Errata

[3.19], [3.26]: The references to the ‘Conference Committee on the Application of Conventions and Recommendations’ are incorrect. The correct name of the Committee is: ‘Conference Committee on the Application of Standards’.

[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, which must be completed by the end of May 2011, describe 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’.

For further details, see www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview.
Review of Modern Awards

The interim two-year review of the modern award system (see [11.89]) is also under way: see www.fwa.gov.au/index.cfm?pagename=awardReview2012.

High Income Threshold

As of 1 July 2011, the ‘high income threshold’ for which s 333 of the Fair Work Act 2009 (FW Act) provides has risen to $118,100. This affects the availability of both unfair dismissal claims (see [19.40]–[19.43]) and high income guarantees (see [11.61]–[11.63]). 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]).

2011 National Wage Decision

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 award wages, including those set by transitional instruments such as enterprise awards. It adjusted the national minimum wage by a similar amount, bringing it to $589.30 per week or $15.51 per hour.

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 also to conduct a broader review in 2010–11 of junior and trainee wage rates in awards, but this has been postponed: see Annual Wage Review 2010-11 – Juniors and Trainees [2011] FWA 619.

In addition, and as expected, the Panel increased the casual loading for award-free employees from 21 to 22%.

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. The Award itself will not
be varied, with the equal remuneration order to operate on a ‘stand alone’ basis. There will also be 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 1000.

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]), upholding the view of the Full Federal Court that it was validly enacted pursuant to the taxation power in s 51(2) of the Constitution (see [4.27]).

The federal government has proposed a number of measures to reform the superannuation system. These include the Superannuation Guarantee (Administration) Amendment Bill 2011, which would increase minimum SG contributions by employers from 9 to 12% and 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. 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.

Also promised, but not yet introduced, is a Superannuation Legislation Amendment (Stronger Super and Other Measures) Bill that would, among things, require greater information about superannuation contributions to be given to employees.

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, and a decision is expected some time in 2012.
Qantas Dispute

Although attracting a great deal of media attention, the bargaining dispute between Qantas and its long-haul pilots, flight engineers and ground staff has not – at least to date – set any significant legal precedents.

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 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 was 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 preparing to arbitrate the remaining disputes.

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, debate on the proposed legislation has been deferred into 2012 by the upper houses of both the South Australian and Tasmanian parliaments. 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 is also dragging its feet, even though the Model Act is substantially based on the legislation in that State.

Consolidation of Federal Anti-Discrimination Laws

The federal government is 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
Other New Federal Legislation

In relation 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 ‘key management personnel’ of listed companies.

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.

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.

A number of other Bills are presently before the federal Parliament:

- The Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 reintroduces proposals (see [24.49]) to replace the Australian Building and Construction Commission with a Fair Work Building Industry Inspectorate.

- The Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 proposes new protections under the FW Act for workers in the clothing industry. In particular, certain outworkers will be 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 Road Safety Remuneration Bill 2011 seeks to establish 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 will complement rather than override existing federal awards, or indeed State laws such as Chapter 6 of the Industrial Relations Act 1996 (NSW) (see [7.05]).

- The Paid Parental Leave and Other Legislation Amendment (Consolidation Bill) 2011 seeks to allow workers taking parental leave under the FW Act (see [13.101]–[13.104]) to return to work for ‘keeping in touch’ purposes, without breaking their leave. A similar provision already exists in relation to parental leave pay under the PPL Act (see [13.109]). Other proposed changes include permitting a pregnant employee to start parental leave more than six weeks before the expected date of birth, with the consent of her employer.

Also expected, but not yet introduced, are:
• a Fair Entitlements Guarantee Bill, to put GEERS (see [16.63]–[16.64]) on a statutory footing and improve some of the protections for employee entitlements;

• a Corporations Amendment (Phoenixing and Other Measures) Bill, another measure that will protect employee entitlements, by targeting 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;

• a Paid Parental Leave and Other Legislation Amendment Bill, to amend the PPL Act to permit secondary carers to claim two weeks’ pay (to be funded by government and set at the national minimum wage) on the birth or adoption of a child;

• 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).

In Queensland, the Electrical Safety and Other Legislation Amendment Act 2011 has abolished the system of individual Queensland Workplace Agreements (QWAs) (see [12.120]). The Public Interest Disclosure Act 2010 has also replaced the Whistleblowers Protection Act 1994 (see [17.108]).

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