Submission to the General Manager of Fair Work Australia

On the operation of the first three years of individual flexibility arrangements under the Fair Work Act 2009

By the Australian Mines & Metals Association (AMMA)

April 2012

Table of contents

About AMMA....3

1. Executive summary 4

2. Recommendations 10

3. The value of the resource industry to the economy....12

4 The uptake of IFAs in the resource industry....20

5 Problems with IFAs in their current form....24

About AMMA

Established in 1918, AMMA is the national employer's group representing the interests of the resources sector in Australia.

AMMA members employ a significant proportion of the 249,700[1] direct employees in the mining industry as a whole, with the industry estimated to be responsible for creating three times as many indirect jobs[2].

AMMA member companies are engaged in a variety of activities in sectors including:

- Mining;
- Hydrocarbons;
- Maritime;
- Exploration;
- Energy;
- Construction;
- Transport;
- Smelting;
- Refining; and
- Suppliers to those industries.

AMMA's Board is comprised of business leaders from:

- Alcoa of Australia Ltd;
- Esso Australia Pty Ltd and Mobil Oil Australia Pty Ltd;
- Minara Resources Ltd;
- Orica Ltd;
- Oz Minerals Ltd;
- P&O Maritime Services Pty Ltd;
- Sodexo Australia and New Zealand; and
- Woodside Energy Ltd.

[1] *Labour Force, Australia, Detailed, Quarterly, February 2012*, ABS, Catalogue no: 6291.0.55.003
[2] *Resourcing the Future*, National Resources Sector Employment Taskforce Report, July 2010

1. Executive summary

1.1 AMMA welcomes the opportunity to contribute to this important review being conducted by the General Manager of Fair Work Australia into the first three years of operation of individual flexibility arrangements (IFAs) under the *Fair Work Act 2009*.

1.2 This submission builds on earlier AMMA research identifying problems with the operation of IFAs, including in AMMA's May 2010 paper, *IFAs: The Great Illusion*, and AMMA's February 2012 written submission to the *Fair Work Act* review panel.

1.3 In *IFAs: The Great Illusion*, AMMA called for this review to be brought forward given that it was of such significance to AMMA members. That did not happen, and resource industry employers have now been operating for nearly three years under the *Fair Work Act's* current provisions relating to IFAs.

1.4 Flexibility clauses became mandatory for inclusion in enterprise agreements from 1 July 2009 onwards and in modern awards from 1 January 2010. It is only under the terms of those flexibility clauses that IFAs between employers and individual employees can be made. The breadth of flexibility available under those clauses is therefore crucial and must be left as broad as possible.

1.5 At the time of writing this submission in April 2012, some resource industry employers will be moving towards negotiating their second round of *Fair Work Act* agreements and so will have been operating less than optimally for nearly three years, and potentially another three, at precisely the time the industry has entered a period of high activity in which flexibility is paramount.

1.6 While this review was not brought forward as requested, AMMA takes this opportunity to again raise the deficiencies around the current operation of IFAs so that those problems can be remedied sooner rather than later. The worst case scenario for the resource industry and the Australian economy would be for future agreement outcomes to fall short of previously gained flexibilities, and for *Fair Work Act* agreements to be doomed to producing inferior benefits for employers and employees.

The value of IFAs

1.7 As an alternative to AWAs, many resource industry employers perceive IFAs to be of very little value.

1.8 In an October 2011 survey of AMMA members as part of the AMMA Workplace Relations Research Project conducted in conjunction with RMIT University[3], just 15 per cent of respondents that had tried to negotiate a flexibility clause or IFA had succeeded in achieving any added flexibility as a result.

1.9 In that same survey:

- 44.2 per cent said IFAs were 'of no value' to them as employers;
- 20.9 per cent said IFAs were of 'little value'; and
- 34.9 per cent said IFAs were of 'some value'.

1.10 Employers are finding the flexibility clauses they are able to negotiate with unions often have limited benefits to employers and employees.

1.11 In the lead-up to Labor's federal election win in 2007, it promised employers that IFAs would be a suitable alternative to statutory individual agreements but without the ability to reduce pay and conditions, something that does not happen in the resource industry.

1.12 In 2008, then-Deputy Prime Minister Julia Gillard promised employers that[4]:

> *... a simple, modern award system with opportunities for individual flexibilities will remove the need for any individual statutory agreements and the associated complexity and bureaucracy attached to those agreements.*

---

[3] *AMMA Workplace Relations Research Project Survey 4 Report*, Dr Steven Kates, RMIT University, October 2011

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

1.13 Given that a flexibility term had to be included in all modern awards and enterprise agreements, it looked as if the government was committed to fostering flexibility in all types of workplace arrangements.

1.14 In practice, however, IFAs in their current form fall far short of the government's promises due to the fact that flexibility around hours of work, rostering and overtime, which is critical to the productivity of resource industry enterprises, is often elusive.

1.15 In order to keep pace with fluctuating demand for their products, resource industry workplaces need to operate around extremely flexible schedules that maximise production while rewarding employees for their efforts. In theory, although rarely in practice, this is possible under the model flexibility clause contained in all awards and some enterprise agreements, but is virtually impossible under many union-negotiated clauses.

1.16 Despite the superior terms and conditions provided to employees in the resource industry, the experience of employers has been that meaningful flexibility clauses are extremely difficult to negotiate and rarely result in much genuine flexibility on the ground. This has consequently limited their take-up.

Extremely low take-up of IFAs

1.17 AMMA is committed to a legislative framework that encourages and allows for direct, co-operative and mutually rewarding relationships between employers and employees that maximise flexibility and benefits to all parties.

1.18 Under this philosophy, AMMA has contributed to and fully supports the positive steps taken to achieve a more modern and flexible workplace relations system in recent years.

1.19 However, despite the commendable objectives of the Rudd/Gillard government in making flexibility clauses mandatory in all modern awards and enterprise agreements under the *Fair Work Act*, there are numerous problems with IFAs from a practical standpoint in terms of their ability to achieve the desired level of flexibility for employers. As a consequence, the uptake of IFAs in the resource industry at this point in time is extremely low.

1.20 AMMA's best estimate based on feedback and surveys of its membership is that less than five per cent of employment arrangements in the industry that have been made under the *Fair Work Act* are subject to IFAs. This means that considerably less than five per cent of all employment arrangements would be subject to IFAs given there are still a significant number of AWAs and ITEAs operating in the industry that are yet to be replaced.

1.21 Prior to the *Fair Work* reforms taking effect, the resource industry's reliance on individual statutory agreements was well-known. The industry utilised the agreements from the time they were first available in Western Australia in 1993 and federally as Australian Workplace Agreements (AWAs) from 1996.

1.22 The Rudd Government removed the option for employers and employees to enter into new employment relationships based on individual statutory agreements in March 2008[5] with the commencement of its move towards the *Forward with Fairness* system of industrial regulation.

1.23 Up until then, it is estimated that 67 per cent of resource industry employers in the federal industrial relations system were operating under AWAs that covered their entire workforce, with that figure closer to 80 per cent in metalliferous mining[6]. Compare that with the less than five per cent of *Fair Work Act* employment arrangements that are subject to IFAs and it becomes obvious that workplace flexibility will suffer in the years to come. This situation will only worsen as the bulk of existing AWAs and ITEAs still operating in the industry, and delivering high levels of workplace flexibility, reach their nominal expiry dates in 2014.

1.24 In an October 2011 survey[7], AMMA member companies made the following comments when asked about the value of IFAs in achieving genuine flexibility at their workplaces:

> *They are not flexible.*

---

[5] Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008

[6] The *case for ongoing flexibility in employment arrangement options in the Australian resources sector*, AMMA, March 2004

[7] *AMMA Workplace Relations Research Project Survey 4 Report*, Dr Steven Kates, RMIT University, October 2011

They are of little value in their current form. They would need to be substantially modified to provide significant benefit to employers (and probably employees as well).

They do not provide or support genuine flexibility.

Key concerns with IFAs in their current form

1.25 Key issues relating to the operation of IFAs in their current form are:

- IFAs offer employers no security against protected industrial action being taken while they are in operation;

- Either party can terminate an IFA with 28 days' notice, making such arrangements far too unreliable to be viable in many resource industry workplaces;

- There is no ability for parties to agree on an IFA prior to the employment relationship commencing, despite the statutory protections in place that protect employees and prospective employees from being disadvantaged by signing an IFA;

- The model flexibility clause, while potentially allowing sufficient flexibility, is not the minimum level of flexibility required in enterprise agreements, with negotiated flexibility clauses typically offering far less scope for flexibility;

- Even where flexibility clauses allow for sufficient flexibility in theory, or where the model flexibility term is used, employers are still not using IFAs due to the lack of protections and security they offer;

- Before approving enterprise agreements, Fair Work Australia does not apply any test that proves the agreement's flexibility clause is capable of delivering genuine flexibility to an enterprise rather than simply paying lip service to the requirements of the *Fair Work Act* to include such a clause;

- While Fair Work Australia applies the Better Off Overall Test (BOOT) to agreement flexibility terms on behalf of employees, there is no

requirement to ensure that any genuine flexibility is able to be delivered to employers;

- The BOOT is applied at a single point in time, i.e. when the IFA is first entered into, rather than on an ongoing basis; and

- Union scrutiny of IFAs, even after they have been entered into, puts pressure on individual workers not to make them in the first place unless the union or a majority of workers approves. This negates the stated objects of IFAs to foster flexibility at an individual level and further limits the uptake of IFAs.

2. Recommendations

This submission makes a number of recommendations that AMMA maintains will improve the operation and usefulness of IFAs for both employers and employees:

1. The ability for either party to unilaterally terminate an IFA with 28 days' notice should be removed. Instead, IFAs should be able to operate for a period of up to four years, or for shorter fixed-term periods where mutually agreed. The arrangements should be able to be terminated at any time with 28 days' notice only by mutual agreement.

2. Parties should be able to agree on an IFA prior to employment commencing, especially given the statutory protections that are in place for employees and prospective employees requiring them to be left better off as a result of signing an IFA.

3. Fair Work Australia's 'model' flexibility clause should be the minimum level of flexibility required under *Fair Work Act* agreements and awards, with parties able to agree on additional flexibility by consent.

4. The test as to whether an employee is better off under an IFA should remain ongoing, with either party able to invite the Fair Work Ombudsman to make an assessment at any time during the IFA's operation.

5. Before Fair Work Australia approves an enterprise agreement, all parties to the agreement should be required to demonstrate that the terms of the flexibility clause are capable of delivering genuine flexibility benefits under a subsequent IFA.

6. Union scrutiny of IFAs, even after they have been entered into, should be prohibited as it is an invasion of privacy and contrary to the intention of the arrangements being 'individual' in nature.

7. Parties to an IFA should be able to agree that, in return for the benefits received under an IFA, no industrial action will be taken during its life.

8. If the above changes to the operation of IFAs are not deemed suitable to adopt for all employees, a high-income cut-off could be introduced, above

which all the recommendations above would apply, set at the current unfair dismissal income threshold of $118,100 a year.

3. The value of the resource industry to the economy

3.1 The Federal Government estimates there is $430 billion in resource project investment in Australia's pipeline, with $82 billion expected to flow through in 2012 alone, more than double the figure of $35 billion two years ago[8].

3.2 Between 2010 and 2012, more than $70 billion worth of major non-resource infrastructure projects will have received the go-ahead including rail, road, port, hospitals and sporting arenas. All of these projects will compete for scarce labour with new and established resource projects, thereby maximising the need for flexible working arrangements and continuity of supply on all resource projects by minimising disruptions, including those due to industrial action.

3.3 The mining industry workforce, the fastest growing workforce of any industry, accounts for 1.5 per cent of the total Australian workforce[9] but punches above its weight by accounting for nine per cent of Australia's GDP at a value of $102.6 billion[10].

3.4 The enormous significance of the resource industry in terms of export revenue and domestic capital investment, both of which can be positively or negatively affected by the industrial relations system of the day, can be seen in the table over the page, which represents a small proportion of resource projects across Australia - those with a capital expenditure of $1 billion or more that are committed or under construction.

3.5 The table identifies selected key projects and their status; the expected date of commencement of operations following construction; the estimated capital expenditure; and anticipated employment figures for the construction and operational phases where available[11].

[8] Senate debate of the Minerals Resource Rent Tax Bill 2011 on 19 March 2012
[9] Senate debate of the Minerals Resource Rent Tax Bill 2011 on 19 March 2012
[10] *Australian Commodities Statistical Tables*, Vol 18, No 1 March quarter 2011, ABARE
[11] ABARES major minerals and energy projects listing for April 2011

Project	Company	Status	Expected start-up	Capital expenditure	Additional employment
Ravensworth North	Xstrata	Expansion, under construction	2012	$1.44b	550 (const) 500 (op)
Ulan West	Xstrata	Expansion, under construction	2014	$1.34b	270 (const) 350 (op)
Daunia	BHP Billiton Mitsubishi Alliance (BMA)	New project, committed	2013	$1.65b	450 (const) 300 (op)
Kestrel	Rio Tinto	Expansion, under construction	2012-13	$1.13b	
Goonyella to Abbott Pt (rail) (X50)	QR National	Expansion, under construction	Early 2012	$1.1b	
Hay Point Coal Terminal Phase 3	BHP Billiton Mitsubishi Alliance (BMA)	Expansion, committed	2014	$2.6b	
Gladstone LNG project	Santos/Petronas/ Total/Kogas	New project, committed	2015	$16.5b	5000 (const) 1000 (op)
Gorgon LNG	Chevron/Shell/ ExxonMobil	New project, under construction	2015	$43b	3000 (const) 600 (op)
Kipper gas project (stage 1)	Esso/BHP Billiton/ Santos	New project, under construction	2012	$1.9b	
Macedon	BHP Billiton/ Apache Energy	New project, under construction	2013	$1.55b	300 (const)
NWS CWLH	Woodside Energy, BHP Billiton, BP, Chevron, Shell, Japan Australia LNG	Expansion, under construction	2011	$1.5b	
NWS North Rankin B	Woodside Energy, BHP Billiton, BP, Chevron, Shell, Japan Australia LNG	Expansion, under construction	2013	$5.3b	
Pluto (train 1)	Woodside Energy	New project, under construction	Late 2011	$14b	2000 (const) 150 (op)
Queensland Curtis LNG project	BG Group	New project, under construction	2014	$15.5b	5000 (const) 1000 (op)
Reindeer gas field/Devil	Apache Energy/Santos	New project, under	Late 2011	$1.08b	

Project	Company	Status	Expected start-up	Capital expenditure	Additional employment
Creek gas processing plant (phase 1)		construction			
Turrum	ExxonMobil/BHP Billiton	New project, under construction	2013	$2.8b	
Cadia East	Newcrest	Expansion, under construction	2013	$1.9b	1300 (const) 800 (op)
Chichester Hub	Fortescue Metals Group	Expansion, committed	2013	$1.55b	
Hamersley Iron Brockman 4 project (Phase B)	Rio Tinto	Expansion, committed	2013	$1.13b	
Hope Downs 4	Rio Tinto, Hancock Prospecting	New project, under construction	2013	$1.65b	
Jimblebar mine and rail (WAIO)	BHP Billiton	New project, committed	2014	$3.5b	
Karara Project	Gindalbie Metals/Ansteel	New project, under construction	2011	$2.6b	500 (const) 130 (op)
Sino Iron Project	CITIC Pacific Mining	New project, under construction	2011	$5.4b	4500 (const) 800 (op)
Western Australian Iron Ore Rapid Growth Project 5	BHP Billiton	Expansion, under construction	2011	$5.8b	
Cape Lambert port and rail expansion	Rio Tinto/Robe River	Expansion, under construction	2013	$3.2b	
Port 55	Fortescue Metals Group	Expansion, under construction	2013	$2.5b	
WAIO optimisation (port blending and rail yards)	BHP Billiton	Expansion, committed	2014	$1.7b	
Argyle underground development (diamonds)	Rio Tinto	Expansion, under construction	2013	$1.65b	250 (const) 500 (op)
Worsley refinery efficiency and growth	BHP Billiton, Japan Alumina, Sojitz Alumina	Expansion, under construction	2011	$2.3b	4000 (const) 100 (op)

Project	Company	Status	Expected start-up	Capital expenditure	Additional employment
project					
Yarwun alumina refinery expansion	Rio Tinto Alcan	Expansion, under construction	2012	$1.96b	1200 (const) 300 (op)

Australia's highest-paying industry

3.6 The mining industry boasts the highest wages of any industry in the Australian economy. Average weekly full-time adult ordinary time earnings across all industries, in both the public and private sectors, are $1,330.10 a week (or $69,165.20 a year). In the private sector alone, average earnings are $1,307.40 a week (or $67,984.80 a year).

3.7 In the mining industry, average weekly earnings are $2,185.30 a week[12] (or $113,635.60 a year), nearly double the average earnings in the private sector as a whole.

3.8 By way of comparison, average weekly adult ordinary time earnings in the construction industry are $1,367.50 (or $71,110 a year).

Australia's fastest growing industry

3.9 The resource industry is Australia's fastest growing industry in terms of employment.

3.10 Employment in the industry has already reached the growth predictions made by the National Resources Sector Employment Taskforce (NRSET) in June 2010[13]. As of February 2012, the industry had already met the expected employment numbers that NRSET predicted for 2015[14].

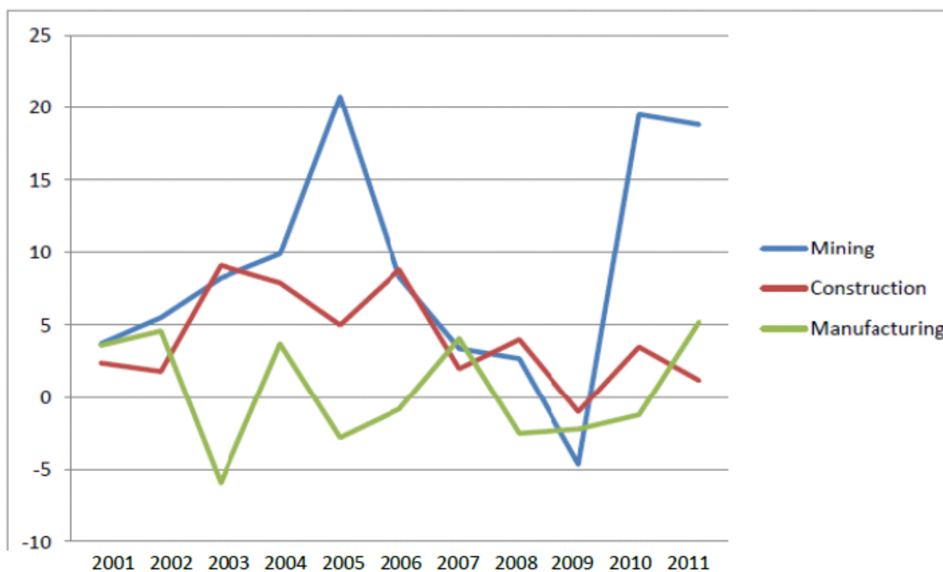
3.11 In the three months leading up to February 2012 alone, the industry's workforce grew by 10,000.

[12] *Average Weekly Earnings, Australia, November 2011,* ABS, Catalogue no 6302.0, published on 23 February 2012
[13] *Resourcing the Future*, National Resources Sector Employment Taskforce Report, July 2010
[14] *Labour Force, February 2012*, released by the ABS on 16 March 2012, Catalogue no 6202.0

3.12 Over the past two years, the rate of employment growth in the mining industry has approached 20 per cent a year, compared with other industries such as construction which has seen growth of around four and two per cent a year during the same period.

3.13 The graph below compares employment growth in the mining industry against other key industries like construction and manufacturing over the past 10 years.

10-year employment growth by industry



Source: ABS Labour Force Statistics, November Quarters, 2001 - 2011

3.14 While this shows the comparative strength of the industry in an economic sense, it also means the industry is in a vulnerable position in terms of being able to source enough labour through upskilling and training, particularly in key occupations undergoing severe skills shortages such as trades and engineering roles. It also puts massive pressure on current workplace arrangements to provide sufficient flexibility in order to maximise efficiency, productivity and continuity of supply. Under the current industrial relations system, that means employers must have access to genuinely flexible IFAs that offer protection and security for business as well as benefits for employers.

The skills shortage

3.15 The table below shows the NRSET predictions for employment growth in the resource industry between 2010 and 2015, and reveals how those predictions have already been met as of early 2012.

	February 2005	May 2010 (around the time the NRSET report was released)	February 2012	NRSET prediction for resource industry employment by 2015
Direct employment in the resource industry	107,500[15]	185,200[16]	249,700[17]	**250,000**
Indirect employment (using a multiplier of three)	322,500	555,600	749,100	**750,000**

3.16 The NRSET report predicted employment in the resource industry would grow by 65,000 jobs between 2010 and 2015. That level of growth has been achieved in two years rather than five. If current annual employment growth rates of around 20 per cent a year continue for the next three years, we can expect the mining industry workforce to reach 300,000 by 2013, 360,000 by 2014 and 432,000 by 2015.

3.17 While based on the best information available at the time, the NRSET report vastly underestimated employment growth in the industry and, correspondingly, the level of skills shortage the industry will face.

3.18 The table over the page shows the NRSET predictions for engineering skills shortages in the resource industry by 2015.

3.19 Just as employment growth has far outstripped the NRSET predictions, so too are shortages in the engineering field expected to exceed the predicted shortfall of 1,700 engineers by 2015.

[15] *Labour Force, February 2005*, published by the ABS
[16] *Labour Force, May 2010*, published by the ABS
[17] *Labour Force, February 2012*, published by the ABS

ENGINEERING JOBS	By 2015
New engineering jobs	1,600 +
Replacement engineering jobs due to attrition	1,300 =
	2,900 -
New engineering graduates	1,200
Predicted shortfall of engineers	**1,700**

3.20 The table below shows the NRSET predictions for the shortfall in supply versus demand for tradespeople in the resource industry, including construction and mining and gas operations, by 2015.

3.21 As with NRSET's predicted shortages in the engineering field, shortages of tradespeople in the resource industry by 2015 are expected to far outstrip the 35,800 that NRSET predicted based on its best estimates at the time.

TRADES JOBS	By 2015
Construction	7,800 +
Mining operations	15,000 +
Gas operations	1,000 =
Total new jobs for tradespeople	23,800 +
Replacement trades jobs due to attrition (mining and gas)	22,000 =
	45,800 -
Supply of tradespeople (construction, mining and gas operations)	10,000 =
Predicted shortfall of tradespeople	**35,800**

3.22 There is no doubt the Australian resource industry is in the midst of a very serious skills/labour shortage. As the industry continues to strive for greater efficiencies to take advantage of the benefits that improved technology can offer, and to maximise the benefits of the current high demand for our resources, the need for highly skilled employees is only set to grow.

3.23 A May 2011 survey of 200 AMMA members revealed that 86 per cent were experiencing a skills shortage at that time, in particular a shortage of engineers closely followed by tradespeople, particularly for the construction phases of projects.

3.24 In an October 2011 survey of AMMA members[18], 33.8 per cent of respondents said it was 'much more difficult than usual' at that time to recruit skilled labour for their enterprises.

3.25 All of the above adds to the pressure on employers to implement sufficiently flexible work practices to minimise the impacts of the skills shortage and maximise the benefits of the resources boom.

3.26 At present, one of the few avenues employers have for achieving workplace flexibility is by entering into IFAs with individual employees. The current negligible uptake of IFAs and the deficiencies in the present system do not bode well for achieving that.

[18] *AMMA Workplace Relations Research Project Report 4*, October 2011, Dr Steven Kates from RMIT University

4 The uptake of IFAs in the resource industry

4.1 As mentioned earlier, AMMA's best estimate is that in the resource industry, less than five per cent of employment arrangements made under the *Fair Work Act* are subject to IFAs.

4.2 By way of background, the industry heavily utilised individual statutory agreements from the time they were first available in Western Australia in 1993 and federally as AWAs from 1996.

4.3 The Rudd Government removed the option for employers and employees to embark on new employment relationships based on statutory individual agreements in March 2008[19].

4.4 Up until then, it is estimated that 67 per cent of resource industry employers were operating under AWAs that covered their entire workforce, with that figure closer to 80 per cent in metalliferous mining[20]. This is in stark contrast with the considerably less than five per cent of employment arrangements made under the current federal industrial relations system that are believed to be subject to IFAs.

4.5 With only half of AMMA's membership estimated to have negotiated new enterprise agreements under the *Fair Work Act*, the prospective termination of hundreds of thousands of AWAs means the industry will again be reliant on awards and collective agreements for workplace flexibility. Employers will increasingly have to rely on efficiencies available under flexibility clauses and IFAs to achieve increased productivity in the years to come.

4.6 Of the approximately half of AMMA members that have negotiated enterprise agreements under the *Fair Work Act*, around 75 per cent are estimated to have used Fair Work Australia's model flexibility clause, while an estimated 25 per cent have used negotiated flexibility clauses. It needs to be borne in mind, however, this was the first generation of agreements struck

[19] Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008
[20] The *case for ongoing flexibility in employment arrangement options in the Australian resources sector*, AMMA, March 2004

under the *Fair Work Act*, when unions were more inclined to go with the model clause as a default option. AMMA expects the next round of agreements, if made under the same laws, to see unions trying to water down the model flexibility clause.

4.7 Those AMMA members that have used the model clause are generally more satisfied than those who negotiated a clause in terms of the potential flexibility available. However, AMMA members are widely reporting that no matter what type of clause is used, the lack of protections afforded by IFAs renders them virtually useless from an operational perspective.

Types of roles/occupations working under IFAs

4.8 The types of roles and occupations currently working under IFAs in the resource industry include:

- Masters and deckhands;
- Operational staff;
- Maintenance and process workers;
- Staff/administrative roles;
- Technical roles; and
- Common law contract employees, i.e. white-collar workers.

4.9 As one AMMA member commented[21]:

> *To onshore staff, IFAs would hold value. However, the majority of our employees are offshore where a system of flexibility can mean a huge drop in safety (not to mention productivity).*

[21] *AMMA Workplace Relations Research Project Survey 4 Report*, October 2011, by Dr Steven Kates from RMIT University

Who initiates IFAs?

4.10 Resource industry IFAs tend to be initiated equally by employers and employees and tend to be more commonly used to formalise existing work practices than to establish new ones.

4.11 In cases where informal arrangements are in place between certain departments and individuals, IFAs have been used to put structure around the arrangements and provide a clearer understanding for both parties as to the requirements associated with ceasing such arrangements.

4.12 In the case of one AMMA member company, an IFA was structured to enable the hours normally worked in a fortnight (i.e. 10 working days) to be worked in nine days instead. This allowed workers to have a rostered day off (RDO) every fortnight. Effectively, workers performed an extra hour's work each day over nine days and took the extra time as a regular RDO each fortnight.

4.13 Obviously, those types of arrangements may not be capable of being supported in all resource industry workplaces.

4.14 In the scenario above, workers retained all of their other entitlements including public holidays under the IFA. On top of that they had improved work / life balance and, importantly due to the remoteness of the site, a regular business day as an RDO to complete personal business and attend appointments.

4.15 Another AMMA member company included the ability to take blood donor leave under an IFA. Again, such clauses are hardly generating significant increased flexibility for the enterprise.

4.16 As AMMA members have reported[22]:

> *[IFAs] are good for staff but have to meet the business needs to make them mutually effective.*

[22] *AMMA Workplace Relations Research Project Survey 4 Report*, October 2011, by Dr Steven Kates from RMIT University

Their main value is to the employee. There are significant road blocks to negotiating and introducing IFAs in heavily unionised workforces. Unions will only let clauses cover matters related to parental leave or taking annual leave in single days (or similar).

On an individual basis, yes, flexibility has been able to be achieved, but not at an organisational level.

While they are required under the Fair Work Act, the issues which can be covered are almost always reduced to meaningless issues such as the employees' desire to alternate leave arrangements, etc. There is no capacity to vary the agreement re an individual's role and responsibilities in any real sense.

4.17 AMMA members report finding it difficult to get a meaningful flexibility clause into an enterprise agreement in the first place and, if they do, difficulties getting a genuinely flexible IFA in place afterwards. The risk that such arrangements can be cancelled at 28 days' notice further undermines their utility and minimises their uptake.

5 Problems with IFAs in their current form

5.1 Since the *Fair Work Act* began, unions have shown resistance to negotiating genuine flexibility terms no matter how generous the terms might be for employees who choose to use them to make IFAs. One reason for this is that IFAs have the capacity to undermine the notion that collective bargaining yields better outcomes for workers than they could achieve individually.

5.2 Since 2009, the Australian Council of Trade Unions (ACTU) and the Australian Manufacturing Workers Union (AMWU) have led the charge against IFAs, urging their members to treat them with suspicion, even going so far as to warn them that employers will try to use IFAs to exploit individuals. Such comments are disingenuous as they ignore the statutory protections that require workers to be left 'better off overall' after entering into an IFA.

5.3 The ACTU website cites IFAs as 'an ongoing concern for unions, as it may allow unscrupulous employers to undermine the collective agreement'[23].

5.4 The AMWU posted a warning on its website accusing employers of seeking flexibility clauses 'in an attempt to undermine pay and conditions in collective agreements'[24]. The union said while it supported flexible working arrangements that suited employers and employees, the extent of that flexibility should first be agreed by a majority of workers and not 'forced on individuals'.

5.5 This attempt to make flexibility clauses subject to collective approval is at odds with a June 2008 Australian Industrial Relations Commission (AIRC) decision which highlighted that the intention of the model flexibility clause was to allow negotiations on an individual basis[25]:

> *It is not intended that the clause should deal with collective agreements such as those with a majority of employees. The use of*

[23] New protections and minimum standards for all Australian workers from 1 January 2010, ACTU Fact Sheet, January 2010
[24] Flexibility push by employers is about undermining collective agreements, 22 September 2009, AMWU website
[25] AIRC Full Bench decision on award modernisation [2008], AIRCFB 550, 20 June 2008

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

5.6 While under the *Fair Work Act*, unions are not allowed to access IFAs before they are entered into, many EBAs provide for unions to scrutinise them after the event, which is just as detrimental to individual flexibility.

5.7 As AMMA members have reported about their experiences in trying to negotiate flexibility clauses with unions[26]:

This does not work when involving unions. They have conflicting views.

Unions don't support these – so either they are of no value or the initial intent is diluted.

Unions only give them lip service.

With regard to flexibility clauses, union resistance is too high, plus the company is not convinced it is worth the fight (i.e. any flexibilities achieved would be too hard to exercise anyway).

We just included the flexibility clause in the agreement as part of the obligations of the Fair Work Act. However, all unions sought to modify the model flexibility clause. And frankly, they are not really worth the paper they are written on as they provide no certainty.

The AMWU strongly opposes any flexibility in the workplace.

5.8 Notwithstanding the intention of IFAs as individual agreements, unions are approaching them as instruments to be collectively negotiated and vetted, despite the AIRC having early on rejected an ACTU-drafted model flexibility

[26] AMMA Workplace Relations Research Project Survey 4 Report, October 2011, Dr Steven Kates, RMIT University

clause that would have required union consent before IFAs could be entered into.

5.9 The ACTU's submission to the *Fair Work Act* review panel in February 2012 reveals unions' stance against IFAs remains unchanged:

> *Unions did not support the creation of IFAs. In our view, there was already ample scope under awards (and contracts of employment) for employers to roster work in a flexible and efficient manner.*

5.10 The ACTU's submission to that review called for IFAs to no longer be mandatory in awards and enterprise agreements. While AMMA's view is that a major overhaul of the IFA provisions is needed, and that a minimum level of flexibility should be required in all flexibility clauses, it would oppose any move to make flexibility clauses optional until a suitable substitute is introduced.

Examples of sub-standard flexibility clauses

5.11 Some flexibility clauses that make their way into enterprise agreements pay only lip service to the concept of flexibility but continue to be approved by Fair Work Australia because they meet the requirements of the *Fair Work Act*.

5.12 Following are some notable examples of sub-standard flexibility clauses:

- **An agreement struck between** the construction division of the CFMEU in Victoria and Bam & Associates[27] was approved by Fair Work Australia in March 2010 and includes a mandatory flexibility term specifying that only one clause in the agreement can be subject to an IFA. That is the 'protective clothing and boots clause' which states:

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

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

This type of 'flexibility' clause provides no enterprise-specific flexibility but meets the *Fair Work Act*'s approval requirements. To suggest it is a viable alternative to the protections and flexibility afforded to employers under a statutory individual agreement is nonsense.

- **The *Coates Hire Operations Pty Ltd National Agreement 2009***[28], an agreement negotiated with the AMWU and CEPU, contains two separate flexibility terms applying in different circumstances.

  The first 'flexibility' term applies to all employees covered by the agreement but allows flexibility around just one clause:

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

  The second flexibility term applies only to specific projects but more closely resembles the 'model' flexibility clause.

- **In a greenfield agreement** approved by Fair Work Australia in August 2009[29], the flexibility clause stated:

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

- **Another agreement approved in October 2009**[30] involving Parmalat Australia Ltd stated the only term an IFA could vary was one that said:

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

  The clause also required the employer to provide copies of all IFAs to the union upon request.

[28] Coates Hire Operations Pty Ltd t/as Coates Hire [2009], FWAA 1366
[29] Emerald Reo Greenfields Enterprise Agreement 2009-2012 [2009] FWA 135.
[30] Parmalat Australia Limited [2009] FWAA 664

- **An agreement between Campbell's Soup and the AMWU**[31] was approved in December 2009 following a very public dispute between the parties over the flexibility clauses in particular. Two flexibility clauses eventually made their way into the agreement. The first was an 'individual' flexibility clause, the second a 'majority' flexibility clause.

  Under the individual clause, the only terms an IFA could vary were those in the *Food Preservers Award* that was incorporated into the agreement. Flexibility was confined to the maximum number of single days or parts of a single day's annual leave an employee could take in any calendar year.

  The 'majority' flexibility clause offered more flexibility but required majority support from the workforce in order to arrive at any sort of arrangement. Similar to the model clause, this clause allowed terms to be varied including arrangements about when work was performed; overtime rates; penalty rates and allowances. But a majority of employees in each department had to agree to any changes. It also required the AMWU to be fully consulted in developing and considering any modifications, giving the union the right to consult with members over any proposals.

5.13 Fair Work Australia is on the record as saying the intention of the model flexibility clause and, by extension all other flexibility clauses, is to allow negotiations on an individual basis, not to require majority consent for genuine workplace flexibility[32]:

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

[31] Campbell Australasia Pty Ltd t/as Campbell Soups Australia [2009] FWAA 1598.
[32] AIRC Full Bench decision on award modernisation [2008], AIRCFB 550. 20 June 2008

The case against union access to IFAs

5.14 Under the *Fair Work Act*, unions cannot insist on being shown proposed IFAs before individual workers and employers agree to them. However, many enterprise agreements now include a requirement to show a union all IFAs after they have been made.

5.15 As one AMMA member observed[33]:

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

5.16 Union scrutiny of IFAs, even after the event, should be prohibited as it constitutes a breach of individual privacy and undermines the intention of the arrangements as being private.

The case for fixed-term IFAs

5.17 There is a strong case for fixed-term IFAs and for mutual agreement to be required before an IFA is able to be terminated prior to its expiry date.

5.18 Problems resulting from the ability for either party to terminate an IFA with 28 days' notice include not only the insecurity that brings but the potential for a multitude of industrial arrangements to have to operate across a single business at any given time. For instance, at a single enterprise, some employees could be working under an IFA while others have reverted to the modern award or enterprise agreement after terminating their IFA.

5.19 There is no fixed end date for IFAs under the *Fair Work Act* and they continue to operate until a new enterprise agreement is finalised or until one of the parties decides to terminate the arrangement. Resource industry employers therefore face the prospect of having to update a plethora of workplace arrangements on a rolling basis as employees opt out of previously agreed arrangements. Given that employee wage rates may have been negotiated and calculated on the basis of an IFA being in force, the ability for employees

[33] *AMMA WR Research Project Report 2*, October 2010, Dr Steven Kates, RMIT University

to terminate an IFA at short notice can require an adjustment of the employee's pay, again requiring the employer to have numerous payroll systems in place.

5.20 As AMMA members have reported[34]:

> *In their current form, there is no confidence of their longevity so they are not a good tool for underpinning sustainable change.*
>
> *They are too easy to withdraw and too limited in scope.*
>
> *Anything that can be overturned by one party in such a short time is pointless; you need certainty.*
>
> *The ability for the employee to terminate them with 28 days' notice and the IFA being limited to matters contained in an award reduces their value.*
>
> *The 28-day severance capacity by the employee provides no certainty for work and workforce planning; it would require the ability for IFAs to have fixed terms of two to four years to be of value.*
>
> *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.*[35]

5.21 To be of any value, IFAs must operate for a set period, which AMMA recommends should be up to four years, with the ability for parties to re-negotiate the arrangements at the end of that time if desired. This would give both parties certainty that the arrangements would continue for a minimum period and would see IFAs operate with more certainty, increasing their up-

[34] AMMA Workplace Relations Research Project Survey Report 4, October 2011, Dr Steven Kates, RMIT University

[35] AMMA member company responding to AMMA WR Research Project Survey 4, October 2011, reported by Dr Steven Kates, RMIT University

take in the resource industry. This would also retain the flexibility to terminate arrangements where that is what both parties want.

5.22 A four-year maximum end date for IFAs would go some way towards making them more attractive to employers, with agreements able to be terminated by mutual agreement at any time with 28 days' notice.

The case for pre-start IFAs

5.23 The inability for employers to offer pre-employment IFAs prevents companies that have reached agreement with existing employees from hiring new employees on the same flexible arrangements. It also impedes employers' ability to advertise enhanced benefits under an IFA in order to attract the best applicants.

5.24 Under the *Fair Work Act* as it currently stands, employers can 'offer' an individual an IFA prior to employment but it cannot be a 'condition' of employment. An employer could outline at the interview stage what the difference in pay would be between the award or agreement and the IFA. While this would not offend the requirement not to make an IFA a condition of employment, it does represent uncertainty for both parties from the outset.

5.25 The current system requires a 'double handling' of the employment relationship which is time consuming and costly. For instance, a worker might start out on one set of arrangements and a short time after starting work move onto an IFA.

5.26 The statutory protections in place for employees under ss.144 and 203 of the *Fair Work Act* ensure that IFAs leave workers 'better off overall' in comparison with an award or enterprise agreement. This should remove any concerns that Fair Work Australia might have about the potential exploitation of new employees as a reason not to allow IFAs as a condition of employment.

5.27 There is strong support among AMMA members for being able to make IFAs a condition of employment. In an October 2011 survey of AMMA members[36],

[36] *AMMA WR Research Project Report 4*, October 2011, Dr Steven Kates, RMIT University

73.2 per cent of respondents said they supported that capacity being introduced.

The case against industrial action during the life of IFAs

5.28 One of the key attractions of statutory individual agreements for employers is the protection they afford against protected industrial action during the life of an agreement.

5.29 This is a significant difference between an AWA and an IFA given there is nothing stopping an employee who is covered by an IFA from taking protected industrial action during the life of the arrangement while continuing to enjoy benefits such as increased pay.

5.30 In light of the current skills shortage and the resources boom, continuity of supply in the resource industry is paramount and should be facilitated wherever possible, particularly in an industry that is the highest paying in the country and is responsible for a greater rate of jobs creation than any other at this point in time.

5.31 In an April 2010 survey of AMMA members, 90 per cent of respondents supported industrial action not being able to be taken during the life of an IFA[37].

Conclusion

5.32 As we approach the third anniversary of the *Fair Work Act*, it has become increasingly clear that flexibility terms in enterprise agreements are not delivering genuine flexibility to any but a minority of businesses, contrary to Labor Government promises.

5.33 If the government is serious about its stated aims of increasing enterprise flexibility and productivity, it should act immediately to address the glaring deficiencies in its current industrial relations system in relation to IFAs.

[37] *AMMA WR Research Project Report 1*, April 2011, Dr Steven Kates, RMIT University

5.34 This submission offers eight recommendations for change that would allow it to do just that.

5.35 AMMA would be more than happy to elaborate on any of the points made in this submission upon request.