfair dismissal claims). The data point to the likelihood that unfair dismissal legislation is becoming more entrenched and more widely known as increasing numbers of employees go down this road following dismissal. It could also reflect the opening up of the unfair dismissal jurisdiction for employees of businesses with 15 or more employees as distinct from businesses with more than 100 employees under Work Choices.

It could also be a result of the redundancies the resource sector experienced during the economic downturn in 2008 and 2009, which meant a higher number of employees was made redundant than would normally be the case.

During the past six months, has your organisation paid money to a former employee to avoid going to Fair Work Australia or having an arbitrated decision against it in response to an unfair dismissal claim?

	Yes	No
Survey date	**(%)**	**(%)**
April 2010	30.0	70.0
October 2010	25.8	74.2

The results in the above table show that the incidence of "go away" money is still a factor in 25.8% of workplaces that received unfair dismissal claims in the latest survey period, although this is down from 30% in the earlier survey.

How could the unfair dismissal legislation be changed to remove incentives for employees to seek this type of "go away" money?

Survey respondents were then asked to propose solutions to remove any legislative incentives for employees to seek a financial settlement in return for withdrawing their unfair dismissal applications. Responses included:

> *"In most unfair dismissal applications there has been an expectation that the employer will pay 'go away' money in order to resolve the matter. The legal fees involved in going to arbitration are extremely high so we tend to agree to settle at conciliation in order to avoid arbitration."*

> *"Increased application fees; costs being awarded in cases of unsubstantiated claims; and the removal of lawyers from the system."*

> *"Holding a preliminary hearing or review to determine the merits of the case before filing of the application is accepted, along with an increased filing fee."*

> *"Removing the ability of high income earners to seek [unfair dismissal] remedies before Fair Work Australia."*

> *"Enabling the contract of employment to reflect the maximum amount payable in the event of an unfair dismissal."*

> *"Making applicants put up a bond of $1,000 to weed out the genuine cases."*

Do you think daily hire employees should be prevented from bringing unfair dismissal claims?

Yes	No	Don't know
(%)	**(%)**	**(%)**
67.2	25.4	7.5

The data in the above table show that more than two-thirds of respondents believe daily hire employees should be prevented from bringing unfair dismissal claims, while only a quarter believe daily hire workers should have access to the unfair dismissal jurisdiction.

If you have been involved in telephone conciliation of unfair dismissal claims, how does it compare with face-to-face conciliation?

More effective than face-to-face	Equally as effective as face-to-face	Less effective than face-to-face	Too soon to tell	Not applicable
(%)	(%)	(%)	(%)	(%)
1.5	7.7	24.6	9.2	56.9

As the data in the table above show, 24.6% of respondents found telephone conciliation of unfair dismissal claims less effective than face-to-face conciliation, while 7.7% found it equally as effective and 1.5% found it more effective. Some 56.9% of respondents answered "not applicable", presumably because they had not had any interaction with the new telephone conciliation system for unfair dismissals, via which the vast majority of claims are now conciliated.

On the subject of telephone conciliation of unfair dismissal claims, one participant in the latest focus group said:

> *"I do appreciate that from the commission's perspective they've got a lot of cases on and to deal with those most efficiently, to get things to happen and make them work, a telephone call in the first place might be helpful to achieve an outcome. In our case, it did achieve that outcome and basically it would have been the same in a formal setting. So, I see that as being a helpful way of avoiding people having to travel, and that's the other reason why in my mind it's a positive, is that when you've got people travelling on different shift rosters around the country, it's easier to try to work through those things in that process."*

General comments about the current unfair dismissal framework

Negative comments made by respondents to the latest survey about the current unfair dismissal laws include:

> *"The inconsistency of tribunal decisions generates confusion and lowers any sense of clarity or certainty."*

> *"Increased access has led to increased claims and time required to deal with those matters."*

> *"The relevant legislation via certain mechanisms (i.e. award covered workers) still allows high income earners such as those earning amounts significantly higher than the income threshold to bring unfair dismissal claims."*

> *"It is easier to make a claim. The attitude in society has changed to a view that: everyone owes me something; what can I get for free; I'm not to blame for my own actions because …; not accepting that they are doing something wrong and therefore the manager is disciplining them, not bullying or discriminating against them."*

> *"Judgement in hearings has been inconsistent and therefore gives employees and legal firms more hope for payments/compensation."*

> *"The new legislation and increased union activity support these types of claims."*

> *"There is increased access to the [unfair dismissal] system for high-income employees."*

"There have been changes to the legislation and an increased awareness by employees of these rights."

It was also pointed out in focus group discussions that many IR managers were not knowledgeable about unfair dismissal laws. The Fair Work Act's changes to the former unfair dismissal provisions may thus in many ways be in the "too early to tell" category in terms of their impact on resource sector employers and employers generally, but the early signs are not encouraging. One focus group participant noted the potentially serious implications of unfair dismissal proceedings:

"Generally, the people that are being dismissed know they are being dismissed for a reason … But if we don't get every dot point in line before we dismiss them, we know that they've got 14 days and they're going to go unfair dismissal. The biggest fear … is that … we get an order for reinstatement."

Another made a suggestion on how to structure the system so as to reduce the amount of managerial time devoted to defending unmeritorious unfair dismissal claims:

"We'd like to see a bond put up by any individual that wants to claim unfair dismissal, and a worthwhile bond. If you lose the case, you lose your bond, but more than that, if it's proven to be a frivolous case, he or she can be had for expenses.

"Generally speaking, we will ensure we don't get ourselves in a position of an unfair termination. We'll do everything to stay away from that in a sensible way. But if we are going to go there, if the decision is made to terminate employment, then I want to be there before the decision is made to make sure our ducks are in order and that we can stand up in any court and have an argument that a person is wasting your time, my time and everyone else's time coming to this venue for a discussion.

"Many cases I've been involved in have just been a pure and utter waste of time. There is nothing [for the applicant] to lose."

Some survey respondents, however, did not blame the legislation for unfair dismissal applications but put the onus squarely on employers and their HR departments:

"The legislation deals with the end result of poor HR and IR practice. If you cop an unfair dismissal application then you deserve it for not putting the hard yards in during the management of your employees."

"It always boils down to two things – the cost of potentially defending a claim and the level of mutual accountability when dismissing someone."

"We have seen no impact. We have dismissed people who deserve to be dismissed with no problems; the same as we did under previous rules."

"As our workforce is new, the unfair dismissal protection for employers within the first six months has been to our benefit. This situation will probably change as the workforce moves beyond the first six months of tenure."

"There has been no change and this is not a big issue for us as we dismiss rarely and only after exhaustive internal review."

"We can work within the current structure."

"We've done several redundancies and had no repercussions nor accusations of unfair dismissal."

"We do not change our processes, which ensure that a thorough, fair investigation and disciplinary process is used that is in alignment with our values. If this results in dismissal, then it is due to the facts at hand and the seriousness of the situation. The same process is used regardless of income level or length of service."

"There is now better education of site staff in dealing with a termination."

As one focus group participant said:

"We have dismissed people in the six-month period but we've had no comeback because we do it right."

7 Right of entry

The Fair Work Act changed right of entry laws on 1 July 2009 with, among other things, the removal of the concept of "parties bound" by agreements and awards. Unions now have the right to enter a workplace based on their eligibility rules, even if they are not bound by an agreement or award covering that workplace.

The Fair Work Act thus provides more extensive right of entry provisions that allow unions to enter worksites whether there are members on the premises or not. There is only a requirement that potential members be present for unions to gain entry for discussion purposes. There is a formal procedure that must be followed to gain entry and there was initially some uncertainty amongst employers about the procedure. But even as employers get used to the new system, the reality is that union visits have become more commonplace and demanding of more management resources.

Please rate your level of concern with the current right of entry laws.

None whatsoever	Minimal	Slight	Some	Significant	High	Extremely high	Index
(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)
3.0	3.0	6.0	40.3	16.4	22.4	9.0	**61.3**

The data above indicate a strong level of concern about the right of entry provisions in the Fair Work Act. In particular, 47.8% of respondents in total indicated their level of concern with right of entry laws was "significant" or greater. Within that, 31.4% of respondents, almost one in three, expressed either a "high" or "extremely high" level of concern. This is an area that has created a degree of apprehension within the sector and which is at the sharp end of IR where tensions often flare. It is also an area that places an extra administrative burden on company resources given that someone has to be there to escort the permit holders around the site on each and every visit.

What has happened to your level of concern with right of entry laws in the past six months?

Diminished	Stayed the same	Increased
(%)	(%)	(%)
1.5	47.8	50.7

There had been only limited experience with the new provisions at the time the initial survey was conducted but, in the latest survey, more than half of the respondents (50.7%) said their level of concern with the Fair Work Act's right of entry provisions had increased in the past six months. That is, concerns are growing as the legislation becomes more familiar, because as employers become more familiar with the legislation, so too do unions who have used the legislation to further entrench themselves in the workplace.

The fact that more than half of the respondents cited growing concerns with right of entry laws, compared with just 1.5% that cited diminished concerns, makes right of entry the area in which employer concerns have grown the most during the past six months.

During the past six months, how often did union officials visit your workplace(s) for IR purposes (excluding visits under occupational health and safety laws)?

	Daily	Weekly	Monthly	Occasionally	Rarely	Never	Don't know
Survey date	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**
April 2010	3.2	3.2	14.3	30.2	15.9	31.7	1.6
Oct 2010	0.0	10.4	19.4	37.3	Not asked	32.8	Not asked

The data in the table above show that in the latest survey, union visits occurred at least once a month in 29.8% of respondent companies (an increase on the 20.7% of respondents that cited at least monthly visits in the previous survey). In only 32.8% of workplaces in the latest survey did union officials not visit at all, which is around the same number that received no visits from unions in the previous survey (31.7%).

While the number of respondents experiencing daily union visits has declined from 3.2% in the earlier survey to zero in the latest survey, the number receiving weekly visits has risen substantially from 3.2% in the earlier survey to 10.4% in the latest one.

The number of respondents citing "occasional" union visits has also increased from 30.2% to 37.3% between the two surveys.

Did a greater number of different unions enter your worksite(s) during the survey period compared with the previous six months?

Yes	No	Don't know
(%)	**(%)**	**(%)**
40.0	55.6	4.4

The change in the experience of businesses in this area since the Fair Work Act began is shown by the above data, which indicate that at 40% of worksites there were a greater number of different unions visiting compared with the previous survey period.

How did the number of union visits for industrial purposes during the past six months compare with the number of visits in the previous survey period?

Significantly more	Slightly more	About the same	Slightly fewer	Significantly fewer	Don't know
(%)	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**
8.9	42.2	46.7	2.2	0.0	0.0

Not only are the number of different unions entering worksites in the sector increasing, but the number of visits is also increasing for around half of AMMA's surveyed membership. More than half of the respondents to the latest survey (51.1%) said there were more union visits taking place in the latest survey period compared with the previous one. In only 2.2% of worksites was the number of union visits said to have fallen compared with the previous survey period.

How often did union officials enter your worksite(s) during the survey period for the following purposes?

	Often	Occasionally	Never
Reason for visit	**(%)**	**(%)**	**(%)**
Bargaining	26.8	46.3	26.8
Recruitment/consultation/discussion	16.3	58.1	25.6
Consultation about workplace change	8.1	27.0	64.9
Alleged award or agreement breaches	2.8	27.8	69.4
Other	0.0	31.8	68.2

The most common reason for union visits in the latest survey period was for "bargaining" purposes, with 26.8% of respondents saying unions visited "often" for this reason and 46.3% saying they visited "occasionally" for that purpose.

This was followed by visits for "recruitment/consultation/discussion" purposes, which 16.3% of respondents said happened "often" and 58.1% said happened "occasionally".

Reasons cited less commonly but nevertheless reported were for "consultation about workplace change" (cited "often" or "occasionally" by 35.1% of respondents) and "alleged award or agreement breaches" (cited "often" or "occasionally" by 30.6% of respondents).

"Other" reasons for which unions entered worksites during the survey period included:

- safety/OHS issues;
- demarcation issues;
- to discuss adverse action claims;
- to hold discussions with contractors;
- to meet with management;
- to introduce new officials to the workforce; and
- in one case, to meet with the workforce to discuss employees' dissatisfaction with the union itself.

Please indicate the level of disruption union officials caused to your operations during their visits.

	No disruption whatsoever	Minor disruption	Moderate disruption	Significant disruption	Total disruption
Survey date	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**
April 2010	30.2	51.1	16.3	2.3	0.0
Oct 2010	13.3	66.7	17.8	0.0	2.2

In the previous survey, some disruption from union actions while exercising right of entry was reported by 69.7% of respondents. This has now risen to 86.7% of respondents in the latest survey citing at least some disruption, a quite significant increase. Some of this disruption appears to be at the level of what one might describe as irritation or minor disruption (cited by 66.7% of respondents to the latest survey), but 2.2% of respondents chose the category "total disruption" at the worksites they managed as a result of union visits whereas no respondent chose that category in the previous survey.

It was noted during the latest focus group that union site visits were increasingly absorbing managerial time. There was also a concern that union entry was being used as a means to stir up trouble at the workplace. One focus group participant said that while they had not yet experienced good faith bargaining and, therefore, bargaining-related visits and protected industrial action:

> *"We might have a different view after we've been through that. Again, just watching what goes on around the place and listening to people speak about a few different things, that has been a difficult area and confirms comments on right of entry that have been made to me."*

The focus group participant said other employers in the mining industry had reported they had had no union entry for two years but were now having six to eight visits a week:

> *"It's a pain in the backside because you've got to look after the site, which means chauffeuring those people around the place."*

In the past six months, have union visits become:

Less disruptive	Neither more nor less disruptive	More disruptive
(%)	**(%)**	**(%)**
0.0	80.0	20.0

Respondents were then asked to directly compare the level of disruption associated with union visits between the two survey periods. What is significant about the figures above is that the level of disruption is rising. The data show that 20.0% of respondents experienced increased disruption due to union visits in the latest survey period. The data portray a situation in which union site visits are adding to the level of workplace disruption, an important impediment to workplace productivity and continuous improvement. As one respondent put it, the Fair Work Act meant there was

increased union access to non-unionised workforces, and access was for a very broad range of reasons. This, the respondent said, was "time consuming to manage".

Major concerns with right of entry laws

Below is a sample of respondent comments in response to a question asking them to outline their major concerns with the Fair Work Act's right of entry laws:

> *"The changes have encouraged a major increase in right of entry claims hidden as safety issues."*
>
> *"It is difficult to fully ascertain the eligibility rules of each and every union; they are difficult to obtain, read, and make sense of."*
>
> *"Increased access can lead to increased agitation by unions and them wanting more access. This has resulted in additional resources being required to manage right of entry requests and to deal with union delegates when they arrive; they are often quite aggressive."*
>
> *"Union officials are not notifying the company when they are visiting our vessels."*
>
> *"Union representatives can have access to a workplace with limited protection to employers."*
>
> *"The concern is that a union can now gain lawful access to a site based upon the scope of their rules as distinct from any real connection to the workforce or workplace."*
>
> *"Unions are embarking on fishing expeditions under the guise of 'safety'."*
>
> *"There have been multiple right of entry applications. There are also concerns about access to personnel records and requests to access other areas of the site impacting on freedom of choice of employees, e.g. the unions want access to lunchrooms shared by members and non-members."*
>
> "*It hands increased power to unions."*
>
> *"Non-unionised workplaces are treated the same as unionised workplaces, with no regard to the lack of union membership at a workplace."*

Also cited as major concerns were:

> *"A lack of knowledgeable union delegates and also the site's capability to manage union entry."*
>
> *"The disclosure of employee information of non-union members and unions' ability to investigate/access records without substantiation."*
>
> *"A lack of knowledge among site-based employees as to how to handle potential visits from union representatives, as well as the scope for misinterpretation regarding the willingness to negotiate."*
>
> *"The opportunity for aggressive unions to disturb existing arrangements with employees and other unions."*

"No need for unions to give reasons for right of entry due to safety allegations. Dual right of entry permits to organisers from different unions are also an issue, ie. an organiser from one union can hold a permit to represent another union. Another issue is Fair Work Australia determining where meetings have to be held [in the case of a dispute over an employer-designated meeting place], for example, in crib rooms."

The Fair Work Act gives unions access to a worksite and to workers who may not necessarily be their members. The reality is that this greater access has turned into a greater level of disruption and in many cases an escalation of industrial discord. It has also led to the potential for demarcation disputes between unions, which were cited as a significant and emerging problem by survey respondents:

"Any union can have right of entry whether they have members or not on the simple fact that they have some right to cover the type of work being done, but so do other unions. It is all very confusing as to who has what right."

"As multiple unions have potential coverage, it means an increase in entries and therefore time taken out of my day."

"The unions spend a lot of time bagging out the other unions which causes confusion in the workforce. This in turn increases the entries on-site so that each union can maintain face, strength, and counter attack."

"The entries are about who can be the union with the most members and not about the employees."

One participant in the latest focus group cited "coverage issues" as well as issues with "more infighting between unions".

Another participant said "we didn't see any sign of it happening initially" when the Fair Work Act was first introduced, but demarcation disputes between unions were starting to become a feature of the resources sector:

"That's starting to heat up again under the new legislation because of the rights of unions, whether they've got a member or not, if the work that's being done would be covered by that union. That's where you have the problem because not only this union but that union has the same coverage opportunity."

It is clear from the above findings and comments based on on-the-ground experience that the Fair Work Act's right of entry provisions are creating increased tensions at the workplace and are causing more and more disruptions to productive work. It is also clear that the industry believes it has not yet seen the tip of the iceberg in terms of the increased potential for union demarcation disputes to arise.

8 Workplace flexibility

The ability to make workplace changes in order to lower costs and increase production volumes is one of the most critical factors in raising workplace productivity. An IR system that is flexible enough to be applied in an industry such as the resources sector where unusual arrangements are the norm is crucial to the success of a project.

The Fair Work Act changed the rules about the sorts of flexible arrangements that could be agreed between employers and employees. Flexibility clauses became mandatory in all enterprise agreements negotiated after 1 July 2009 and in all modern awards from 1 January 2010.

The stated aim of the flexibility clauses was to enable individual flexibility arrangements (IFAs) to be negotiated between an employer and an individual employee in order to vary specific agreement and award terms to achieve added flexibility.

This research project seeks to track the experience of employers in the mining and resources sector as they deal with IFAs and mandatory flexibility clauses as part of the new enterprise bargaining system, as well as any difficulties being encountered on this front since the Fair Work Act was introduced.

How satisfied are you with your current level of workplace flexibility?

	Totally dissatisfied	Moderately dissatisfied	Somewhat dissatisfied	Neither satisfied nor dissatisfied	Somewhat satisfied	Moderately satisfied	Totally satisfied	
Survey date	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**(%)**	**Index**
April 2010	8.3	6.7	20.0	51.7	6.7	5.0	1.7	**44.0**
Oct 2010	1.5	12.1	18.2	40.9	16.7	7.6	3.0	**49.0**

Although working from a low base, the data show improved satisfaction with the level of workplace flexibility experienced by employers in the sector in the latest survey period as compared with the previous one. There were fewer respondents dissatisfied with arrangements in relation to workplace flexibility and more who were expressing satisfaction with the available arrangements.

In the previous survey, only 13.4% of respondents indicated they were "somewhat satisfied" or better with the levels of workplace flexibility they were able to achieve under the Fair Work Act. That proportion has now risen to 27.3%, a quite significant change.

At the other end of the table, those expressing "total dissatisfaction" with workplace flexibility has fallen from 8.3% to 1.5% between the two survey periods. This again indicates there is a greater understanding by participants of the new arrangements and a greater ability to work things out in a mutually beneficial way.

The overall satisfaction index in this area has risen from 44.0 to 49.0. It must still be emphasised, however, that a satisfaction rating of 49.0 out of a potential 100.0 in such a crucial area remains far too low.

During the past six months, have the worksites that are subject to this survey had the opportunity to negotiate IFAs with individual employees to try to achieve extra workplace flexibility?

Yes	No	Don't know
(%)	(%)	(%)
11.9	80.6	7.5

As can be seen from the table above, during the latest survey period only 11.9% of respondents had the opportunity to negotiate IFAs with individual employees to try to achieve extra workplace flexibility. Despite that, it seems that many employers are not feeling confident that when it comes time to negotiate an IFA the desired flexibility will be able to be achieved.

If you answered 'yes' to the question above, was the aim of achieving extra workplace flexibility under the IFA achieved?

Yes	No	Too soon to tell
(%)	(%)	(%)
11.1	33.3	55.6

As the table above shows, only 11.1% of respondents who had had the opportunity to negotiate an IFA with an individual employee felt they had achieved their aim of obtaining extra workplace flexibility. Another 33.3% felt no extra workplace flexibility was achieved under the IFA, while another 55.6% reserved judgement on the success or otherwise of a negotiated IFA.

In your experience, what is the value of IFAs in achieving genuine workplace flexibility?

Significant value	Some value	No value	Can't say	Not applicable
(%)	(%)	(%)	(%)	(%)
3.0	25.8	28.8	12.1	30.3

The crucial question here is how well do IFAs enable genuine workplace flexibility to be achieved. The figures above show that only 3.0% of respondents believed IFAs provided "significant value" in achieving genuine workplace flexibility, while another 25.8% found IFAs to be of "some value". However, 28.8% found them of no value and a further 12.1% were unable to make a determination at this stage. It should be noted that 30.3% of respondents answered "not applicable" to this question, meaning they had no experience on which to judge the effectiveness of IFAs at this point in time.

So here, too, although there is no consensus, there is reason to believe that IFAs can provide an avenue for increased workplace flexibility. It may not be all that might be hoped, but they do make certain arrangements possible that might not otherwise have been achievable under the constraints of the legislation itself. Nevertheless, the fact that two in five AMMA members responding to the survey said IFAs were of no value is a serious concern.

In which areas of the Fair Work Act, if any, are there obstacles to achieving the workplace flexibility you require? Please give details.

Responses were sought from those who had experienced obstacles to achieving flexibility under the new regime as to what the specific issues were they had encountered. Their responses on the issue of mandatory flexibility clauses included:

> *"The removal of individual agreements has meant a significant change to longstanding arrangements with some sectors of the workforce. Unions have the ability to refuse to have any meaningful flexibility clauses in collective agreements."*
>
> *"Tokenism – the flexibility clause is there but is inaccessible."*
>
> *"Not being able to make flexibility agreements part of condition of employment offers."*
>
> *"With union involvement in agreements, the flexibility clause is being amended to require advising unions where the clause is sought to be used."*
>
> *"The Fair Work Australia model flexibility clause requirement is a joke because there is no obligation to include the 'model' clause. Unions can pressure employers via bargaining to render the clause meaningless. Workplace change is still resisted in certain profitable sectors of our business with no pressure or imperative to drive improvement."*
>
> *"Individual flexibility arrangements (IFAs) are not relied upon by an employer. As when making greenfield agreements, unions are ensuring that IFAs are restricted to very basic items, e.g. single day leave absences etc. It is difficult for an employer to even consider an IFA as an alternative as there is no reliability nor continuity as an employee can opt out of the arrangement by giving notice."*
>
> *"During enterprise agreement negotiations it is hard to reach agreement with parties - even on the model clause."*

Respondents' comments in relation to other aspects of the Fair Work Act where they were having issues with flexibility included:

> *"Transfer of business provisions."*
>
> *"Moving personnel between vessels."*
>
> *"Minimum hours."*
>
> *"The inability to allow employees to cash out as much annual leave as they may request."*

On the positive side, some respondents were happy with the flexibility they were able to achieve under the Fair Work Act. In response to being questioned about their major concerns with flexibility, their responses included:

> *"None. We have flexibility with our workforce."*
>
> *"None are apparent."*

However, from the majority of the above comments and findings, it appears the problem with IFAs continues to be the refusal of union negotiators to allow broad improvements in the flexibility that is able to be achieved on individual worksites. There is a strong degree of frustration exhibited in employers' comments about the lack of support they get from the legislation in achieving genuine workplace flexibility that is more often than not resisted or co-opted by unions.

9 The National Employment Standards

As of 1 January 2010, employers and employees in the national workplace relations system became subject to a new set of ten minimum employment conditions known as the National Employment Standards (NES).

AMMA member companies who responded to the first and second surveys in this project were asked about their experience with the operation of the NES, including any requests for flexible working arrangements that had been made by their employees.

The biggest concern cited by respondents in relation to the NES in this latest survey was maximum weekly hours being capped at 38 plus reasonable additional hours, followed by the right to request flexible working arrangements.

During the past six months, is the number of requests you received for flexible working arrangements under the new right to request provisions of the NES:

Decreasing	Staying about the Same	Increasing	Too early to tell	Not applicable
(%)	(%)	(%)	(%)	(%)
0.0	31.3	11.9	22.4	34.3

As the data in the table above show, in no instance in the latest survey has the number of requests for flexible working arrangements fallen, while in 31.3% of respondent companies the number has stayed the same. However, in one workplace in nine (11.9%), the number of requests for flexible working arrangements has grown. In the remaining half of respondent companies it was either "too early to tell" or the question was not applicable, presumably because there had been no requests by employees for flexible working arrangements under the NES during the survey period.

What types of flexible arrangements did employees request during the survey period?

Type of arrangement requested	(%) of respondents to this survey question	(%) of total respondents to the survey
The ability to return to work part-time	69.0	38.2
Ability to work from home	54.8	30.3
Ability to return to a different role following parental leave	19.0	10.5
Job sharing arrangements	19.0	10.5
An extra year of unpaid parental leave	16.7	9.2
Other	14.3	7.9

The middle column of figures in the table above is restricted to just those companies that had received a request for flexible arrangements during the latest six-month survey period, while the right-hand column provides the proportion of total respondent companies that had received such requests. The latter set of data provide a better estimate of the frequency overall of such requests at workplaces in the sector.

The data show that the most common request for flexible arrangements under the NES during the survey period was the ability to return to work on a part-time basis (cited by 38.2% of total respondents); followed by the ability to work from home (cited by 30.3%); the ability to return to a different role following parental leave (10.5%); job sharing arrangements (10.5%); and an extra year of unpaid parental leave (cited by 7.9% of total survey respondents).

"Other" requests for flexible arrangements during the survey period included for:

- Rostered days off in exchange for accrued time in lieu; and
- A four-day working week.

Major concerns with the NES

Asked to expand further on their major concerns with the operation of the NES, member responses included:

> *"The interpretation of annual leave entitlements has been problematic given that employees can potentially work side by side on the same roster yet have different entitlements given the application of several modern awards and the Fair Work Act."*
>
> *"Concerns that the capped 38 plus reasonable additional hours may be open to change, i.e. what is reasonable could change over time."*
>
> *"Uncertainty about maternity leave."*
>
> *"The way unions are immediately targeting this area of the Fair Work Act to minimise what we can be flexible about. This is resulting in employees seeking us to agree to flexibility outside of the agreement."*
>
> *"The inability to take/deduct personal/carer's leave on a public holiday."*
>
> *"Redundancy payments to persons still employed on the same site, doing the same job but now working for another contractor due to the contract with the existing employer being terminated whereby the existing employer pays the employee redundancy payments. This is not fair and reasonable!"*
>
> *"Printing the Fair Work Information Statement is a waste of trees."*

It should be noted that this second survey was the first full six-month period under which the NES had been in operation, having been introduced six months later than the rest of the Fair Work Act on 1 January 2010. Future surveys are expected to give a better picture of what is happening in this area.

10 Modern awards

Modern awards took effect on 1 January 2010, which for many employers changed the nature and number of awards covering their operations.

Issues around award coverage can be complex, particularly in the resources, energy and construction sectors and will often depend on the classification structure peculiar to each award.

On this basis, the survey sought answers from AMMA member companies to a series of questions on the impact of the modern awards system as well as their understanding of it and how it applied to their operations.

Do you know which modern awards apply to your organisation or worksite as of 1 January 2010?

	Yes	No
Survey date	**(%)**	**(%)**
April 2010	75.9	24.1
October 2010	89.6	10.4

The response to this question shows a growing familiarity with the modern awards system and an increased knowledge of which awards now apply to businesses. The latest survey shows that 89.6% of respondents are aware of which modern awards apply to their organisation, up from 75.9% in the previous survey.

How does the number of awards now applying compare to the number that applied prior to 1 January 2010?

Higher	Same	Lower	Don't know
(%)	**(%)**	**(%)**	**(%)**
20.9	44.8	17.9	16.4

The data in the above table show that the number of awards applying post-1 January 2010 is higher than the number of awards applying prior to that date in 20.9% of respondents' workplaces, which is slightly above the 17.9% in which the number of awards applying was now lower.

The aim of reducing the number of awards that employers have to apply to their workplaces, which is the stated aim of award modernisation, has obviously not succeeded in all cases. The 16.4% who did not know whether the number of awards now applying was higher or lower is itself an indication of the uncertainties that still abound in this area.

The kinds of real world complexity that these changes have introduced is made apparent by the comments from respondents provided below:

> *"Understanding of the new modern awards and determining those which apply to our workforce has involved significant legal costs from our external lawyers to get agreement on which awards cover our workforce."*

"It has been a convoluted process delivering very little real advantage for the effort invested."

"I know which two major modern awards apply but we still have enterprise-specific awards in operation plus an unidentified potential exposure to other new modern awards not obvious from our work to date."

"Transitional provisions and added employment costs, e.g. casual loadings are concerns."

"The phasing in of allowances and clauses over a long period of time is leading to confusion."

"There are gaps, particularly in relation to clerical workers. The clerical award only goes so high in skills sets then the majority are not covered by an award as industry awards don't necessarily apply either."

"The ability to annualise salaries differs from some awards to others."

Nevertheless, there are other respondents who specifically stated they had no major concerns with the application of modern awards at this stage. Such comments included:

"No major concerns."

"No concerns at this point other than having to reference several awards, the National Employment Standards and the Fair Work Act in conjunction with the award."

Based on the above results and comments, this is an area for which no early judgements are possible since there is a need for time to ensure that the contours of the new arrangements are properly understood and embedded. Future surveys are expected to shed more light on the permanent rather than transitional issues related to the operation of modern awards in the sector.

11 Industrial action

When the Fair Work Act took effect on 1 July 2009, it changed the rules governing protected industrial action, including the circumstances under which employees could take protected action and the rules for lawfully approving it.

This section of the survey sought information on how prevalent industrial action was at resource sector workplaces under the new regime, as well as the level of satisfaction AMMA members had with the remedies available to stop or prevent such action.

What types of industrial action were taken at your workplace(s) during the past six months?

Type of industrial action taken	(%)
None	86.4
Protected stoppages – agreement making	6.1
Protected stoppages – alleged safety concerns	4.5
Unprotected stoppages	4.5
Unprotected work bans	4.5
Other	4.5
Protected work bans	1.5

As the table above demonstrates, the vast majority of respondents to the survey (86.4%) did not experience industrial action of any kind on their worksites during the latest six-month survey period. However, this means there was industrial action of some kind in one workplace out of seven (or 13.6% of workplaces). Moreover, since the totals in the rest of the table sum to more than 100, on some worksites there was more than a single instance or type of industrial action taken during the survey period.

Amongst those experiencing industrial action during the survey period, the most common type was protected stoppages in the context of enterprise bargaining. This was followed by protected stoppages over alleged safety concerns, unprotected stoppages and unprotected work bans.

"Other" types of industrial action that occurred during the survey period included:

- Stopwork meetings; and
- Unions/protesters not allowing employees to cross a picket line.

How satisfied are you with the remedies available to employers under the Fair Work Act to stop or prevent *protected* industrial action?

	Totally dissatisfied	Very dissatisfied	Somewhat dissatisfied	Neither satisfied nor dissatisfied	Somewhat satisfied	Very satisfied	Totally satisfied	
Survey date	(%)	(%)	(%)	(%)	(%)	(%)	(%)	**Index**
April 2010	17.5	28.1	22.8	22.8	5.3	1.8	1.8	**30.5**
Oct 2010	7.5	13.4	23.9	50.7	1.5	3.0	0.0	**39.1**

This question refers to the ability of the Fair Work Act to stop or prevent protected industrial action under circumstances where it becomes protracted or endangers the economy or a significant part of it. The survey results in what is arguably the area of highest importance for a successful and productive IR system – the rules governing protected industrial action – indicate an improvement in satisfaction relative to the views expressed in the survey six months ago.

The index level for the latest survey measuring employers' satisfaction with the remedies against protected industrial action is 39.1 out of a potential 100.0 – a poor result. However, this index level has risen from the 30.5 recorded six months ago, so there has been some improvement. But the high level of dissatisfaction and the low level of satisfaction is clear from the table.

The proportion of respondents who were "somewhat satisfied" or better with the Fair Work Act's remedies against protected industrial action totalled a mere 4.5% of respondents in the latest survey, fewer than the 8.9% in the previous survey. The area in which the greatest shift has occurred is that more than half of the respondents in the latest survey (50.7%) said they were "neither satisfied nor dissatisfied" with the remedies for protected industrial action compared with 22.8% in the previous survey.

Significantly, the proportion of respondents who were either "very dissatisfied" or "totally dissatisfied" with the remedies available has fallen from 45.6% of all respondents in the earlier survey to 20.9% in the latest one. This is a significant improvement on that scale, although still leaves a good deal of discontent.

How satisfied are you with the remedies available to employers under the Fair Work Act to stop or prevent *unprotected* industrial action?

	Totally dissatisfied	Very dissatisfied	Somewhat dissatisfied	Neither satisfied nor dissatisfied	Somewhat satisfied	Very satisfied	Totally satisfied	
Survey date	(%)	(%)	(%)	(%)	(%)	(%)	(%)	**Index**
April 2010	15.8	31.6	14.0	24.6	8.8	3.5	1.8	**32.8**
Oct 2010	7.5	14.9	17.9	49.3	7.5	3.0	0.0	**40.6**

A very similar outcome is found in relation to employer satisfaction with the Fair Work Act's remedies against "unprotected" industrial action. Here, the index has risen from 32.8 to 40.6, showing an improvement in satisfaction generally but also a continuing unsatisfactory score.

In the latest survey, 10.5% of respondents indicated some degree of satisfaction with the remedies available to deal with unprotected industrial action, a smaller proportion than the number that expressed a degree of satisfaction in the previous survey (14.1%). The key differences in the latest survey are that there are fewer who are dissatisfied with the remedies against unprotected industrial action, with the proportion who are "neither satisfied nor dissatisfied" having risen from 24.6% in the previous survey to 49.3%.

General comments on industrial action

During the latest focus group discussions, one participant said on the issue of employees taking protected industrial action under the new legislative regime:

> *"The current legislation is good because employees/unions have to apply to Fair Work Australia for a secret ballot before they can take protected industrial action. The unions have to go through some hoops before they can get there. It makes it a bit more difficult for them ... But I feel that the current climate is probably ripe for them to take it."*

Another focus group participant said:

> *"Once the economy settles down, that's when you'll have more industrial disputes I believe... It's when times get tough that you start to have issues with unions."*

12 Enterprise bargaining and agreement making

On 1 July 2009, the Fair Work Act introduced new rules for the enterprise bargaining process known as the "good faith bargaining" principles.

It also introduced new rules for agreement making including extending the definition of "matters pertaining to the employment relationship" to matters relating to not just the relationship between an employer and its employees but to the relationship between an employer and its employees' union.

This part of the survey is designed to track the experience of employers in the resources sector with the new rules as companies engage in enterprise bargaining and agreement making under the Fair Work Act.

Have you engaged in good faith bargaining since the Fair Work Act was introduced on 1 July 2009?

Yes	No
(%)	(%)
52.2	47.8

The data show that just over half of all respondents (52.2%) have engaged in good faith bargaining since the introduction of the Fair Work Act on 1 July 2009. This means that 47.8% of respondents are yet to fully interface with the new agreement making and good faith bargaining rules.

How does the ease of bargaining under the Fair Work Act compare to your experience of bargaining under the Workplace Relations Act?

	(%) of respondents who have experienced bargaining under the Fair Work Act	(%) of total respondents
Significantly easier	0.0	0.0
Easier	0.0	0.0
No significant difference	27.3	18.5
More difficult	29.5	20.0
Significantly more difficult	18.2	12.3
Too soon to tell	25.0	16.9

The responses to this question are shown in the table above, firstly, as a proportion of those who have actually experienced bargaining under the Fair Work Act to date and, secondly, as a percentage of total respondents. Irrespective of which base is used, no respondent in the latest survey has reported finding bargaining under the Fair Work Act easier than it was under the Workplace Relations Act. Similarly, no respondent in the first survey reported bargaining being "easier" in any way under the Fair Work Act.

The latest results did, however, show that amongst those who had engaged in the bargaining process to date, 29.5% found bargaining "more difficult" and a further 18.2% found the new bargaining regime "significantly more difficult". Thus, from amongst the respondents who had engaged in good faith bargaining, nearly half (47.7%) found the bargaining process more difficult under the Fair Work Act. Even then, there was a further quarter of the latest sample who stated it was "too soon to tell" if bargaining would be more difficult under the new legislation.

Please indicate your level of concern due to any difficulties experienced while bargaining for the following types of industrial agreements.

	No concern	Some concern	Major concern
Type of agreement	**(%)**	**(%)**	**(%)**
Single enterprise greenfield agreements	53.5	27.9	18.6
Multi-enterprise non-greenfield agreements	61.5	30.8	7.7
Single enterprise non-greenfield agreements	37.5	56.3	6.3

The results in the table above show the difficulties being encountered in negotiating all three types of agreements available under the Fair Work Act – single enterprise greenfield agreements, multi-enterprise non-greenfield agreements and single-enterprise non-greenfield agreements. Almost half of all respondents that had engaged in bargaining under the Fair Work Act to date (46.5%) cited either "some concern" or "major concern" with bargaining for single enterprise greenfield agreements. Single enterprise non-greenfield agreements were also proving more difficult for resource sector employers to negotiate, with 56.3% citing "some concern" over bargaining for those types of agreements and 6.3% citing "major concerns". Negotiating multi-enterprise non-greenfield agreements was also of "some" concern for 30.8% of relevant respondents and of "major concern" to 7.7%.

The data show that the agreement type most commonly cited as a "major concern" is single enterprise greenfield agreements.

How concerned are you with each of the following bargaining activities under the Fair Work Act?

	No concern	Some concern	Major concern
Type of bargaining activity	**(%)**	**(%)**	**(%)**
The number of union-specific clauses demanded	19.7	37.7	42.6
Union involvement in bargaining	14.5	51.6	33.9
Protected industrial action during negotiations	22.6	45.2	32.3
The number of bargaining representatives involved	24.2	46.8	29.0
Working hours devoted to the bargaining process in general	21.0	61.3	17.7
The ability to communicate directly with your employees during bargaining	40.3	41.9	17.7
Time devoted to tribunal processes and applications	21.3	63.9	14.8
Time devoted to meetings and negotiations	19.4	67.7	12.9

The largest area of evident concern amongst employers in the good faith bargaining context from the above list of issues is with the number of union-specific clauses demanded by unions during enterprise negotiations. Almost as large are employer concerns with union involvement in bargaining and protected action during negotiations.

Indeed, what this list of issues confirms is that there are a host of impediments to negotiating effectively under the new system, some large and others small, but all of them significant.

While some of the previous survey's questions were not included in this latest survey, it is worth noting that in the first survey conducted in April, the data in the table below were recorded in response to questions which asked whether a series of bargaining parameters had increased, decreased or remained unchanged under the new regime.

Direction of movement in each form of bargaining activity April 2010			
	Increased	No change	Decreased
	(%)	(%)	(%)
Working hours devoted to the bargaining process in general	90.0	10.0	0.0
Time devoted to meetings and negotiations	80.0	20.0	0.0
Union involvement in bargaining	65.0	35.0	0.0
Protected industrial action during negotiations	25.0	75.0	0.0
The number of bargaining representatives involved	55.0	45.0	0.0
Direct communication with employees	20.0	65.0	15.0
The number of union-specific clauses demanded	68.4	31.6	0.0
Time devoted to tribunal applications	68.4	31.6	0.0

It is worth noting in the table above that 90% of respondents to the previous survey said the number of working hours they had had to devote to the bargaining process in general had increased under the Fair Work Act, while 80% said the time devoted to meetings and negotiations had increased.

In terms of the specific union-centric clauses that bargaining representatives have pursued in negotiations since the start of the Fair Work Act, and how often the different types of clauses are pursued, the following table provides some insights.

During enterprise bargaining since the Fair Work Act began, have union bargaining representatives pursued any of the following types of clauses?

	April 2010	October 2010
Type of clause pursued	**(%)**	**(%)**
Trade union training leave	76.5	60.0
Right of entry clauses	64.7	55.0
Training levies	Not asked	47.5
Payroll deductions of union fees	52.9	47.5
Paid union meetings	Not asked	45.0
Income protection insurance	Not asked	42.5
Shop stewards' rights clauses	58.8	35.0
Clauses relating to the use of contractors	29.4	32.5
Requirement for an onsite union office	11.8	20.0
Union picnic days	35.3	17.5

The table above provides an indication of the kinds of issues that have been put on the table by union bargaining representatives during enterprise bargaining negotiations since the Fair Work Act began.

Please note that the figures in the above table do not add up to 100% as some respondents experienced more than one type of listed claim being pursued by unions during the respective survey periods.

Here we see a comparison between the types of clauses being pursued in the April 2010 survey period compared with the October 2010 period. However, it should be noted that it will be a largely different sample of respondents answering these questions each time as each company will only be involved in enterprise bargaining once every three years or so.

So while we are generally seeing decreases in the number of respondents saying unions have sought each specific type of clause for inclusion in enterprise agreements (with the exception of the requirement for a union office on-site, the prevalence of which has increased), these figures should be seen as indicative only of what is being sought and should not be seen as showing any trend one way or the other at this point in time.

"Other" types of clauses sought in the latest survey period included:

- Union-specific dispute and consultation clauses; and
- Clauses specifying full-time paid employees will undertake union activities.

Aside from a couple of areas, all of the above types of clauses are of direct benefit to unions themselves but provide no direct benefits to employers or employees. It is clear that unions are using the agreement making provisions of the Fair Work Act to entrench themselves deeper into the structure of the workplace and into the bargaining process in order to make their own positions more secure.

The effect on productivity of entrenching unions within the structure of the workplace is an issue that will need to be carefully watched, particularly as many of these types of clauses have no productivity benefits whatsoever and in many cases have the opposite effect.

As noted by one participant in the latest focus group who commented on the renewed emergence of union-centric clauses in agreements:

> *"Those were things that were in some areas fought for by the unions, but it's a matter of whether you as a company want to go and take them on for it. And you know it doesn't come from the guys, it comes from the union to strengthen the union position and to make life easier for the union leaders rather than be of true benefit for employees."*

Another focus group participant said on the subject of payroll deductions of union dues:

> *"There's no real pain in doing a payroll deduction. And knowing that someone is paying a union membership fee to us would make no difference whatsoever. The policies and procedures and approach of how we manage etc is done on the basis of some professionalism. Because some outside party might be having some influence, they can be doing that whether they have a payroll deduction or not. Once you put a payroll deduction in place it's a simple process. It's a bit of paperwork to start off with, which is not onerous, and really if someone is a union member, so what? If someone's not or someone is, it really doesn't make a difference to someone running the place."*

How much of a concern is the existence of such clauses in your enterprise agreements?

	No concern	Some concern	Major concern
Type of clause	**(%)**	**(%)**	**(%)**
Requirement for onsite union office	23.1	13.5	63.5
Clauses relating to the use of contractors	18.9	22.6	58.5
Paid union meetings	13.5	36.5	50.0
Union picnic days	32.7	21.2	46.2
Shop stewards' rights clauses	19.2	36.5	44.2
Trade union training leave	15.4	42.3	42.3
Training levies	20.8	37.7	41.5
Right of entry clauses	15.1	47.2	37.7
Payroll deductions of union fees	38.5	40.4	23.1
Income protection insurance	44.2	48.1	7.7

As the data above show, the types of clauses that were cited most often as a major concern by employers were, in order:

- the requirement for an onsite union office;

- clauses relating to the use of contractors, such as restricting the use of labour hire and independent contractors; and
- having to pay staff to attend union meetings.

The entrenching of unions within the workplace is a very large concern to employers within the resources sector who will not be encouraged by these results.

At this stage, the requirement to have a union office on-site and clauses restricting the use of contractors are among those being pursued least often by unions despite being of the greatest concern to employers. One could expect that, as the legislation becomes more familiar and more businesses embark on enterprise bargaining, unions will take full advantage of their ability to pursue all of the above types of clauses more often and in many cases as part of their standard log of claims.

On the subject of trade union training leave clauses, one focus group participant asked:

"An employer has to pay for that, so why would you want that in an agreement?"

During the past six months, was your organisation affected by any of the following applications to Fair Work Australia brought by another bargaining representative? Tick all that apply.

Type of application to Fair Work Australia	**(%)**
None	76.6
Dispute resolution applications	15.6
Secret ballot applications for protected industrial action	12.5
Scope order applications to determine coverage of a proposed agreement	7.8
Majority support applications to determine if a majority of employees wanted to bargain with you as the employer	4.7
Other	3.1
Applications for bargaining orders where another bargaining party accused you of failing to meet the good faith bargaining requirements	1.6

The table above shows the proportion of respondents who were affected by applications to Fair Work Australia during enterprise bargaining in a number of categories. It is worth noting that most respondents (76.6%) were not affected by any applications to Fair Work Australia during the survey period.

Of those that were, the most frequent type of application employers were subject to was dispute resolution applications followed by secret ballots for protected industrial action and scope orders. While the number of applications being brought by union and employee bargaining

representatives is not high, it is an area to watch, particularly as unions grow more used to the types of applications they can bring and how best to maximise their chances of success.

In addition to the types of applications listed, "other" types of applications employers were affected by during the survey period included "general protections / adverse action" claims in the context of enterprise bargaining.

During the past six months, did another bargaining representative obtain any of the following orders from Fair Work Australia?

	(%) of respondents who answered this question	(%) of total survey respondents
Dispute resolution orders	33.3	4.7
Bargaining orders	22.2	3.1
Scope orders	11.1	1.7
Majority support determinations	0.0	0.0

As the data in the above table show, union and employee bargaining representatives obtaining orders from Fair Work Australia affected a significant number of employer respondents who had been involved in enterprise bargaining. The most frequently cited type of order obtained was dispute resolution orders (cited by 33.3% of relevant respondents), followed by bargaining orders (22.2% of relevant respondents) and scope orders (11.1% of respondents).

No majority support determinations were obtained by employee or union bargaining representatives against respondents during the latest survey period.

During the past six months, has your organisation lodged any of the following bargaining-related applications with Fair Work Australia? Tick all that apply.

	(%) of respondents who answered this question	(%) of total survey respondents
Dispute resolution applications	8.3	6.6
Applications to stop or prevent PROTECTED industrial action	8.3	6.6
Applications to stop or prevent UNPROTECTED industrial action	6.7	5.3
Applications for bargaining orders where you have alleged another bargaining party was failing to meet the good faith bargaining requirements	1.7	1.3
Scope order applications to determine the coverage of a proposed agreement	0.0	0.0

The table above provides an indication of the proportion of respondent businesses who themselves lodged applications with Fair Work Australia for orders in relation to enterprise bargaining under the Fair Work Act. The two main areas where employers applied for orders were:

- dispute resolution applications; and
- applications to stop or prevent protected industrial action, both of which occurred in 6.6% of respondent companies taken as a proportion of the entire survey sample.

What has happened to your level of concern in the enterprise bargaining and agreement making area in the past six months?

Diminished	Stayed the same	Increased
(%)	(%)	(%)
1.6	73.4	25.0

Significantly, a quarter of respondents to the latest survey (25.0%) said their level of concern with the Fair Work Act's enterprise bargaining and agreement making rules had increased during the survey period, while a negligible proportion (1.6%) said their concerns had diminished. The bulk of respondents (73.4%) said their concerns with good faith bargaining and agreement making had stayed the same compared with the previous survey period.

Please rate your level of satisfaction with the federal industrial relations tribunal Fair Work Australia.

Totally dissatisfied	Very dissatisfied	Somewhat dissatisfied	Neither satisfied nor dissatisfied	Somewhat satisfied	Very satisfied	Totally satisfied
(%)	(%)	(%)	(%)	(%)	(%)	(%)
1.6	12.5	20.3	54.7	9.4	1.6	0.0

As the table above shows, there is a significant level of dissatisfaction with the federal IR tribunal Fair Work Australia among employers in the resources sector.

Only 11.0% of respondents said they were in any way "satisfied" with the tribunal in terms of its processes and decisions, while 34.4% indicated some degree of dissatisfaction, including 12.5% who were "very dissatisfied" and 1.6% who were "totally dissatisfied".

The majority of respondents (54.7%) were in the "neither satisfied nor dissatisfied" category.

Moreover, as the table below shows, the level of dissatisfaction with Fair Work Australia is on the increase.

What has happened to your level of satisfaction with Fair Work Australia in the past six months?

Diminished	Stayed the same	Increased
(%)	(%)	(%)
17.7	75.8	6.5

The data show that during the past six months, just 6.5% of respondents experienced an increase in satisfaction with the performance of Fair Work Australia, while there was a fall in satisfaction on behalf of 17.7% of respondents. Three quarters of respondents (75.8%) cited no change in their level of satisfaction with Fair Work Australia, although this does not mean the level of satisfaction was high to begin with.

Being perceived as maintaining a proper balance between the employee and employer industrial parties must remain an important element in the approach taken by Fair Work Australia in mediating between employer and worker concerns if these levels of satisfaction are to improve.

Consistency in decision-making in order to provide the respective parties with greater clarity around what they can expect might also help to improve satisfaction levels.

Please indicate your major concerns with the Fair Work Act's enterprise bargaining and agreement making rules.

Respondents were asked to comment on their major concerns with the Fair Work Act's enterprise bargaining and agreement making rules. A sample of comments is provided below:

> *"The complexity of the rules makes the process challenging and is likely to require all companies regardless of size to engage external resources including legal advice."*

> *"The new good faith bargaining rules require significant employer resources, new expertise and better planning. There is a risk of being left standing by unions."*

> *"There is uncertainty over what will or will not be considered 'bargaining in good faith' and what constitutes a valid or reasonable claim as interpreted by Fair Work Australia, particularly where claims are excessive."*

> *"Problems include procedural matters, lack of clarity and consistency in [Fair Work Australia] decisions, interpreting procedural requirements and communications with employees."*

> *"The ability of unions to become covered by the agreement on the basis of a statutory declaration stating they have a union member on site is a problem."*

> *"The underlying focus [in enterprise bargaining] is on pleasing and strengthening the unions whether or not the workforce is actually supportive of union involvement."*

> *"There has been the removal of our ability to have a direct [bargaining] relationship with our people."*

Other concerns cited included:

> *"Effectively automatic union involvement in the agreement making process."*

> *"Having to bargain with unions, i.e. no right to bargain directly with employees."*

> *"The number of unions that could be sitting at the bargaining table pushing their own agendas."*

> *"The high level of detail required to ensure you comply with the Act and the ease with which agreements fail to be approved. The Better Off Overall Test (BOOT) does not appear to be being applied as an overall test but rather each individual clause is tested stand-alone."*

> *"Multiple bargaining agents."*

> *"Ambit claims are not properly legislated against."*

An indicator for the future was expressed by one focus group participant in discussing the problems they had experienced in trying to re-negotiate their enterprise bargaining agreement:

> *"I just can't get the three unions in the same room together. They've got a head of agreement document signed saying 'yes' they'll co-operate in redrafting the EBAs, but I can't get them in the same room together to discuss it."*

Another focus group participant said:

> *"Every one of the employers I've talked to has said there are more problems than they thought [with enterprise bargaining under the Fair Work Act] and that it's not an easy process to work through."*

13 Adverse action (the General Protections)

The Fair Work Act significantly broadened the Workplace Relations Act's anti-discrimination and freedom of association provisions by introducing the 'General Protections'. Under the General Protections, an employer is prohibited from taking adverse action against an employee "because" the employee has a "workplace right".

Such a "workplace right" can include:

- an entitlement to the benefit of an industrial instrument;
- the ability to initiate proceedings under a workplace law; or
- the ability to make a complaint or enquiry to seek compliance with a workplace law.

Where such adverse action is alleged to have been taken for a prohibited reason, an applicant has 60 days to bring a claim in cases where the action resulted in termination of employment. They have six years to bring a claim where the adverse action does not result in termination of employment.

Has your organisation received any adverse action claims from current, prospective or former employees since the Fair Work Act was introduced?

Yes	No
(%)	(%)
10.4	89.6

Although this is a very new element of IR practice that builds significantly on the former anti-discrimination provisions of the Workplace Relations Act, 10.4% of respondents have already received an adverse action claim from a current, prospective or former employee.

This is an area of the IR system that is only likely to expand as time passes and as employees and unions test the boundaries of the sorts of claims they can bring. This will become a greater problem for business as time goes by, with employers in the resources sector already expressing a great deal of concern about this area of regulation.

How would you rate the level of awareness in your workforce of their increased capacity to bring an adverse action claim?

Low	Moderate	High	Don't know
(%)	(%)	(%)	(%)
60.6	30.3	1.5	7.6

Adding to the likelihood that the incidence of adverse action claims will grow in the period ahead, the assessment of 60.6% of respondents to the latest survey was that awareness of such a facility was at present "low" among their employees. Only 1.5% of respondents believed awareness of the ability to bring an adverse action claim was "high", while another 30.3% rated employee awareness in this area as "moderate".

What has happened to your level of concern with the adverse action provisions in the past six months?

Diminished	Stayed the same	Grown
(%)	(%)	(%)
1.5	72.7	25.8

The data in the table above show there has been an increase in concern amongst 25.8% of respondent employers about the Fair Work Act's adverse action provisions.

The introduction of the Fair Work Act on 1 July 2009 was likely to be the first time IR practitioners had been exposed to the breadth of the concept of adverse action, so it is not surprising to find the level of concern on the rise at this point in time.

Asked to state their major concerns with the Fair Work Act's adverse action / general protections provisions, responses from survey respondents included:

"This is a new and emerging ground for wrongful dismissal."

"It has opened the door very wide for employees and potential employees to lodge a claim against an employer. There is also the reverse onus of proof requirement which places higher requirements on the employer."

"It is an untested area, compensation is uncapped and it covers areas that are already covered by other legislation, e.g. anti-discrimination legislation."

"Adverse action not resulting in dismissal should have the same timeframe of 60 days as that resulting in dismissal. This could improve the management practices of employers and raise awareness of the impacts of undertaking adverse action against employees. The six-year timeframe is too long. Perhaps those who were responsible for taking the adverse action would no longer be associated with the employer."

"An employee who raises an issue within the workplace and it is resolved and then at a later time receives disciplinary action in relation to their unacceptable work performance (ie. for a reason that has nothing to do with the issue raised) can lodge an adverse action claim stating the two matters are linked."

Other issues cited with the adverse action provisions included:

"The scope for abuse and the growth in creative litigation once it is entrenched and people hear of 'success' stories."

"A lack of clarity about scope."

> *"The potential ability for the employees of contractors to take adverse action claims against the principal contractor."*

This is an area the Federal Government will need to monitor closely to ensure it does not become even more of an obstacle to doing business efficiently. There are also obviously major problems around the six-year time limit for bringing some claims, by which time many of the staff involved in the alleged adverse action will have moved on from the company.

14 Supplementary questions

This latest survey included a number of supplementary questions dealing with specific details of the Fair Work Act and areas of interest to employers in the resources sector. These questions may or may not be repeated in future surveys but are designed to give an indication of employer views in specific areas of interest and to inform AMMA's ongoing policy activities.

Individual Flexibility Arrangements (IFAs)

Do you believe unions should be able to view individual flexibility arrangements (IFAs) that have been negotiated between an employer and an individual employee after they have been negotiated?

Yes	No	Don't know
(%)	(%)	(%)
7.5	91.0	1.5

As can be seen from the table above, a huge 91.0% of respondents said unions should not be able to view IFAs that have been negotiated between an employer and an individual employee after they have been negotiated. Clauses giving unions such rights are an emerging area of demand in enterprise negotiations in the sector.

As one survey respondent said:

> *"This places undue pressure on the employee and discourages the departure from standard terms in the collective agreement for fear of attention being drawn to them."*

Another said:

> *"They are a matter for the individual and should only be accessible if the individual gives their approval."*

Would you support a four-year maximum end-date for IFAs rather than the current capacity for either party to terminate them with 28 days' notice?

Yes	No	Don't know
(%)	(%)	(%)
50.7	22.4	26.9

The above table shows that more than half of the survey respondents (50.7%) support a four-year maximum end date for IFAs rather than the ability for an employee or employer to terminate them at 28 days' notice.

One respondent to the survey said:

> *"This would provide greater certainty for both parties and would encourage the making of such arrangements where genuine flexibility could be agreed upon."*

Another said:

"They need to be in place for a fixed term rather than subject to termination on a whim!"

This is something the Federal Government should consider in its upcoming review of IFAs, which AMMA has asked to be brought forward to 2011 rather than 2012.

Protected industrial action

Should the right to take protected industrial action extinguish at an income level of $113,800 (i.e. the current unfair dismissal income threshold)?

Yes	No	Don't know
(%)	(%)	(%)
65.6	15.6	18.8

The table above shows strong support for the contention that the right to take protected industrial action should extinguish at an income level of $113,800, which is the current unfair dismissal threshold.

Would you like to have the right to refuse to allow employees to turn up for work in cases where they have notified that they are taking protected industrial action but instead present for work expecting to be paid?

Yes	No	Don't know
(%)	(%)	(%)
77.6	4.5	17.9

The table above shows strong support for employers having the choice of whether to allow employees to work as usual when they turn up after having notified they would take protected industrial action on that day. The use of this industrial tactic enables employees and unions to cause inconvenience to the employer during enterprise bargaining by announcing industrial action but then failing to take the action and turning up at work without notice and expecting to be paid. The employer is put to the cost and inconvenience of having to make other arrangements while the employee loses no pay as a result.

Greenfield agreements

Has the lack of a non-union greenfield agreement option delayed the start-up of any of your organisation's projects?

Yes	No	Too soon to tell	Not applicable
(%)	(%)	(%)	(%)
13.4	31.3	22.4	32.8

As you can see from the table above, 13.4% of survey respondents stated that the lack of an ability to make a greenfield agreement without the involvement of at least one union has delayed the

start-up of resources sector projects. This figure, while it might seem low, in light of the huge amounts of money invested in such start-up projects should be ringing alarm bells with the Federal Government.

Would you like the option of entering into a non-union greenfield agreement subject to approval from Fair Work Australia and the application of the Better Off Overall Test?

Yes	No	Don't know
(%)	(%)	(%)
73.8	7.7	18.5

Following on from the previous question, the table above shows that 73.8% of all survey respondents would like the option of being able to make a greenfield agreement without the involvement of unions but which would be subject to approval by Fair Work Australia and vetted against the Better Off Overall Test to ensure prospective employees are not disadvantaged.

Transfer of business provisions

Are the Fair Work Act's transfer of business rules deterring you from employing the existing employees of a business you are taking over?

Yes	No	Too soon to tell	Not applicable
(%)	(%)	(%)	(%)
9.0	17.9	22.4	50.7

As the table above shows, 9% of total respondents to the survey said the Fair Work Act's transfer of business rules were deterring them from taking on the employees of an existing contractor in the event they took over a business. If the responses are taken as a proportion of respondents to which the transfer of business rules actually apply, the proportion is much higher. This should be cause for concern for the Federal Government as the aim of the transfer of business provisions was presumably to protect the employment of existing employees in the event a company was taken over by another employer.

Would a six-month end date for transferable industrial instruments rather than their open-ended application following a transfer of business make employing the workers of the previous owner more attractive?

Yes	No	Don't know	Not applicable
(%)	(%)	(%)	(%)
40.0	1.5	23.1	35.4

As the table above shows, 40% of all respondents to the latest survey, and an even more significant proportion of those to whom the provisions were directly applicable, said a six-month end date for transferable industrial instruments following the sale of a business (rather than their open-ended application under the Fair Work Act) would make it more attractive to take on the existing employees of the company they had just taken over. This is something the Federal Government should take on board when considering legislative changes to the Fair Work Act.

In commenting on major concerns with the Fair Work Act's transfer of business provisions, one survey respondent stated:

> *"They do not allow for more commercial arrangements to be pursued and they perpetuate outdated and potentially uncompetitive arrangements."*

Another said:

> *"The 'associated entity' basis for connection means a transfer of business can occur where an employee voluntarily resigns from one employer and commences employment with another, simply because of corporate ownership."*

And another stated simply that:

> *"Taking on other EBAs is encouraging us not to employ other contractors' employees."*

What has happened to your level of concern with transfer of business provisions in the past six months?

Diminished	Stayed the same	Increased
(%)	(%)	(%)
1.8	78.2	20.0

One survey respondent in five (or 20%) said their concern over the Fair Work Act's transfer of business provisions had increased during the survey period. Again, this is an area of significant concern to those businesses operating in the resources sector who may be avoiding taking on existing employees because of these concerns.

Labour turnover

What is your current rate of staff turnover at the worksite(s) that are subject to this survey?

0 to 5%	6% to 10%	11% to 15%	16% to 20%	21% to 25%	26% to 30%	31% to 35%
No of respondents	No of respondents	No of respondents	No of respondents	No of respondents	No of respondents	No of respondents
10	10	11	3	5	3	1

In answer to the question above, the responses were varied and have been reproduced in the table. The most commonly cited rate of turnover by respondents was between 11% and 15%, followed by 0% to 5% and 6% to 10%. One respondent had a turnover rate of nearly 35%, which was the highest rate recorded by any respondent.

How does the size of your current workforce compare to the size it was six months ago?

Significantly increased	Increased	Stayed the same	Decreased	Significantly Decreased
(%)	(%)	(%)	(%)	(%)
7.9	28.9	48.7	13.2	1.3

Due to AMMA members' interest in comparing the turnover of their workforce to others in the sector, the latest survey asked respondents how the current size of their workforce compared to the size it was six months ago.

As can be seen from the table above, nearly half of all respondents (48.7%) said the size of their workforce had "stayed the same" compared with six months ago, while 28.9% said it had "increased" and 7.9% said it had "significantly increased" in the past six months.

At the other end of the spectrum, 13.2% said their workforce had "decreased" while another 1.3% said it had "significantly decreased" compared with six months ago.

Please estimate how your current rate of staff turnover compares to turnover rates 12 months ago.

Significantly increased	Increased	Stayed the same	Decreased	Significantly Decreased
(%)	(%)	(%)	(%)	(%)
7.5	23.9	55.2	11.9	1.5

As the data from the above table show, 23.9% of respondents said their level of staff turnover had "increased" compared with 12 months ago, while 7.5% said it had "significantly increased". It is fair to say that the lower the level of turnover the better it is for the employer, so the fact that 31.4% of respondents said their turnover rate had in some way increased is worth noting.

The reasons given by AMMA members as to what they put any increase in labour turnover down to included:

- The global financial crisis;
- Labour market competitiveness;
- A lack of work;
- Significantly higher rates of pay in the offshore oil and gas sector coupled with an ongoing shrinking labour pool;
- Downsizing in our organisation;
- Employees again having choices and leaving for another role if the conditions are better; and
- Work/life balance and increased pressure.

Approximately what proportion of your current workforce are new employees who have been engaged in the past 12 months?

0%	25%	50%	75%	100%
(%)	(%)	(%)	(%)	(%)
19.7	63.2	10.5	5.3	1.3

As the table above shows, of the respondents to the latest survey, 63.2% said around 25% of their workforce had been engaged in the past 12 months. This either reflects a high rate of turnover in which workers that leave have to be replaced, or an expanding business in which new employees are being recruited while the size of the existing workforce may or may not vary.

In which occupational areas is staff turnover the highest?

Responses to the question about which specific occupational areas were seeing the highest turnover of labour included:

- Engineers;
- Professional and technical employees;
- Tradespeople;
- Maintenance workers;
- Seafarers;
- Processing technicians;
- Middle management;
- Surveyors;
- Office personnel; and
- Occupational health and safety professionals.

15 Methodology

The analysis in this report is based on a comprehensive survey of the IR/HR managers of businesses operating in Australia's resource and construction sectors. The survey upon which this report is based was conducted from the end of September 2010 through to the third week of October 2010 by the Australian Mines and Metals Association (AMMA), the peak representative organisation for the resources sector dealing with IR issues in Australia.

AMMA distributed a survey questionnaire among its member companies, receiving 76 completed surveys from companies within its membership. Fifty-two of the respondent companies employed 200 or more people, while 22 of them employed between 20 and 199 people. Only two respondents employed less than 20 people. The respondents were resource and construction-based companies with members in every part of the industry and across the whole of Australia. It is a representative sample of the industry.

In order that comparisons can be made between relatively complex data sets at different periods of time, an index has been used on some of the tables included in this report. The index weights each of the responses to particular questions in order to provide an index measure out of 100.0. If 100% of respondents were clustered in the lowest category, the index measure would be zero. If 100% were clustered in the highest category, then the index measure would be 100.0. Movements in the index provide a measure of the central point of the data that balances those which are higher against those which are lower.

The conclusions reached in this report are based entirely on the stated experiences of those who are closely involved in IR practice in the sector. Not all survey questions have been reproduced in this report.

Each survey question has been designed in an open way to allow every possible perspective to be shown. The use of the survey questionnaire technique was chosen to ensure that the analysis was recognised as being as objectively determined as possible.

The latest survey questionnaire was supplemented by a focus group held in Perth on the afternoon of 20 October 2010 after the survey results were tabulated and assessed. The individuals included in the focus group had responded to an open invitation by AMMA to attend and had completed the latest survey questionnaire.

Where the survey identified issues relating to the Fair Work Act that required additional information, the participants in the focus group were asked to expand on the nature of such issues and explain in greater detail the specific circumstances they were encountering. The aim of the focus group was to clarify the actual problems encountered and to enhance the understanding of the IR issues being faced by the sector at this point in time.

The present aim is to conduct this survey on a six-monthly basis. If the project continues beyond this first year (2010) it will be a three-to-five year study consisting of two surveys and two focus groups each year, performed six months apart. The aim of such an ongoing study will be to assess trends in IR practice and outcomes in the resources and construction sectors. Rather than it being a one-off study looking at the situation at a single moment in time, the aim is to provide a longer term perspective on how the impact of the legislation is changing in order to enable policy makers to see how the legislation is operating "on the ground" over time.

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