Errata

[6.29], [6.51]: These paragraphs should make it clear that applications for judicial review against Fair Work Australia (FWA) decisions may be lodged either in the Federal Court or the High Court. Section 39B of the Judiciary Act 1903 (Cth) was amended in 2009 to permit such actions to be initiated in the Federal Court, rather than having to be made to the High Court and then remitted (although that option remains open).

[17.27] The section reference at the end of the paragraph should read: (s 357(2)).

[17.65] Fourth last line should read: ‘addition of protection against victimisation on grounds of non-membership, as well as membership…’

[17.113]: The Listening Devices Act 1972 (SA), referred to in fn 290, should be the Listening and Surveillance Devices Act 1972.

[20.29]: In fn 31, ‘Queensland and Western Australia’ should be just ‘Queensland’. The list of legislation that follows should include the Conspiracy and Protection of Property Act 1900 (WA) s 5.

Bibliography: The following entry was inadvertently omitted:

Cooper J (chair) 2010, Super System Review: Final Report (Commonwealth of Australia, Canberra)

Review of the Fair Work Legislation

In December 2011, the federal government announced that a review of the Fair Work legislation would be conducted by a panel comprising economist John Edwards, labour law academic Ron McCallum and retired Federal Court judge Michael Moore. The terms of reference for the review described it as involving an ‘evidence based assessment of the operation of the Fair Work legislation, and the extent to which its effects have been consistent with the objects set out in section 3 of the Fair Work Act’.


The Review’s principal finding is that ‘the effects of the Fair Work legislation have been broadly consistent’ with the stated objects of the Act, and that it is ‘operating broadly as intended’ (p 18).

The panel also concludes, after an extensive review of economic data and other statistics, that since the introduction of the Fair Work Act 2009 (FW Act) ‘important outcomes such as wages growth,
industrial disputation, the responsiveness of wages to supply and demand, the rate of employment growth and the flexibility of work patterns have been favourable to Australia’s continuing prosperity’ (p 19). While productivity growth in Australia has been ‘disappointing’ over the past decade, the Review notes that this has been the case under both the Fair Work system and the legislation that preceded it. In contrast to the widely expressed view by some business leaders that the current laws are holding back economic performance, the panel finds nothing to suggest that the ‘productivity slowdown’ can be traced to changes in ‘the legislative framework for industrial relations’ (p 19).

The Review likewise notes that there has been no significant increase in the number of industrial disputes, and that there is no evidence to support claims that either minimum wage increases or increased access to unfair dismissal protection (compared to the Howard Government’s Work Choices regime) has had a discernible impact on levels of employment.

Consistent with this analysis, the report rejects proposals from employer groups for a return to ‘voluntary bargaining’, the reintroduction of statutory individual agreements, a relaxation of the ‘better off overall test’ for agreement-making, or a narrowing of the ‘transfer of business’ provisions. Nor does it accept that there should be any significant curtailment in the right of employees to complain of unfair dismissal or take industrial action, or the right of union officials to enter workplaces.

The Review nonetheless puts forward 53 proposals for improving the Fair Work system, many of which would involve amendments to the legislation. Some of these would address technical problems that have been identified, or (in a few cases) either reverse or confirm contentious interpretations of the current Act. For the most part, however, the panel has emphasised the need to allow the newer aspects of the Fair Work regime to be fully tested, before rushing to intervene.

Among the changes proposed in the report are two that have been championed by the new FWA president, Justice Iain Ross. One is to rename the agency, preferably as some form of ‘Commission’, but without the ‘Fair Work’ prefix that is so confusingly attached to other bodies, as well the Act itself.

The second is to extend FWA’s activities in actively encouraging more productive and co-operative workplace relations. This might be done, for instance, by ‘identifying best-practice productivity enhancing provisions in agreements and making them more widely known to employers and unions, encouraging the development and adoption of model workplace productivity enhancing provisions in agreements, and disseminating information on workplace productivity enhancement through conferences and workshops’ (p 21).

Some of the other notable recommendations in the Review are discussed under the various headings that follow.

The government has indicated it will be consulting with stakeholders over the Review’s findings before announcing any response. There is no set timeframe for any legislation to be put before Parliament, though the Minister for Workplace Relations has expressed the hope that at the very least some less contentious reforms might be introduced and passed by the end of 2012.
National Employment Standards

The FW Act Review has proposed a significant expansion to the right of employees to request flexible work arrangements (see [13.94]–[13.97]). At present this is limited to parents of pre-school or disabled children, and not (for example) those caring for elderly relatives or adults with disabilities. The panel recommends that the right be ‘expanded to reflect a wider range of caring responsibilities’ (p 98). It is also proposed that employers should no longer be able to reject requests without meeting the employee, and there is a similar recommendation in relation to requests to extend unpaid parental leave (see [13.101]). But the panel has resisted calls to give employees a right to appeal against rejections of either type of request.

The Review has also recommended that the process of harmonising State and Territory long service laws (see [13.130]) should be expedited; and that the government consider whether to limit to 11 the number of public holidays for which penalty rates can become payable (see [13.126]).

Modern Awards

The interim two-year review of the modern award system required by item 6 of Schedule 5 to the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (see [11.89]) is underway: see www.fwa.gov.au/index.cfm?pagename=awardReview2012. On the current timetable, the review is not expected to be completed until some time in 2013. In an important preliminary decision, a Full Bench of FWA has made it clear that it sees the interim review as having a narrower scope than the regular four-yearly reviews required by s 156 of the FW Act. In particular, it is not to be seen as requiring a ‘fresh assessment’ of every modern award. Any party seeking to re-agitate an argument previously dealt with by the AIRC during the 2008–09 award modernisation process will have to show ‘cogent reasons for departing from the previous Full Bench decision, such as a significant change in circumstances, which warrant a different outcome’: see Modern Awards Review 2012 [2012] FWAFB 5600 at [88]–[89]. This will clearly make it harder, for instance, for employer groups seeking significant changes to penalty rates.

Even prior to the interim review, a number of applications had been brought to vary the modern awards that took effect in January 2010. The most significant of these, in terms of the potential to set a precedent across a number of industries, involved an attempt to reduce the minimum period of engagement for casual employees set by the General Retail Industry Award 2010. A general application to that effect was rejected by FWA, on the basis that such a change was not necessary to achieve the ‘modern awards objective’ set out in s 134(1) of the FW Act: see Appeal by National Retail Association Ltd [2010] FWAFB 7838. However, a much more limited variation was subsequently granted, allowing students to work 90-minute shifts after school: see SDA v National Retail Association Ltd (No 2) [2012] FCA 480.

In another development, FWA has decided to create the first modern enterprise award (see [11.26]–[11.33]), covering Telstra: see Telstra Corp Ltd v CEPU [2012] FWAFB 5401. In doing so, it rejected Telstra’s application to terminate its existing enterprise instruments and fall back to the relevant industry awards. The Full Bench agreed with the unions’ view that if ‘the history and circumstances of Telstra’ did not justify the making of an enterprise award, then nothing ever would. The Full
Bench also noted that, unlike the case with previous unsuccessful applications (see eg Yum Restaurants Australia Pty Ltd v Full Bench of FWA [2011] FCA 1315), the Telstra awards generally set pay and conditions that were above the industry safety net, not below.

High Income Threshold

As of 1 July 2012, the ‘high income threshold’ for which s 333 of the FW Act provides has risen to $123,300. This affects the availability of both unfair dismissal claims (see [19.40]–[19.43]) and high income guarantees (see [11.61]–[11.63]), as well as the cap on compensation for unfair dismissal (see [19.76]). The same figure operates as a maximum income for the purpose of calculating payments under the General Employee Entitlements and Redundancy Scheme (GEERS) (see [16.63]).

Individual Flexibility Arrangements

The FW Act Review has recommended a number of significant changes to the provisions regarding ‘flexibility terms’ in industrial instruments (see [11.64]–[11.68], [12.48]–[12.51]). But it is unclear whether these will in practice have much effect in encouraging the use of individual flexibility arrangements (IFAs).

To meet employer concerns that unions are effectively negating the use of IFAs under enterprise agreements, it is proposed that agreements will, as a minimum, have to permit individual employees to negotiate arrangements as to the full range of matters covered by the model flexibility term in Schedule 2.2 of the Fair Work Regulations 2009: that is, the times at which work can be performed, overtime or penalty rates, allowances and leave loadings.

Further changes are proposed ‘to make IFAs easier to access and more attractive to both employers and employees’ (p 19), whether under awards or enterprise agreements. These include:

- lengthening the period of notice to be given to a terminate an IFA from 28 to 90 days (unless a shorter period is agreed);
- making it clear that the better-off overall test can be satisfied by providing non-monetary benefits in lieu of monetary entitlements; and
- providing that an employer may defend an action for breaching a flexibility term by showing that it followed the required procedures and reasonably believed that the requirements for a valid IFA were satisfied.

At the same time, the Review has rejected any suggestion of employers being able to make an employment offer conditional on the signing of an IFA. It also recommends that whenever an IFA is made, certain details must be reported to the Fair Work Ombudsman (FWO), including the name of the employee. This may well have the effect of dissuading certain employers from using IFAs at all, given the administrative burdens involved, and the greater scrutiny that such a requirement might well be expected to invite.
Minimum Wages

Part 2-6 of the FW Act provides for annual adjustments to the minimum wages set for national system employees (see [13.09]–[13.21]). In its Annual Wage Review 2010–11 [2011] FWAFB 3400, FWA’s Minimum Wage Panel granted a 3.4% increase in minimum wages, including those set by modern awards and transitional instruments such as enterprise awards. The following year, it decided on a 2.9% increase: see Annual Wage Review 2011–12 [2012] FWAFB 5000. As from July 2012, the national minimum wage is now $606.40 per week or $15.96 per hour.

In 2011 the Panel also, for the first time, established minimum rates for award-free juniors and trainees. In both cases, it opted to apply the special rates set for those types of worker by the Miscellaneous Award 2010.

The Panel had originally intended to conduct a broader review in 2010–11 of junior and trainee wage rates in awards, but this was postponed: see Annual Wage Review 2010-11 – Juniors and Trainees [2011] FWA 619. The issue is now being addressed as part of the review of modern awards mentioned above: see Modern Awards Review – Apprentices, Trainees and Juniors [2012] FWA 5102.

In addition, and as expected, the Panel has in its past two annual wage reviews increased the casual loading for award-free employees to 23%, as from July 2012. It will eventually reach 25% in July 2014.

In Western Australia, the Industrial Relations Commission has increased the State minimum wage (see [13.22]) to $627.70 per week or $16.52 per hour: see State Wage Case [2012] WAIRC 00346.

Pay Equity

Under Part 2-7 of the FW Act, FWA can make an order to ensure ‘equal remuneration for men and women workers for work of equal or comparable value’: see [13.30]–[13.33]. The first such order has now been made, in a case brought by the ASU in respect of the female-dominated social and community services (SACS) sector.

In a preliminary ruling, the Full Bench was satisfied that gender had been ‘important in creating the gap between pay in the SACS industry and pay in comparable state and local government employment’: Equal Remuneration Case [2011] FWAFB 2700 at [291]. It refused, however, to articulate any ‘equal remuneration principle’ to guide future decisions.

In February 2012, a majority of the Bench accepted a joint ASU-Commonwealth submission that this gap should be remedied by increases of between 19 and 41% to the minimum wage rates set by the Social, Community, Home Care and Disability Services Industry Award 2010: see Equal Remuneration Case [2012] FWAFB 1000. The Award itself has not been varied, and the equal remuneration order is to operate on a ‘stand alone’ basis. There is also a special 4% loading, to recognise ‘impediments to bargaining in the industry’. Both the increases and the loading will be phased in over an eight-year period that commences in December 2012: see Equal Remuneration Case [2012] FWAFB 5184.
Superannuation

In *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2011] HCA 35 the High Court rejected a challenge to the constitutional validity of the superannuation guarantee (SG) legislation (see [13.66]–[13.69]), holding that it was validly enacted pursuant to the taxation power in s 51(2) of the Constitution (see [4.27]).

The federal government has introduced a number of measures to reform the superannuation system. These include the *Superannuation Guarantee (Administration) Amendment Act 2012*, which will take effect in July 2013. Besides eventually increasing minimum SG contributions by employers from 9 to 12%, it will remove the current age limit of 70 (see [13.66]).

The *Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011* envisages the establishment of low-cost MySuper products (see [13.71]). Where an employee fails to choose a fund, any SG contributions will need to be made to a ‘default’ fund that offers a MySuper product. Assuming that the Bill is passed in time, together with related legislation that is still being drafted or released for consultation, the MySuper system will commence in July 2013.

The government has also asked the Productivity Commission to conduct an inquiry into the criteria for identifying default funds in modern awards, something that is presently left entirely to FWA. A draft report was issued in June 2012, proposing significant changes: see [http://www.pc.gov.au/projects/inquiry/default-super/draft](http://www.pc.gov.au/projects/inquiry/default-super/draft).

The *Superannuation Legislation Amendment (Stronger Super) Act 2012* amends the *Superannuation Industry (Supervision) Act 1993* to require compliance (in most cases from July 2014) with new data and payment standards for the making of contributions and other superannuation-related transactions.

The *Tax and Superannuation Laws Amendment (2012 Measures No 1) Act 2012* amends the *Superannuation Industry (Supervision) Act 1993* to require employers (from July 2013) to provide greater information on payslips as to superannuation contributions made on behalf of their employees. Payslip requirements in relation to superannuation will henceforth be prescribed by the *Superannuation Industry (Supervision) Regulations 1994*, rather than by reg 3.46 of the *Fair Work Regulations 2009*, meaning that they will apply to all employers, not just national system employers.

Finally, the *Tax Laws Amendment (2012 Measures No 2) Act 2012* extends the director penalty regime in Schedule 1 to the *Taxation Administration Act 1953* so that it applies to SG amounts. This means that if a company fails to make its required superannuation contributions, the amounts in question can be recovered from any directors who have not taken reasonable steps to ensure compliance, unless they were too ill to participate in the management of the company, or the company itself had acted reasonably in attempting to comply with the SG legislation.
Parental Leave

The *Family Assistance and Other Legislation Amendment Act 2011* has amended the *Paid Parental Leave Act 2010* (PPL Act), so that the $150,000 salary limit for claiming parental leave pay (see [13.109]) will be frozen at $150,000 until 1 July 2014.

More significantly, the *Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Act 2012* has amended the PPL Act to permit secondary or joint carers to claim two weeks’ pay at the minimum wage, for births or adoptions occurring after 1 January 2013. As with parental leave pay, the new ‘dad and partner pay’ entitlement will be funded by the government, although in this case employers will not be expected to act as ‘paymasters’. Claimants must satisfy similar work and income tests as for parental leave pay. A payment can only be claimed for a period during the first year after the birth or adoption, and the claimant must not be at work at the time, nor be on paid leave from their employment. This means that to obtain the new entitlement, an employee who has not left their job will need to take a period of unpaid leave. They can, however, choose to combine such leave with any paid leave available to them (such as annual leave, or paid paternity leave under an employer-funded scheme), provided those periods of leave are taken at different times.

The *Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Act 2012* has also amended the parental leave provisions in the FW Act (see [13.101]–[13.104]). Employees will now be able to return to work for ‘keeping in touch’ purposes without breaking their leave, reflecting similar provisions in the PPL Act (see [13.109]). A pregnant employee can also now start parental leave more than six weeks before the expected date of birth, with the consent of her employer.

Anti-Discrimination Laws

The *Sex and Age Discrimination Legislation Amendment Act 2011* has, among other things, amended the *Sex Discrimination Act 1984* (see [17.35]) to create a separate prohibition for discrimination on the ground of breastfeeding; to broaden protection against discrimination on the ground of family responsibilities, beyond just situations involving dismissal; and to broaden the definition of sexual harassment.

The federal government is also exploring the possibility of consolidating existing federal anti-discrimination laws (see [17.35]–[17.39]) into a single Act. A discussion paper was released in September 2011, and consultations are ongoing: see www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/ConsolidationofCommonwealthantidiscriminationlaws.aspx.

General Protections

For the purpose of the general protections in Part 3-1 of the FW Act, s 361 casts on the defendant the burden of proving that any adverse action they may have taken was not for a prohibited reason (see [17.98]–[17.100]). In *Barclay v Board of Bendigo TAFE* [2011] FCAFC 14, an employer had taken
disciplinary action against a senior employee, a union delegate, for sending out an e-mail that suggested corrupt behaviour by management. In response to an allegation that this breached s 346 (which prohibits victimisation for engaging in ‘industrial activities’), the employer argued that the employee had been disciplined for failing to comply with his employment obligations in the way in which he dealt with the matter, not because of his status or activities as a union official. But a majority of the Full Federal Court held that it was not enough that the relevant managers believed they had acted for such a reason. If, objectively, the ‘real’ reason for adverse action lay in something lawfully done by the employee in his capacity as a union delegate, that was sufficient to contravene s 346, regardless of any subjective belief.

The High Court has granted leave to appeal against the Full Court decision. The case has been argued, and a decision is expected some time in 2012. Interestingly, however, the FW Act Review has recommended that if the High Court fails to allow the appeal, the legislation should be amended to clarify that ‘the central consideration about the reason for adverse action is the subjective intention of the person taking the alleged adverse action’ (p 26).

A further proposal for change relates to the prohibition in s 357 on misrepresenting what is in reality an employment relationship as a contract for services (see [17.27]–[17.28]). At present, an employer that mistakenly treats an employee as an independent contractor can escape liability by showing that it did not know the true nature of the relationship, and was not reckless as to that matter. The Review recommends that the defence be changed so that the employer must show that it could not reasonably have been expected to know the worker was an employee.

In other respects, the Review has dismissed concerns about the drafting and scope of the general protections. The panel’s general view is that judgment should be withheld until the meaning of the new provisions is more fully explored by the courts. As noted below, however (see Unfair Dismissal), the Review has moved to shorten the timeframe for lodging dismissal-related claims.

**Model Work Health and Safety Legislation**

As predicted, the adoption of the model Work Health and Safety legislation (see [15.17], [15.31]–[15.38]) has been anything but uniform. Only the Commonwealth, New South Wales, Queensland, the ACT and the Northern Territory adopted the legislation by the original deadline of 1 January 2012. In each of those jurisdictions, there is now a *Work Health and Safety Act 2011*, backed by the *Work Health and Safety Regulation(s) 2011* – except the Northern Territory, which has the *Work Health and Safety (National Uniform Legislation) Act and Regulations*. Even in these jurisdictions, there are significant departures from the Model Act: for example, in New South Wales unions have retained the capacity to initiate prosecutions, even though the Review Panel had expressly recommended that they should not do so (see [15.67]).

Of the other jurisdictions, Tasmania belatedly passed the *Work Health and Safety Act 2012*, to commence on 1 January 2013. In South Australia, the legislation is still being debated by the upper house. The Western Australian government has continued to express opposition to various aspects of the Model Act, while indicating that it may be prepared to pass a modified version. The Coalition Government in Victoria has indicated that it is not prepared to adopt the Model Act, ostensibly
because of the cost implications of implementing the new regime. This is somewhat ironic in light of the fact that the Model Act is substantially based on the legislation in that State.

**Transfer of Employment**

The panel reviewing the FW Act heard many complaints from employers about the Act’s ‘transfer of business’ provisions (see [12.100]–[12.105], [18.78]–[18.81]). These have been dismissed by the panel, which sees the new regime as creating greater certainty, as well as more appropriate protection for employees whose jobs are moved from one organisation to another. One exception, however, concerns employees transferring between related entities in a corporate group. It is proposed that where an employee seeks on their own initiative to make such a move, they will be covered by any award or agreement that applies to the new employer, rather than having their old employer’s instrument moving with them.

**Unfair Dismissal**

Although recognising that the FW Act’s unfair dismissal provisions (see Chapter 19.4) are generally working well, the Review has recommended a number of changes. One of these would give dismissed employees 21 days in which to lodge a claim, compared to 14 under the present regime. Importantly, however, the same time limit would apply to ‘dismissal-related general protections’ claims under Part 3-1, which at the moment are permitted within 60 days following a dismissal (see [17.101]–[17.104]). The effect of this proposal, if implemented, would be to deny dismissed employees and their representatives the option of pursuing an adverse action claim in the event that they either miss the unfair dismissal time limit, or lodge an unfair dismissal claim but then discontinue the application: an applicant would have to choose one type of claim or the other.

Other recommendations involve giving FWA greater power to reject or deter unmeritorious claims. For example, FWA is to be specifically permitted to dismiss an application ‘where the parties have concluded a settlement agreement, or where an applicant fails to attend a proceeding relating to the application, or where the applicant fails to comply with FWA directions or orders relating to the application’ (p 26). There is also to be an expanded power to award costs ‘against a party that has unreasonably failed to discontinue a proceeding, or that has unreasonably failed to agree to terms of settlement that could have led to discontinuing the application, or that has through an unreasonable act or omission caused the other party to incur costs’ (p 26).

**Collective Bargaining**

There has been a steady stream, but not a torrent, of applications for the various facilitative orders that are available under Part 2-4 of the FW Act (see [21.48]–[21.58] and [21.68]). For example, in the 12 months to 31 March 2012 there were a total of 73 applications for majority support determinations, with a total of 36 actually made over the same period. Also in the year to 31 March 2012, there were 33 applications for scope orders, with 4 made, and 99 applications for bargaining orders, with just 9 orders made. There were also 318 applications for tribunal assistance under s 240 of the FW Act, with 204 decisions to deal with the matter. There have still been no applications for a
serious breach determination, which means that by definition there have been no bargaining related workplace determinations.

Although the total number of applications is relatively modest, there is now a substantial body of case law on various aspects of Part 2-4.

Some of the decided cases are more than a little confusing. A particular source of difficulty has been the question of whether FWA can validly approve an agreement which contains a provision which gives employees who would otherwise be covered by the agreement the right ‘at any time to elect not to be covered by the agreement’.

An agreement containing a clause to this effect was approved by a majority decision of a Full Bench of FWA in Newlands Coal Pty Ltd v CFMEU [2010] FWAFB 7401. Following a Federal Court challenge to this decision (see CFMEU v Hamberger [2011] FCA 719), and further FWA proceedings (see Newlands Coal Pty Ltd v CFMEU [2011] FWAFB 7325), the agreement was eventually approved by Hamberger SDP in January 2012 on the basis of undertakings which were intended to ensure that the agreement passed the BOOT: see Newlands Coal Pty Ltd [2012] FWAFB 721. Some subsequent decisions seemed to take a different approach to the opt out issue: see especially CFMEU v New Oakleigh Coal Pty Ltd [2012] FWAFB 5107. In an attempt to provide greater clarity on the issue, the President of FWA took the somewhat unusual step (in a non-wage case) of convening a five-member Full Bench to hear an appeal against the decision of Sams DP in Queensland Bulk Handling Pty Ltd v CFMEU [2012] FWA 4478 to approve an agreement containing an opt-out clause. The case has been argued, and a decision was pending at the time of writing. The FW Act Review has in any event recommended that the Act be amended to prohibit such clauses.

Another issue which has generated considerable interest in recent months is the extent to which s 228(1) of the FW Act requires employers to attempt to conclude an enterprise agreement, given that s 228(2) expressly provides that good faith bargaining does not require the making of concessions or the actual making of an agreement (see [21.25]).

In Endeavour Coal Pty Ltd v APESMA [2012] FWAFB 1891 a Full Bench of FWA determined that it was not consistent with the requirements of s 228 for an employer to adopt a largely passive approach to the bargaining process. In this instance the employer had participated in meetings and had responded to proposals put by the union, but had not made ‘any substantive contribution to the possible content of an enterprise agreement or put proposals of its own’ (at [32]). According to the Full Bench (at [27]):

The objects of the Act and Part 2-4 support an interpretation of s 228 as requiring parties to approach bargaining on the basis that they are to attempt to conclude an enterprise agreement ... There is nothing inconsistent about encouraging parties to make agreements – and imposing an obligation on them to try to do so – but at the same time not compelling parties to make concessions in bargaining. An agreement remains what the name implies.

This decision was upheld by the Federal Court in Endeavour Coal Pty Ltd v APESMA [2012] FCA 764. However, Flick J parted company with the Full Bench in relation to the orders that could appropriately be made in such a case. He set aside orders which, amongst other things, required the employer to provide the union with a list of subject matters it would be prepared to agree to include in an agreement; tell the union which aspects of its claim, if any, could be agreed; tell the union
what changes would need to be made to its draft agreement for it to be acceptable; and propose the terms of an agreement into which it would be prepared to enter. These were all regarded as unacceptable on the ground that they were inconsistent with s 228(2).

Although many submissions were made to the FW Act Review concerning the operation of the bargaining and agreement-making provisions, the panel took the view that the new system should be allowed to settle down and be fully tested before FWA, before rushing to judgment on it. Nevertheless, a few changes were recommended.

The most significant concern greenfields agreements (see [12.28]–[12.29]). The Review acknowledges employer concerns about the capacity of unions to ‘frustrate’ the making of an appropriate agreement for a new worksite, with potentially adverse consequences for investment in major projects (p 171). Although rejecting any notion of returning to the Work Choices regime, under which employers could bypass unions and make an ‘agreement’ with themselves, the Review proposes increased powers for FWA to intervene. This is partly to be achieved by amending the Act so that good faith bargaining requirements apply. But it is also envisaged that where negotiations for a greenfields agreement have reached an impasse, and any conciliation has failed, FWA may ‘conduct a limited form of arbitration, including “last offer” arbitration, to determine the content of the agreement’ (p 24).

By contrast, the Review does not support calls to lower the threshold for compulsory arbitration by FWA in other contexts: for example in long-running disputes (such as that at Cochlear) where an employer has staunchly resisted negotiating a first agreement; or where damaging industrial action is not considered sufficiently ‘significant’ (ie, exceptional) to warrant the action being terminated.

Industrial Action

A number of bargaining disputes between Qantas and its long-haul pilots, flight engineers and ground staff attracted a great deal of media attention during the second half of 2011.

Following a prolonged campaign of intermittent industrial action by its workers, on 29 October 2011 Qantas gave notice of an indefinite lockout and grounded its entire fleet. Within two days FWA had granted an urgent application by the Commonwealth to terminate all protected action, under s 424 of the FW Act (see [23.46]). This was on the basis that the lockout (though not the original employee action) was likely to cause significant damage to important parts of the Australian economy, including the tourism industry: see Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations [2011] FWAFB 7444.

Since the parties were unable to resolve their differences in the 21 days following this decision, FWA became obliged by s 266 to make a workplace determination (see [21.33]–[21.35]) for each group of workers. Agreement was subsequently reached in relation to the flight engineers, with a Full Bench agreeing to make a determination in the terms proposed by the airline and the ALAEA: see Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd [2012] FWAFB 236. At the time of writing, FWA was in the process of arbitrating the remaining disputes.
FWA’s decision to terminate the pilots’ industrial action was challenged, on the basis that their actions were relatively minor (being confined to wearing red ties and making certain announcements to passengers) and that Qantas’ lockout could not legitimately be regarded as having been taken in response to that action. However, a Full Federal Court found that what Qantas did was ‘causally connected’ to the pilots’ action. It did not need to constitute a ‘reasonable, proportionate or rational’ response. As such, FWA had the power to terminate Qantas’ action and that in turn meant that neither the pilots nor the other affected workers could continue to engage in protected action: see Australian and International Pilots Association v FWA [2012] FCAFC 65.

It was notable that the federal government asked FWA to terminate the industrial action at Qantas, rather than the Minister exercising the power to do so under s 431 of the FW Act (see [23.50]–[23.51]). The Review of the Act recommends that the s 431 power be removed from the legislation.

In another important case, the Federal Court has held that a union can organise protected industrial action against an employer that is refusing to bargain, without first having to seek a majority support determination: see JJ Richards & Sons Pty Ltd v FWA [2012] FCAFC 53. (In a subsequent dispute with the same employer, but in relation to a different group of employees, the union concerned did apply for, and obtain, such a determination: see TWU v JJ Richards & Sons Pty Ltd [2012] FWA 5609.) The right to take action in this situation had clearly existed under the Workplace Relations Act 1996. But given that the FW Act has ‘sought to codify the circumstances in which an employer can be positively required to bargain’, the Review panel has said that it is ‘incongruous for industrial action to be available to bring pressure to bear on an employer to bargain outside of those circumstances’ (p 177). Accordingly it is recommended that a protected action ballot order can only be sought where bargaining for a proposed agreement has actually commenced, either voluntarily or because of the making of a majority support determination.

**Building and Construction Industry**

The federal government has, at the second attempt, gained parliamentary support for its changes to the Building and Construction Industry Improvement Act 2005 (see [24.49]). The Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012 has:

- renamed the 2005 statute as the Fair Work (Building Industry) Act 2012;
- replaced the Office of the Australian Building and Construction Commissioner with a body formally termed the Fair Work Building Industry Inspectorate (although it has elected to be referred to as ‘Fair Work Building and Construction’);
- placed various limitations on the new body’s powers to compel the provision of information when investigating contraventions; and
- removed provisions on industrial action that were previously specific to the building industry, including higher penalties for unlawful action than those applicable under the FW Act.
Registered Organisations

There has been considerable media coverage of infighting and alleged corruption within the Health Services Union of Australia (HSU) – mainly because of the prospect of its former National Secretary, Craig Thomson, being forced to vacate his seat in the House of Representatives, something that would have the potential to bring down the minority Gillard Government.

As a result of a long-running and much criticised investigation by a delegate of FWA’s General Manager, civil penalty proceedings are to be instituted against current and former HSU officials, including Mr Thomson, for various breaches of the Fair Work (Registered Organisations) Act 2009 (RO Act). The federal government has also successfully moved to have the union’s HSU East branch declared “dysfunctional” and placed into administration, with a restructure to follow: see Brown v Health Services Union [2012] FCA 644.

In addition, the government has moved to amend the RO Act to address some of the problems highlighted by the HSU saga. The Fair Work (Registered Organisations) Amendment Act 2012 will require the rules of registered unions and employer associations to deal with disclosure of remuneration, pecuniary and financial interests and also oblige officers engaged in financial management to undertake FWA-approved training. In addition, civil penalties under the RO Act will be increased and FWA’s investigative powers enhanced.

Other New Federal Legislation

The Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012 introduces new protections under the FW Act for workers in the clothing industry. In particular, certain outworkers are deemed to be employees, a code of practice may be issued for their engagement, and they may recover payments from ‘indirectly responsible entities’ that benefit from their work. The protections are similar to those that already exist under certain State laws (see [8.18]).

The Corporations Amendment (Phoenixing and Other Measures) Act 2012 empowers the Australian Securities and Investments Commission (ASIC) to put a company into liquidation where it has effectively been abandoned by its directors. This is intended to facilitate the recovery through GEERS (see [16.63]–[16.64]) of any unpaid entitlements for the company’s employees. It will also allow the liquidator to investigate any unlawful ‘phoenixing’ activity. This term refers to directors who let one company go under owing money to workers and other creditors, and then create a new one (a ‘phoenix company’) out of the ashes of the first. The same phenomenon was addressed in a report prepared for the FWO, which recommended a range of regulatory responses to address the issue: see PwC, Phoenix Activity: Sizing the Problem and Matching Solutions, June 2012, available at www.fairwork.gov.au/about-us/publications/pages/research-reports.aspx.

In relation to executive pay (see [13.05]), the Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011 took effect in July 2011. It imposes new rules for the determination and control of remuneration packages for the ‘key management personnel’ of listed companies.
The Road Safety Remuneration Act 2012 establishes a new federal tribunal that can make ‘road safety remuneration orders’ and deal with disputes over unsafe work practices, in relation to both employed and self-employed drivers. This complements both existing federal awards and State laws such as Chapter 6 of the Industrial Relations Act 1996 (NSW) (see [7.05]), rather than overriding them.

Other Bills presently before the federal Parliament include the Privacy Amendment (Enhancing Privacy Protection) Bill 2012, which represents the first stage of the government’s response to the Australian Law Reform Commission’s recommendations to amend the Privacy Act 1988 (see [17.111]–[17.112]). Among other changes, it proposes that there should be a single set of Australian Privacy Principles that would apply both to the public and private sectors, and enhanced powers for the Privacy Commissioner and the courts to deal with breaches. The government is yet to announce its response to other key recommendations, including removal of the small business and employee records exemptions, and the creation of a new cause of action for ‘serious invasion of privacy’.

Also expected, but not yet introduced, are:

- a Fair Entitlements Guarantee Bill, to put GEERS on a statutory footing and improve some of the protections for employee entitlements;
- a Public Interest Disclosure Bill, to introduce new protections for whistleblowers (see [17.107]–[17.109]) in the federal public sector.

Other New State or Territory Legislation

In New South Wales, the Public Holidays Act 2010 has replaced the Banks and Bank Holidays Act 1912 (see [13.125]).

There has been much controversy over the Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011, which amended the Industrial Relations Act 1996 to require the NSW Industrial Relations Commission to abide by government policies in arbitrating disputes over public sector wage rates. The constitutionality of the legislation was upheld in Public Service Association and Professional Officers’ Association Amalgamated Union of NSW v Director of Public Employment [2011] NSWIRComm 143; although a High Court challenge to that decision is pending.

In another development affecting the NSW Commission, the State Government is considering whether to amalgamate it with one or more other tribunals, including the Administrative Decisions Tribunal: see Legislative Council Standing Committee on Law and Justice, Opportunities to Consolidate Tribunals in NSW, March 2012.

A further reform proposed in New South Wales involves a significant increase in the penalties for taking industrial action in defiance of dispute orders issued by the Commission: see Industrial Relations Amendment (Dispute Orders) Bill 2012 (NSW).

In Queensland, the Electrical Safety and Other Legislation Amendment Act 2011 has abolished the system of individual Queensland Workplace Agreements (see [12.120]). A subsequent and more substantial package of reforms has amended the Industrial Relations Act 1999 to bring its bargaining
and industrial action provisions more into line with those in the FW Act: see *Industrial Relations (Fair Work Act Harmonisation) and Other Legislation Amendment Act 2012*. The *Public Interest Disclosure Act 2010* has also replaced the *Whistleblowers Protection Act 1994* (see [17.108]).

From July 2012, though subject to transitional arrangements, the *Long Service Leave Amendment Act 2011* (Tas) has largely brought long service leave entitlements in Tasmania into line with those in Victoria, Queensland and Western Australia (see [13.129]).

In Western Australia, there is still no sign of any changes to the State’s industrial relations legislation. This is despite the Barnett Government commissioning a review from lawyer Steven Amendola (see [2.34]) which was released in December 2010 more than a year after it was received: see [www.commerce.wa.gov.au/labourrelations/PDF/Misc/AmendolaReviewofWAIndustrialRelationsSystem.pdf](http://www.commerce.wa.gov.au/labourrelations/PDF/Misc/AmendolaReviewofWAIndustrialRelationsSystem.pdf).