School of Economics, Finance and Marketing / College of Business

The AMMA Workplace Relations Research Project – A Survey Based Analysis

Third Report

A research report prepared by

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1. Executive summary

Three surveys six months apart have been conducted of AMMA members since the Fair Work Act began as part of the *AMMA Workplace Relations Research Project*, an ongoing comprehensive study of the long-term impacts of the Fair Work Act on resource industry employers.

The results of the third and latest survey, which are the subject of this report, reveal that the overall workplace relations (WR) environment experienced by businesses in the minerals and resources sector deteriorated between the first and second surveys (conducted in April and October 2010 respectively) and again between the second and third survey, which was conducted starting in April 2011.

This now confirms what seemed to be the case at the time of writing the previous report, that 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.

The WR environment satisfaction index, which had already fallen from 75.9 for the first survey to 65.1 for the second, in this latest survey further deteriorated to a level of 61.7.[1]

Also of serious concern is the fall in the index for employers' perceptions of levels of labour productivity, which has also declined in each of the surveys since the first. In an industry where wages growth is accelerating due to industry expansion, the scarcity of skilled labour and the increased militancy of unions – the third issue in many ways encouraged by the first two – we find that it is becoming more difficult to raise labour productivity in the industry.

The index on labour productivity had been relatively positive in the first survey but had fallen in the second. It has now fallen again and is moving into dangerously low terrain. The index level in April 2010 was 66.7; by October 2010 it had fallen to 61.3; and in this latest survey it had descended again to reach a figure of 56.7. This is a level that is only barely acceptable.

The types of industrial agreements covering the 74 respondent companies in this survey, many of them pre-dating the Fair Work Act, are:

- Fair Work Act single enterprise non-greenfield agreements;
- Fair Work Act single enterprise greenfield agreements;
- Workplace Relations Act employee collective agreements;
- Workplace Relations Act employer greenfield agreements;
- Workplace Relations Act union greenfield agreements;
- Australian Workplace Agreements (AWAs);
- Individual Transitional Employment Agreements (ITEAs);
- Common law contracts;

[1] See the final section 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.

- Modern award-based terms and conditions;
- Enterprise award-based terms and conditions; and
- Old Industrial Relations Act agreements.

The agreements that pre-date the Fair Work Act will progressively expire between 2011 and 2014, with the peak of agreement expiry for survey respondents occurring in 2013.

There is thus a rising potential for industrial disputation to accelerate over the foreseeable future as one agreement after another comes up for renewal. Therefore, the data in this report detailing the difficulties associated with enterprise bargaining indicates that industrial turmoil may increase before it subsides again later in the decade as agreements are locked in.

Areas the survey covered

The latest survey was divided into a number of sections:

- the industrial relations (IR) environment;
- labour productivity;
- direct engagement with the workforce;
- workplace flexibility;
- enterprise bargaining and agreement making;
- industrial action;
- wage increases;
- union demarcation issues; and
- adverse action.

It is a survey that has, moreover, been constructed so that the results speak for themselves. It is constructed as a set of survey questions asked in a neutral manner to determine the circumstances on the ground at the present time. The quantitative survey results have been supplemented by qualitative comments by those who responded to the survey questionnaire.

What is evident from the data is that there are serious concerns with the operation of the IR system in virtually every area covered by this survey. In each of the areas covered, there are major concerns expressed in both the survey data and the comments made by respondents.

At a time when greater flexibility and higher productivity are needed, we find there is less of both in the resource industry than required. It is becoming evident that employers are being frustrated in their efforts to make positive changes at the workplace, and that union activity is becoming a greater burden and more difficult to deal with. The problems caused by adverse action claims are beginning to take on a more entrenched appearance, with a larger proportion of firms now finding themselves in the line of sight for greater numbers of claims.

The Fair Work Act was seen in a relatively positive light when it was first introduced. There is now a large degree of disillusionment setting in as greater familiarity with the Fair Work Act creates

many additional problems for management, and increasingly for those employees who wish to do a good day's work in the industry without being brought into the fray of militant industrial action.

A thorough and detailed review of the Fair Work Act is urgently needed to forestall the problems that are highlighted on every page of this report.

Key findings of the report

- **Resource industry employers** have a myriad of long-term concerns with the Fair Work Act that are not going away with time, ranging from unions being more visible and vocal in the workplace to the lack of ability to make individual agreements and the lack of a non-union greenfield agreement option;
- **Direct engagement levels** with the workforce have declined in the industry in each of the three surveys conducted as part of this research project;
- **Employers' level of satisfaction** with workplace flexibility, while increasing, remains at low levels;
- **47.1 per cent of respondents** have found enterprise bargaining under the Fair Work Act in some way 'difficult';
- **The time having to be devoted** to meetings and negotiations during enterprise bargaining has increased under the Fair Work Act compared to the Workplace Relations Act for 71.9 per cent of respondents;
- **The lack of a non-union greenfield agreement option** has delayed the start-up of projects at 11.5 per cent of respondent companies since the Fair Work Act began, with a further 34.6 per cent saying it was 'too soon to tell' if projects would be delayed;
- **40 per cent of respondent companies** that have engaged in bargaining under the Fair Work Act have conceded to union claims during greenfield agreement negotiations that they would otherwise not have, solely to obtain an agreement;
- **82.6 per cent of respondents** have not been able to negotiate productivity improvements in exchange for wage increases under the Fair Work Act;
- **29.3 per cent of respondents** have already experienced flow-on effects to their enterprise from recent wage and allowance outcomes in the offshore oil and gas industry. A further 41.4 per cent said it was 'too soon to tell' if there would be flow-on effects for their enterprise;
- **Union demarcation issues** have increased at 27.8 per cent of respondent enterprises;
- **16.2 per cent of respondents** have received adverse action claims from former employees since the Fair Work Act took effect, while 10.8 per cent have received claims from current employees; and
- **31.6 per cent of respondents** that have received adverse action claims under the Fair Work Act say all such claims are agitated by unions.

2. The overall workplace relations environment

This first set of survey questions was designed to get a general sense of how WR conditions within the resource industry had changed since the previous survey was conducted six months earlier.

How would you describe your current workplace relations environment?

Survey date	Extremely poor (%)	Poor (%)	Less than acceptable (%)	Acceptable (%)	Better than acceptable (%)	Good (%)	Excellent (%)	Index score out of 100
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**
April 2011	0.0	4.2	9.9	29.6	28.2	23.9	4.2	**61.7**

As the data above show, since the first survey was undertaken in April 2010, there has been a clear and unmistakable deterioration in the WR environment. This deterioration is shown by the fall in the index from 75.9 when the first survey was conducted, to 65.1 in the second survey, to 61.7 in the latest survey.

The IR environment is determined in part by the efforts made onsite by management, labour and unions where they are involved. But it is also deeply affected by the IR architecture as designed and the institutional parameters set by the surrounding legislation and regulations.

The generally very positive attitude shown during the early stages of the introduction of the Fair Work Act has given way to a much less positive view of the nature of the overall workplace relations (WR) environment. It is an environment in which workplace change and productivity will be more difficult to achieve.

This downward shift in sentiment is reflected in the index result but also in the frank comments made by respondents in describing their current IR environment. To understand this shift in sentiment, it is important to appreciate the answer to the following question, which sought from respondents an indication of how they had found the experience of operating under the Fair Work Act.

Generally speaking, how have you found operating under the provisions of the Fair Work Act since it was first introduced?

Comments in response to this question included the following reasonably positive observations about the introduction of the Fair Work Act:

> *"No major impediments and no major benefits. Business has continued as usual. Teleconference facilities for conciliation conferences have been useful and have reduced time and costs associated with attending Fair Work Australia unfair dismissal hearings."*

"There have been some benefits in terms of streamlining of provisions and consolidation of award systems. Adverse action is a concern and bargaining for agreements is now harder."

"At this point, the Fair Work Act hasn't really had much of an impact at our site."

"Not much change but then we are operating under a non-union collective agreement."

"No issues as long as we keep the status quo but we don't expect to be able to do that."

"In general, the Fair Work Act has not hindered the company. However, the few claims we do get tend to drag out and cause a cost far too excessive in relation to the event or claim."

"The Fair Work Act has required a rethink of certain issues but in general terms is making little difference in the way we operate."

"It is fair, open and transparent."

The bulk of comments, however, were negative, tending to indicate either existing problems or an inventory of potential future problems that were of concern to the industry:

"Unions are more visible and vocal in the workplace. There is an increase in adverse action activity. There is also a lack of clarity around the interpretation of the legislation by Fair Work Australia."

"It is frustrating as the new laws are not yet tested 100 per cent. Different judgments from different members of the industrial tribunals are adding to the confusion."

"Industrial relations has become a lot harder, with employees being prepared to walk off the job too easily."

"The Fair Work Act is more difficult than Work Choices. The union greenfield agreement provisions are a disaster for major projects. The individual flexibility arrangement (IFA) clauses are ineffective."

"Obviously, there are far less agreement making options and therefore reduced bargaining power with unions. The unfair dismissal conciliation process is unsatisfactory as there is a reduced ability to influence matters via phone conferences. There is also increased union right of entries with no protection via agreement making options."

"It is time consuming and resource intensive."

"It is cumbersome, bureaucratic and heavily biased against employers."

As the above comments show, the changes to the IR legislation introduced with the Fair Work Act have led to a significant deterioration in the IR environment in the eyes of a great many employers. There are now greater problems in trying to organise a workplace productively while at the same time few benefits have been identified.

What are your long-term concerns, if any, with the Fair Work Act that remain unresolved now that you are more familiar with the legislation?

The following comment was amongst the replies to the above question about long-term unresolved issues with the Fair Work Act:

> *"The objects of the Act specify that individual agreements can never be fair. I think that says it all as far as the mindset of the authors is concerned. The unimpeded right of parties to take punitive industrial action in support of unsustainable claims is a recipe for economic peril for my company and the entire economy, and while proponents will point to options available to employers, these are not realistic in a competitive commercial environment. The Act facilitates actions that amount to commercial terrorism and the complete absence of balance in the form of compulsory third party involvement through mediation either within Fair Work Australia or via private mediation or conciliation, or else in the extreme through compulsory arbitration (ie final offer arbitration). This is a ticking time bomb for the economy. Significant change is needed to address this power imbalance in bargaining. It is currently as bad an imbalance as having individuals required to bargain with multinationals without some protection, which was the theme of the anti-Work Choices campaign."*

Other long-term concerns with the Fair Work Act cited by respondents were:

> *"Less productivity, more unrealistic demands by employees that are represented by unions."*

> *"The adverse action provisions appear to be too broad with long time limits for claims. The bargaining regime is still unsettled, particularly the 'good faith bargaining' principles. The bargaining representatives provisions are potentially problematic if unreasonable numbers of representatives are nominated."*

> *"Union preference clauses; the ability for unions to take protected industrial action under the guise of 'good faith bargaining'; and right of entry being biased towards multiple unions accessing the workforce."*

> *"Unions moving beyond the legislation and Fair Work Australia accepting those provisions outside the Fair Work Act. Nine out of 11 ex-union delegates sitting on Fair Work Australia."*

> *"Rights of unions/employees to pursue non-employment related matters during the bargaining process; the ability of unions / employees to leverage outcomes through lawful action; the inability to introduce employer greenfield agreements or singular instruments; and the extension of Fair Work Australia's jurisdiction in the dispute resolution process."*

"There seems to be stronger potential for third party involvement in the future whether it is warranted or not."

"The adverse action provisions. I think we're only just beginning to see how these provisions may be utilised. It is also too easy for unions to instigate protected industrial action in the bargaining process and, allied to a lack of agreement making options, this is a huge concern."

"Coming up to negotiating the next agreement and the potential to be dealing with numerous unions and bargaining agents at the same time – it seems uncontrolled."

"The liberal interpretation of right of entry requirements resulting in less control on union visits, i.e. where meetings can be held, overnight accommodation being required to be provided. Limited agreement making options. No bargaining leverage to deal with excessive claims; and the ease with which Fair Work Australia is issuing secret ballot orders. Adverse action claims."

"Increase in wages costs; limited productivity gains; increases in old style wording and claw back of allowances and union positioning."

"The good faith bargaining provisions still seem very unclear and open to interpretation based on current litigations. It is very hard to strategise on the best steps to take when we are soon to commence negotiation of collective agreements upon expiry of the current employee collective agreements."

"Interference by unions resulting in productivity loss, decreased employee engagement, decreased preferred culture, increase in negativity, increased workload for HR."

"We still remain in an undefined environment in which interest groups hold greater sway in matters relating to our employees than is warranted. The legislation is open to interpretation and therefore we are hesitant to fully engage with it."

"Inconsistency with annual leave provisions and the definitions re shift rosters as to how they apply. Potentially you could have a Mon - Fri admin employee getting five weeks' leave the same as a shift worker. Complex schedules when it comes to apprentices, trainees and supported workers. Being forced to renegotiate a new collective agreement with third parties when we have had direct engagement with employees for years. The potential disruption to critical projects and hostility it will create in a stable workplace. Right of entry provisions – we haven't seen a union rep in 10 years and then we see them twice within a month this year."

"Our ability to have union-free agreements and be free from non-value adding and ideological union influence will be removed."

"The Fair Work Act is far too open in terms of 'adverse actions'; there needs to be clear guidelines included as to what is adverse action and what isn't. The reverse ownership of proof appears to be in conflict with innocent until proven guilty."

"Even though union representation is only a very small percentage of our workforce, agreements can decrease productivity through restrictions while very large wage increases are negotiated."

"The inclusion of previously non-allowable matters being introduced into new agreements and the effect of these in the long term."

"The inability to establish project agreements for major construction works. The developing reality of adverse action. The variable interpretations appearing from Fair Work Australia decisions."

"Increasing union influence. No ability for direct engagement of employees. High $AUD. Inflated wage claims with no concomitant result in productivity. Forced to negotiate with unions. Unfair dismissal laws being accessed by highly paid employees."

As the comments above show, the most significant change arising from the introduction of the Fair Work Act has been the ability of unions to disrupt the flow of workplace activity. It appears that the effect of the legislation in the long term will be a less robust and resilient industry.

What have been the positives for your organisation, if any, arising from the introduction of the Fair Work Act?

Of those who chose to answer this question, 61.4 per cent specifically stated there had been no benefits for their organisations from the introduction of the Fair Work Act. Where a positive result was detailed, the below comments are typical of those received:

"Currently, apart from the industrial agreement changing on which to employ staff, there have been no other significant changes."

"Modern awards; the stability of the IR legislation, with changes having been relatively minor."

"Less bureaucracy in certifying agreements and maintaining the unlawful industrial action provisions to avoid wildcat type stoppages."

One respondent said of the positives of the legislation:

"Nil – it kept me employed during the GFC given the concern to the company for IR complexity."

It seems one positive from the introduction of the Fair Work Act has been increased work for IR professionals.

3. Labour productivity

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

Labour productivity for the purposes of this research has been 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 labour productivity.

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

Survey date	Extremely low (%)	Quite low (%)	Low (%)	Acceptable (%)	High (%)	Quite high (%)	Extremely high (%)	Index score out of 100
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**
April 2011	0.0	2.9	20.0	28.6	32.9	14.3	1.4	**56.7**

The issue of labour productivity is of major importance for the resource and construction industries 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 Australian economy.

The survey data above show that labour productivity has experienced a massive deterioration that has become apparent with the second and third surveys. The index has fallen a full ten points from the 66.7 recorded in the first survey to the 56.7 recorded 12 months later in the third survey in April 2011. There has been a broad sweep to the left on the table above towards a far lesser level of labour productivity.

This rapid deterioration in labour productivity is one of the most striking features of the results of this report.

4. Direct engagement with the workforce

This series of questions seeks to identify the potential for the IR legislation to impact on employers' direct engagement with their employees, either to a positive or negative degree. "Direct engagement" is defined as employers' ability to engage with employees at the workplace without the involvement of third parties. As with many other facets of a WR system, direct engagement with an enterprise workforce is seen by employers as being critical to the maintenance of high productivity levels.

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

Survey date	Extremely low (%)	Quite low (%)	Low (%)	Acceptable (%)	High (%)	Quite high (%)	Extremely high (%)	Index score out of 100
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**
April 2011	0.0	2.8	7.0	35.2	29.6	19.7	5.6	**62.2**

As in the first two surveys, the majority of respondents to the third survey said the level of direct engagement they had with their workforce was "acceptable" or better. Nevertheless, as the index shows, there has been a significant falling off in employers' degree of satisfaction with engagement levels over the period during which the surveys have been conducted. The index has fallen from a level of 69.5 in April 2010 to 66.7 in October 2010 then to 62.2 in April 2011, reflecting an unambiguous shift to the lower end of the scale.

A productive workplace is dependent on building and maintaining harmonious relationships between management and employees. To the extent that the Fair Work Act becomes an obstacle to that, the greater the difficulty will be in achieving the kind of IR environment that employers and employees need and can operate most effectively within. The evidence of a major deterioration in direct engagement levels is an extremely worrying trend.

5. Workplace flexibility

The ability to make workplace changes in order to contain costs and increase production is one of the most critical factors in raising workplace productivity. An IR system that is flexible enough to be adaptable to an industry where unique arrangements are the norm is crucial to the success of any project.

The Fair Work Act changed the rules about the sorts of flexible arrangements that could be agreed between employers and employees, with flexibility clauses now mandatory in all enterprise agreements and modern awards.

The stated aim of 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 has sought to track the experience of employers in the resource industry as they deal with IFAs and mandatory flexibility clauses as part of the new WR and enterprise bargaining system. As has become clear from the results to date, employers have encountered many difficulties on this front since the Fair Work Act was introduced.

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

Survey date	Totally dissatisfied %	Moderately dissatisfied %	Somewhat dissatisfied %	Neither satisfied nor dissatisfied %	Somewhat satisfied %	Moderately satisfied %	Totally satisfied %	Index score out of 100
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**
April 2011	2.8	9.9	11.3	22.5	29.6	15.5	8.5	**57.8**

Although working from a low base and remaining at a low level, the data show an improving level of employer satisfaction with the degree of workplace flexibility experienced in the latest six-month survey period as compared with the previous two surveys. There were fewer respondents dissatisfied with arrangements in relation to workplace flexibility and more expressing satisfaction with the available arrangements.

Improved though the situation may be, the figures show that in the latest survey period, almost one in four businesses in the industry (24.0 per cent) remained dissatisfied with the level of flexibility available to them in changing workplace circumstances.

The overall satisfaction index in this area has risen from 49.0 to 57.8 in the latest six-month survey period. However, it must still be emphasised that a satisfaction rating of 57.8 out of 100.0 in such a crucial area remains undesirably low.

6. Enterprise bargaining and agreement making

The remainder of questions in this report relate to the entire period of operation of the Fair Work Act rather than comparing individual survey periods. This is in acknowledgement of the fact that employers will only negotiate new industrial agreements every couple of years and therefore will only be engaged in bargaining every couple of years. A comparison between individual six-month survey periods on a range of bargaining indicators would therefore be of less relevance than looking at the entire period of operation of the Fair Work Act to date in assessing employers' experiences with good faith bargaining and agreement making.

At the core of the current IR system is the regime of good faith bargaining. During bargaining rounds, each bargaining party must come to the negotiating table recognising the importance of supporting the ongoing viability and expansion of the business and the subsequent need to increase wages and other forms of compensation only as far as profitability and long-term economic considerations permit. The issue of importance, therefore, is whether unions are being realistic in their claims and are willing to recognise the economic issues faced by the businesses they deal with in enterprise negotiations. A sympathetic understanding by each party of the concerns of the other parties around the bargaining table makes it possible to reach a productive and enduring agreement that meets the needs of both sides. This next set of questions seeks to ascertain to what extent that is happening as well as the total proportion of AMMA members that have engaged in good faith bargaining to date.

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

	% of respondents
Yes	47.8
No	52.2

As the above table shows, only 47.8 per cent of firms in the sector have engaged in good faith bargaining under the Fair Work Act since its introduction on 1 July 2009. The rest of the results in this section are confined to those firms that have engaged in such bargaining.

Using a scale from 1 to 7 (1 being extremely easy and 7 being extremely difficult), how have you found the process of enterprise bargaining under the Fair Work Act?

Survey date	Extremely easy %	Moderately easy %	Slightly easy %	Neither easy nor difficult %	Slightly difficult %	Moderately difficult %	Extremely difficult %	Index score out of 100
April 2011	2.9	5.9	5.9	38.2	29.4	11.8	5.9	**57.4**

The above question asked how easy or difficult good faith bargaining had been in the experience of resource industry employers. The question used a seven-stage scale as a means to pick up the nuances of the experience of those in the industry. As the data show, a total of just 14.7 per cent of respondents indicated that enterprise bargaining had been in any way 'easy'. The largest single response was the 38.2 per cent who described the enterprise bargaining process under the Fair Work Act as 'neither easy nor difficult'.

Being above 50 on this scale means the experience of the bargaining process is towards the difficult end of the scale. The index score here is 57.4 out of 100. The data show that 17.7 per cent of respondents found the process either 'moderately difficult' or 'extremely difficult' and a further 29.4 per cent found the negotiation process 'slightly difficult'.

Which of the following types of agreements have you tried to negotiate under the Fair Work Act since 1 July 2009? Tick all that apply.

	% of respondents
Single enterprise non-greenfield agreements	87.1
Single enterprise greenfield agreements	29.0
Multi-enterprise non-greenfield agreements	0.0

The data above show that 87.1 per cent of respondents have tried to negotiate single enterprise non-greenfield agreements under the Fair Work Act since 1 July 2009, while 29.0 per cent have attempted to negotiate single enterprise greenfield agreements. Note that because some companies have tried to negotiate both kinds of agreements the percentage figures do not sum to 100 per cent. None of the respondents to the survey had attempted to negotiate a multi-enterprise non-greenfield agreement.

Please describe your organisation's experience with negotiating different types of agreements

The comments below provide an indication of some of the positives of employers' experiences of negotiating different types of agreements under the Fair Work Act:

"We have a very well-structured means of negotiation with our unions and we have a very structured means of informing our workforce through directly elected employee representatives."

"Most of our experience has been neutral. That is, neither better nor worse. An issue arose during negotiations for one of our agreements where we had 34 bargaining representatives nominated. This was resolved locally."

"The process is simple but it needs more structure."

"The process is fair."

The below comments indicate some of the negatives attached to bargaining for different types of Fair Work Act agreements:

"We negotiated a small agreement covering only 12 people but involving five employee representatives including a representative from the CFMEU."

"We have only negotiated non-greenfield collective union agreements at this stage, and the power was very much with the unions as they had confidence that the Fair Work system would provide support for any industrial action."

"Negotiating the above types of agreements is harder than under the Workplace Relations Act."

"There has been extortion and blackmail on major projects. Unions are refusing to accept the individual flexibility clauses."

"There is difficulty with the number of bargaining representatives, and the notice of representational rights has encouraged the involvement of third parties."

"There are no options to ensure industrial certainty and we must make the most of the existing provisions regarding bargaining. We have had long-term agreements in place over many years. This year the unions for the first time in 15-plus years got an order from Fair Work Australia to take industrial action."

"There is limited negotiation leverage as there is a common pattern of union positioning."

"It has been challenging."

"It has involved very long negotiations!"

"All of our agreements are single enterprise agreements done with each union. The application of the Fair Work Act in terms of the agreements is totally one-sided."

These comments clearly communicate that negotiating all types of agreements is becoming increasingly difficult as more and more employers are exposed to the good faith bargaining system.

Please indicate whether any of the following activities have increased or decreased during bargaining under the Fair Work Act compared to bargaining under the Workplace Relations Act

	Increased (% of respondents)	No change (% of respondents)	Decreased (% of respondents)
Time devoted to meetings and negotiations	71.9	25.0	3.1
The number of union-specific clauses demanded	71.0	29.0	0.0
Working hours devoted to the bargaining process	66.7	33.3	0.0
The number of bargaining representatives involved in negotiations	51.5	48.5	0.0
Union involvement in bargaining	51.5	48.5	0.0
Time devoted to tribunal processes and applications	43.3	56.7	0.0
Protected industrial action during negotiations	16.7	83.3	0.0

An indication of just how difficult negotiations have become for employers under the Fair Work Act is shown by respondents' answers to the question of whether particular activities associated with enterprise bargaining had increased or decreased under the Fair Work Act compared with the Workplace Relations Act. The data are quite revealing.

As the table above shows, in all categories but one where respondents reported bargaining activities had undergone a change, that change involved an increased burden on employers. Clearly, there are more union officials and other bargaining representatives involved in bargaining and the time taken to reach agreement has increased. There is more time devoted to going to tribunals and, in one business in six, there was an increased level of protected industrial action during negotiations compared to that under the previous IR regime.

During enterprise bargaining since the Fair Work Act began, have union bargaining representatives pursued any of the following types of union-specific clauses for inclusion in agreements? Tick all that apply.

	% of respondents
Trade union training leave	86.4
Shop stewards' rights clauses	72.7
Paid union meetings	68.2
Trade union training levies	50.0
Payroll deductions of union fees	36.4
The requirement to have a union office onsite	18.2
Union picnic days	18.2
Other union-specific clauses (please specify)	4.5

The data in the table above show that union bargaining representatives are now commonly pursuing a range of union-specific clauses in their agreements that would have been considered prohibited content under the Workplace Relations Act. The inclusion of each of these clauses in agreements will add to costs on the one side and enhance and entrench the power of unions on the other, and represent few if any productivity or efficiency benefits for the enterprise.

Has protected industrial action been taken over these union specific clauses?

	% of respondents
Yes	6.7
No	93.3

Although industrial action specifically and solely taken over union-centric clauses has only affected 6.7 per cent of survey respondents, there is, as shown by the results and comments throughout this survey, a will by unions to use industrial action or the threat of it in pursuit of agreements in general, which very often include union-specific clauses.

What are the most unusual types of agreement clauses that bargaining representatives have pursued in enterprise negotiations under the Fair Work Act?

With the Fair Work Act's broadening of agreement content and abandonment of the concept of 'prohibited matters' in industrial agreements, AMMA has sought to get an idea of some of the more unusual types of clauses being pursued by both union and non-union bargaining representatives since the Fair Work Act began. Below are some of the comments received in response to the request to detail the most unusual clauses being sought:

"Participation in union-sponsored term payments (Incolink) plus guaranteed increases."

"The introduction of change clauses; consultative committee clauses."

"Roster allowances on an annualised basis."

"Call-up provisions for sub-contractors."

"A clause stating that collective industrial relations will continue as a fundamental principle of the employer. Union membership shall be promoted by the employer to all prospective and current employees. Employees will be encouraged to participate in union meetings and exercise their democratic rights."

"Hard lying allowances for shared facilities in offshore projects."

"Limitations to company alcohol and drug policy disciplinary action. Company policy in relation to illicit drugs and alcohol over limits while operating a vehicle was potential termination (after consideration of mitigating circumstances). Union now wants a specific clause over-riding this policy with a forced one strike policy (final warning)."

"Not necessarily unusual - but more benefit related, i.e. increased super, income protection, retention payments."

"A union representative to be paid for performing union duties."

"Perhaps not unusual, but the PAB or construction allowance claims were the most outlandish. The original claims were for $500 extra per day for a virtually zero return productivity-wise."

"That if an employee has a dispute against the company we pay expenses for employees to attend mediations, hearings, court etc."

"The number of Christmas parties offered!"

"The type of bread purchased and the Christmas bonus."

"A delegates' rights charter and paid training leave for trade union training."

"They are all unusual to start off with. No change under the Fair Work Act compared to any other Act."

Are there any specific issues associated with negotiating greenfield agreements under the Fair Work Act compared with negotiating other types of Fair Work Act agreements?

	% of respondents
Yes	25.0
No	75.0

As you can see from the table above, 25 per cent of respondents to the survey that had engaged in enterprise bargaining said there were unique issues associated with negotiating greenfield agreements under the Fair Work Act as opposed to other types of agreements.

Comments from respondents about the specific issues associated with negotiating greenfield agreements centred around the fact that employers now have to negotiate with unions in order to get such an agreement up:

> *"There is no employer (or non-union) greenfields option as there was under the Workplace Relations Act."*

> *"Unions have a great deal of leverage in greenfield agreement making."*

> *"To make a greenfield agreement, you must reach agreement with union officials as there is no workforce to engage. There is also no role for Fair Work Australia to intervene or the power of arbitration."*

> *"It must be with a union - no option."*

> *"You have to agree to get an agreement."*

Going against the trend, one respondent had this to say:

> *"The absence of a union constituency onsite seems to reduce the propensity for officials to want to demonstrate their 'strength' and they are much more likely to settle for outcomes that reflect market conditions."*

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

	% of respondents
Yes	11.5
No	53.8
Too soon to tell	34.6

It should be noted from the results in the table above that even what is considered a small percentage of respondents represents a genuine problem in terms of actual projects moving into the production stage. The data show that 11.5 per cent of businesses have delayed the start-up of projects since the Fair Work Act began due to having no choice but to negotiate with unions for an agreement to cover a greenfield site. That is, more than one in ten companies had not started up when they might otherwise have done due to the changed IR environment.

What is perhaps more menacing is the fact that more than one third (34.6 per cent) of respondents stated it was too soon to tell whether they would be affected by the lack of a union-free greenfield agreement option. This means there are almost certainly going to be other projects that will be delayed over time.

Has your organisation conceded to claims during greenfield agreement negotiations that it otherwise wouldn't have, solely to obtain an agreement?

	% of respondents
Yes	40
No	60

The data in the table above show that 40 per cent of respondents to the survey that had engaged in enterprise bargaining under the Fair Work Act had conceded to union claims during greenfield agreement negotiations that they otherwise would not have in order to obtain an agreement. Comments in this regard included:

> *"Yes, we agreed to union preference clauses as we needed to get an agreement in place and the client did not want a protracted dispute."*

Another respondent had agreed to:

> *"Hard lying allowances; special project allowances; wage increases; and redundancy payments."*

Another respondent had agreed to:

> *"Union access; training days; unions being a part of procedural implementation and approval; and the inclusion of redundancy and insurance payments."*

Another said:

> *"I believe the final wages settlement was agreed to solely to get the agreement signed."*

7. 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 the tribunal has to consider before approving it.

This section of the survey sought information on how prevalent industrial action was at resource industry workplaces since the Fair Work Act was introduced. Again, this set of questions covers the whole term of operation of the Fair Work Act to date in recognition of the fact that parties will only be exposed to protected industrial action every couple of years unless it relates to genuine safety issues.

What types of industrial action have been taken at your workplace(s) since the Fair Work Act began? Tick all that apply.

	% of respondents
None	80
Unprotected stoppages	12.3
Unprotected work bans	10.8
Work to rule	6.2
Protected stoppages – agreement making	6.2
Protected stoppages – alleged safety concerns	3.1
Protected work bans	3.1
Other type of industrial action	1.5

The data in the table above show that 20.0 per cent of businesses have experienced industrial action over the period since the Fair Work Act has been in operation. The remainder of the data show how this industrial action was distributed amongst the various forms it could take. It is notable that the most frequent form of action taken was unprotected stoppages, which had been taken in 12.3 per cent of workplaces. While the level of industrial action is low, we know that the threat of such action is a powerful tool under the Fair Work Act and is used far more often than actual industrial action during agreement negotiations. It also needs to be remembered that around half of the industry is yet to negotiate an agreement under the Fair Work Act. The results of this set of questions in future surveys are expected to become more meaningful.

8. Wage movements

The cost of labour is one of the most important issues affecting the viability of an enterprise. Even in a highly capital-intensive industry such as the resource industry, the cost of labour has an often decisive impact on long-term profitability. Keeping wages and labour-related forms of compensation within the limits imposed by productivity remains critical.

It should also be noted that labour cost movements in the resource industry can be an important indicator of future movements in the rest of the private sector, so any potential increases are likely to have a flow-on effect. The minerals and resources sector is the best performing sector of the Australian economy at the present time. Flow-on and catch-up, although ancient terms for the wage setting process in Australia, are not defunct concepts. Using the industry as a pace-setter for the rest of the economy can create problems for the future that are best dealt with by policymakers sooner rather than later.

As the comments below indicate, the determination of wages and conditions in the industry is being driven in part by increased competition for skilled labour. Union power can build on the actual reality of the market but it is the market itself that drives the upwards movement in wages. Very clearly, wages are rising rapidly and are expected to continue to do so in the period ahead.

If your organisation has negotiated or paid a wage increase to its workforce(s) under a Fair Work Act agreement, how does that rate of wage increase compare to that payable under your previous workplace agreements?

	% of respondents
Significantly higher	17.8
Slightly higher	26.7
About the same	51.1
Slightly lower	0.0
Significantly lower	4.4

Note that the question asks about movements in "the rate of wage increase" and not the actual quantum increase. The question thus asks about the percentage movement in wages and as the data show, the growth rate has been accelerating.

Just over half (51.1 per cent) of respondents indicated wages growth had remained more or less where it was prior to the introduction of the Fair Work Act. But a further quarter (26.7 per cent) indicated the growth rate was slightly higher while one in six (17.8 per cent) indicated it was significantly higher. Only 4.4 per cent indicated that wages growth was lower under the Fair Work Act.

If there has been significant movement in wage increases, either upwards or downwards, how do you account for this change?

The comments from survey respondents to this question provide useful detail on the factors influencing wage movements. While some employers see the heavy hand of union officials as a determining factor, the strong underlying trend is that we are looking at an industry that is experiencing major shortages of skilled labour and this is being reflected in the rise in wages paid and the spiralling growth of market rates:

"The major impact has come from improved economic activity coupled with skill shortages and an increase in cost of living indicators."

"A shortage of skilled labour; prolonged EBA negotiations; more aggressive union leadership which promulgated and promoted unreasonable expectations amongst their members. Couple this with large projects pending in the offshore industry and nervous companies and the Fair Work Act terms which seemed at the time to be biased towards the unions. I believe all these factors contributed to the excessive wages realised in the last agreements."

"Market conditions and retention has been the main indicator for wage increases, more so than the Fair Work Act."

"Keeping up with the industry."

"Upwards, due to competition for labour."

"The skills shortage given the range of projects occurring at the same time."

"The skills shortage, comparable market salaries."

"Our annual wage review is market driven - we apply the median salary."

"Unique to the greenfield project situation. Other agreements have seen similar wage outcomes to agreements made under previous legislation."

"The industrial climate and skilled labour demand in Western Australia."

"Industry labour demands are pushing rates along."

"Market forces - just keeping up with the industry to ensure we have enough skilled labour and to be competitive with other companies."

"The agreement is based on performance increases rather than negotiated increase amounts. No significant change to the process or amounts."

"Market forces."

"Market movement."

"The nature of the risk involved."

"Changes to market conditions."

"Upward movement due to market factors only."

"Market growth, industry comparisons."

"The last overall increase in January 2011 of 5 per cent was in line with market movement."

"I expect market forces to influence an increasing trend."

"We have to forward costs onto our client. It affects new projects and tender processes."

"We reward independently on a common law arrangement."

The role of the Fair Work Act and unions in wage increases was noted by some respondents, coupled with the growing shortage of specific skills:

"Greater union bargaining power, and skill shortages."

"Unions have more bargaining power; the resurgence of the resource industry post GFC."

"Upwards due to an overdeveloped sense of entitlement."

"The only reason is the introduction of the Fair Work Act which had seen claims of $500 dollars a day increases taken as not exorbitant."

"The increased role of unions. Unions are emboldened by the Fair Work Act and the fact that a Labor government will not try and reduce their role."

What are you expecting to happen to the rate of wage increase in your next agreement under the Fair Work Act?

	% of respondents
Increase significantly	37.3
Increase slightly	42.4
Remain about the same	20.3
Decrease slightly	0.0
Decrease significantly	0.0

In looking ahead, the expectation for most of the industry is that the pay rises negotiated in future will be higher than at present. Again, it is not the level that is being discussed but the rate of growth in wages. Not one respondent is expecting a lower rate of growth than occurred during their last agreement, whether or not that agreement was negotiated under the Fair Work Act, and only 20.3 per cent expected the wages growth rate to be the same as it was under previous instruments.

For the majority, the expectation is that wages will rise more rapidly than in the past with more than a third of respondents, 37.3 per cent, anticipating a significantly higher wage increase. Unless productivity can be improved at the same time, Australia is thus moving towards a higher-cost resource industry which will occur at the same time as the international demand for Australian resources continues to rise.

Have you been able to negotiate productivity improvements in exchange for wage increases under Fair Work Act agreements?

	% of respondents
Yes	17.4
No	82.6

Only improved productivity performance can permit higher wages to be absorbed through an increase in value added per person employed. The data above, however, show that only in a small minority of businesses have productivity improvements been negotiated to compensate for wage increases. In the vast majority of cases, no productivity offsets have been agreed to by the workforce in exchange for the increased wages and improved conditions received. An overwhelming 82.6 per cent of respondents that had engaged in bargaining under the Fair Work Act said they had been unable to negotiate productivity improvements in exchange for wage increases in the nearly two years since the legislation had been in operation.

A number of relevant comments were made about productivity offsets in exchange for wage negotiations which put the results into context:

"We have lost productivity improvements previously negotiated under the Workplace Relations Act."

"This is difficult to achieve."

"Unions fight to retain existing conditions."

"We have tried by way of direct engagement with employees and proposing additional increases but these have not been supported by unions."

"I would say that productivity improvements are minimal and not directly noticeable."

"There is no scope to negotiate this."

"The offshore industry gained a 30 per cent wage increase; there were no significant productivity trade-offs in place to compensate employers for this."

"Not really – there is not much we can do to improve what we can do – it is more about reliability/behavioural change so we are targeting that in a different way."

There were, however, some positives reflected in the following comments about productivity improvements that respondents had been able to achieve:

"We have been able to improve our performance and absentee process."

"We have extremely flexible agreements now – our aim at negotiation is to keep out inflexible work practices."

"Improving productivity has been a company focus; in supporting this, we have invested in more skills and supervisor development skills as well."

"The major productivity improvements have either already been achieved in earlier agreements or are achieved through the day-to-day management of the workforce."

"Only in some cases have productivity improvements been achieved – mainly in relation to allowances for supervisor shifts at night in 24-hour operations and duties that were previously carried out by casuals."

The above comments are quite sobering given the industry's need to move towards higher levels of productivity.

Have you experienced any flow-on effect to your enterprise(s) from recent wage and allowance outcomes in the offshore oil and gas industry?

	% of respondents
Yes	29.3
No	29.3
Too soon to tell	41.4

The data shown on the above table is of very great significance. It indicates to all those who believe there are no longer risks of a flow-on of wage increases from one enterprise to another, or from one industry to another, that this is not the case and that flow-ons continue to influence the rate of increase in labour costs.

The above table shows that 29.3 per cent of respondents have experienced a flow-on effect from wages and conditions outcomes in the offshore oil and gas industry where pay rates have increased by 30 per cent since 2009. However, the same proportion state they have not experienced a flow-on. More ominous is that 41.4 per cent state it is too soon to tell what the flow-on effect will be. That is, they have not yet settled their negotiations so the die has not yet been cast. But what has not yet been ruled out is that their own levels of wage increases will be affected by oil and gas industry outcomes. They may yet be, with the contagion that may follow large increases in the mining and resources sector remaining a clear and open possibility.

9. Union demarcation issues

Leading up to the introduction of the Fair Work Act and its changes to right of entry provisions, AMMA expressed serious concerns on behalf of its members that the changes would lead to a ramping up of demarcation disputes between unions that would divert company resources away from doing business effectively given the potential for industrial unrest.

This set of questions seeks to track the effect the Fair Work Act is having over time on the incidence of demarcation disputes between unions.

What, if anything, has happened to the incidence of union demarcation issues on your sites under the Fair Work Act compared with the Workplace Relations Act?

	% of respondents
It has increased significantly	13.0
It has increased slightly	14.8
There has been no significant change	72.2
It has decreased slightly	0.0
It has decreased significantly	0.0

Demarcation issues are a reflection of union battles for representation. The Fair Work Act's right of entry provisions have opened up competition at the worksite amongst unions for representation of workers, with many more unions now having access to resource industry worksites under the current legislation. The result is the potential to harm workplace productivity through inter-union battles over who has the official right to represent and meet with members and bargain with employers on their behalf.

Although in just under three-quarters of respondent businesses there has been no change in the incidence of union demarcation issues, this does not mean there are no problems to begin with. The data indicate that in 14.8 per cent of companies there has been a slight increase in demarcation issues, and almost the same percent, 13.0 per cent, have experienced a significant increase in demarcation issues.

These are productivity reducing struggles between unions, the outcome of which adds nothing to the growth of incomes and prosperity. These inter-union battles are nothing other than a dead weight to the industry and the economy.

While many respondents said the current demarcation situation was similar to what it was beforehand, a number of relevant comments were made in regard to demarcation issues under the Fair Work Act:

> *"Increased rights of entry enable unions without award/agreement coverage to enter the workplace and discuss matters with employees who aren't their traditional membership."*

"It is only a matter of time and it will change our company for the worse for ever. Employees themselves are open in stating they are dreading 'union interference' as 'this great place to work will never be the same'."

"Demarcation is rarely experienced on board our vessels."

"There has been an increase in coverage claims from the MUA in construction areas."

"The MUA is targeting construction and subsea areas of operations."

"We are aware that there is a potential union demarcation issue between the AWU and CFMEU – this has not been an issue to date."

"It is too early to tell."

"No impact. Due to the agreement coverage in place, it is not possible for this to occur as yet."

As with other areas of this report, union demarcation issues will take a while to come to a head as a result of the change of legislation. One thing is certain and that is that even those employers who have not yet experienced any demarcation issues onsite are fearing they will in future. Subsequent surveys as part of this research project will continue to build a picture of what is happening on the ground in this regard.

10. Adverse action

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 that employee has a "workplace right".

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

Has your organisation received any adverse action claims from current, prospective or former employees or independent contractors since the Fair Work Act was introduced? Tick all that apply.

	% of respondents
Former employees	16.2
Current employees	10.8
Prospective employees	0.0
Independent contractors	0.0

Adverse action is a new feature of the IR system. Because of the potential cost to employers of losing against parties bringing such claims, and because claims end up in courts of law, adverse action claims have the potential to create a major problem for every business. The jurisdiction has a nothing-to-lose aspect from a plaintiff's point of view in that claims can be pursued on a 'let us see' basis. How great the potential is to add significantly to the costs and risks of running a business are still to be seen.

The results in the table above are calculated as a percentage of the entire survey population rather than of just the firms that replied to that question. Thus, 16.2 per cent of all survey respondents had received adverse action claims from former employees while 10.8 per cent had received adverse action claims from current employees. It is possible that a single business may have received claims from both current and former employees.

The number of individual claims cited by respondents that had received adverse action claims under the Fair Work Act ranged from one to five claims.

No claims have been received by respondents from prospective employees or independent contractors at this stage.

Please indicate in each instance what the applicant(s) alleged was the adverse action your organisation took.

The below comments are a sample of the kinds of adverse action claims that are being brought by employees and/or their representatives to employers' doors:

"Two claims of racial discrimination, one claim of sexual discrimination and one claim of age/gender discrimination."

"Termination due to discrimination; termination due to a workplace right."

"Termination of employment; the union tried unsuccessfully to have us rehire the person; no issues were taken further."

"Union membership/acting as a representative; worker raising safety issues; termination of worker all alleged to be the reason for adverse action."

"Underpayments."

"Claims that the termination of employment was unfair based on bullying and harassment allegations."

"A poorly conceived 'unlawful dismissal' style of claim that was unsuccessful."

"The employee claimed they did not have to work a night shift going into their RDO."

"An employee's performance was being managed for not ringing in when absent. He claimed [disciplinary action flowing from] that was adverse action because he was taking sick leave to which he was entitled."

"An application to Fair Work Australia on the basis of termination of employment due to illness. The application was not substantiated as the dismissal was for other reasons."

"Treating employees differently based on their union membership."

"Failure to engage or re-engage employees for allegedly acting as a union delegate."

On the face of it, many of the above claims would have little or no merit, but employers are still being put to the time and expense of listening to the claims and responding to them, and potentially ending up in court defending them, even where they have no merit. Given the reverse onus of proof on employers, they might also be tempted to pay 'go away' money even where claims have no merit in order to avoid legal expenses once matters hit the courts.

A picture is also clearly emerging that active unionists are leveraging off recent legal decisions in this area that make it extremely difficult, if not impossible, for employers to discipline them for fear the courts will automatically label this adverse action.

How was the issue resolved in each instance?

In order to start to build an understanding of how employers are dealing with adverse action claims once they receive them (even those with no merit), AMMA asked its members that had received claims since the Fair Work Act took effect how they had dealt with them. The following are some of the responses:

"The worker withdrew the complaint."

"Three claims were resolved via mediation at Fair Work Australia, one via remuneration being paid."

"One claim was resolved through mediation and another claim was resolved when the employee failed to show up for the hearing."

"By direct discussion with the unions."

"We were able to demonstrate that the action taken by the company was not due to the alleged reasons. Legal assistance was used in each case."

"Settlement."

"It was resolved in mediation via the commission."

"The union advised the employee to withdraw the case prior to conciliation."

"We vigorously defended the claim and it was dropped."

"We discussed it with the Fair Work Ombudsman and the ruling was in the company's favour."

"Discussions and exchange of factual correspondence in the first instance. Appearance in Fair Work Australia and then more discussions. The application was eventually dropped."

"Confidential."

"Telephone conference with a commissioner from Fair Work Australia."

"Unresolved at this time … discussions continuing."

"We simply stated what had occurred and that we had followed procedures and, given that we employ and continue to employ others who have acted as delegates, if the allegation was correct the union could not explain why we did not act in the same way towards others. We could also show there was no basis for a claim from the unions so it was not pursued."

Have you paid 'go away' money since the Fair Work Act began in order to avoid any adverse action claims going to court?

	% of respondents
Yes	11.1
No	88.9

The following general comments were provided as part of the response to the survey asking if respondents had made payments in order to settle adverse action claims. As the table above shows, 11.1 per cent of respondents that had received claims had paid money for them to 'go away':

"We have felt the need to pay this money to circumvent the time and money involved in defending the claim in court."

"This was tied to a deed of release. We paid between three and six months' pay generally tied to performance issues that were well documented."

"In some cases, settlements were made."

"We paid six weeks."

"No, but I expect we will."

"We have had claims but defended our decisions. Although we did not pay any 'go away' money, we still had legal fees associated with this activity. Therefore, there was still an unnecessary cost for the employer."

If you have received any adverse action claims under the Fair Work Act, what proportion of them has been agitated by unions rather than employees/individuals?

	% of respondents
All are agitated by unions	31.6
Most are agitated by unions	15.8
Some are agitated by unions	15.8
None are agitated by unions	36.8

The data in the above table indicates there is a fairly even split between the proportion of adverse action claims agitated by unions and those agitated by employees on their own.

The below are some comments associated with whether claims had been brought by unions or employees:

> *"Some unions are clearly using this as a tool."*

> *"Claims have been agitated by the MUA and AWU primarily."*

> *"The employee advised he hadn't wanted to make a case of it – the union pushed him into it."*

As you can see, the nature of the problem with the adverse action provisions is such that it brings about a broad and long-term liability for employers that in less robust industries could be a major deterrent to employment. It will not take many more cases reported in the media before businesses become more reluctant to employ or, as we are already seeing, reluctant to discipline unionists over genuine performance issues.

Please outline your major concerns, if any, with the Fair Work Act's adverse action provisions

Below is a sample of the responses indicating just how vivid the concerns of employers are with this emerging jurisdiction:

> *"The provisions are too broad. The time limits for claims are too long. The provisions are open to abuse by vexatious and litigious employees."*

> *"The unlimited cap on compensation payments; the reverse onus of proof on employers; the ability for all manner of prospective and current employees to access this provision. This should not be a tool for a prospective employee to exercise this as a workplace right when they are not yet even employed by you. People should refer such matters to the Australian Human Rights Commission for discrimination etc."*

"The ability for employees to make an adverse action claim and us having to defend it regardless of the fact there was no adverse action taken against employees."

"The reverse onus of proof on employers; moving the goal posts with regard to the Fair Work Act's provisions."

"The liability of a client for adverse action by contractors; the six-year statute of limitations is too long; it appears to interfere with an employer's right to run a business by assuming guilt on the part of the employer unless they prove otherwise."

"The fabrication of 'anti-union' complaints when a militant unionist is disciplined or terminated."

"The reverse onus of proof on employers."

"Concerns are: the reverse onus of proof on employers; unintentional coverage for frivolous and vexatious claims; and the low threshold for applications/claims."

"The potential for challenges to management exercising its normal responsibilities; the Federal Court interpretation of the Fair Work Act's adverse action provisions, i.e. in Barclay v Board of Bendigo TAFE decision."

"It is not clear on the boundaries of the action nor the scope of compensation payable."

"Like 'safety issues', adverse action will be used as an excuse to leverage power over our business."

"They are too broad and leave the employer too vulnerable and unable to exercise basic rights to manage staff even if in a fair and equitable manner. They are extremely worrisome."

"It appears the ability to change or remove discretionary benefits has been removed."

"They provide an avenue for vexatious complaints about the most mundane of operational decisions, for example, where a given employee is unhappy about not having been successful in being allocated a particular type of work."

"The adverse action provisions specifically around the area of length of time an employee can make a claim is of concern."

"The length of time that employees have to make the claim."

"They are broad. The reverse onus of proof negatively affects productivity."

"It establishes two classes of employees and applies inconsistent standards of behaviour. It makes delegates a protected species and discourages supervisors from managing their work teams fairly."

"The still unknown scope of the provisions, limited case law."

"Over time, when we become a larger organisation, we will come under the eye of the union movement; then it is believed we will become a target for some form of militancy."

"Given the length of time to lodge the complaint it could be done when the persons concerned no longer work for the company. The claim timeframe is too great."

"We have not as yet had any adverse action claims against us. This is something we are concerned about as it is at this stage unknown."

"The provisions create an unknown liability to the business for an unnecessarily extended period."

"I believe that this area may be a sleeping giant."

The adverse action jurisdiction and its impact on employers' ability to do business effectively will be one area to watch, along with others in this survey as time goes by.

The aim is to conduct a survey of the impacts of the Fair Work Act on AMMA members every six months going forward.

11. 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 starting in April 2011 by the Australian Mines and Metals Association (AMMA), the peak representative organisation for the resource industry dealing with IR issues in Australia.

AMMA distributed a survey questionnaire among its member companies, receiving completed surveys from 74 member companies employing more than 55,000 people. 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 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 per cent of respondents are clustered in the lowest category, the index measure would be zero. If 100 per cent are 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.

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