Welcome to the Workplace Mid-Year Review – 2016

Corrs is pleased to present our third annual review of the Australian employment, workplace and safety landscape.

We believe Corrs has a role to play in helping Australian businesses to navigate the complexity of change and its intersection with law. It has been a long-held ambition of the Corrs team to think outside the traditionally siloed approach to the categories of employment, discrimination, industrial relations and safety and become true advisers who bring a holistic approach to solving new problems and seizing every opportunity to drive the competitiveness of Australia and our clients. The team are committed to creating long-term value through our focus on the shape of future organisations, risk, restructuring from 20th century models, cost effective infrastructure delivery, human capital, the special needs of the public sector and start-ups.

This year, we have explored five key issues that we consider Australian employers need to be engaging with in the modern workplace. These five themes – digital disruption and the future of work, Australia’s 21st century infrastructure needs, the public sector workforce, social enterprises and the not-for-profit sector, and business culture and risk – are discussed in detail and examined in the context of safety, risk and culture.

We hope you find this year’s publication valuable and relevant.

The Corrs Workplace Relations team
Introduction

In our third annual review of the Australian employment, workplace and safety landscape, we explore the following key issues impacting on employers in the modern workplace context:

- Future Organisations: Digital disruption and the future of work.
- Australia’s 21st century infrastructure needs.
- The transformation required in the public sector as citizen demand grows and budgets are constrained.
- Social enterprises, social impact bonds and the not-for-profit sector.
- Business culture and risk.

This builds on our focus, in last year’s annual review, on the developing ‘sharing economy’ and its transformative impact on employers’ engagement with labour and service providers – both in Australia and globally.

This trend has intensified in the last 12 months. We are now witnessing the rapid growth of ‘peer to peer’ platforms like Deliveroo, Mojo Power and 99designs – bringing new challenges to Australia’s traditional approach to workplace relations and safety regulation.

Internationally, the relentless pace of change has created what United States law professor David Weil has called ‘the fissured workplace’.

It has meant that investors have driven firms to focus resources on core competencies for competitive advantage. As a result, lead businesses transfer employment to networks of smaller business units, and major brands coordinate complex supply chains, setting demanding overall standards on product and service delivery.

But smaller companies in the chain have actual responsibility for oversight and supervision of the workforce. This involves multiple mechanisms: franchising, outsourcing, third party labour providers, contracting (all of which have been common since the 1990s) and now newer forms of engaging labour, such as freelancing and peer-to-peer platforms.

The result is ‘fissuring’ – splitting off functions that were once managed internally, to small business units that compete fiercely with each other.

Weil’s main focus is upon the significant risks to workers arising from the fissured workplace. And certainly, the last 12 months in Australia have shown that complex labour supply chains and franchising arrangements raise important questions about legal responsibility for workers’ entitlements.
The 7-Eleven underpayment episode and allegations of sham contracting at Myer/Spotless (among many other examples) highlight the social, legal and ‘brand’ risks for businesses if this conduct is occurring in their supply chain.3

These issues were also central in the 2016 federal election campaign, with both major parties adopting policies to bolster employee protections and impose higher penalties for breaches of awards and workplace laws.4

The broader workplace reform debate over the last year saw significant focus on the final reports of the Productivity Commission Review and the Royal Commission on Trade Union Governance and Corruption.5

The Royal Commission’s recommendations paved the way for the Government’s introduction of legislation to restore a stronger regulator for the building and construction industry.6 The Parliament’s rejection of this bill became a trigger for the July 2 double-dissolution election, along with the legislation seeking to establish a new Registered Organisations Commission and higher accountability standards for unions.7

However, the closeness of the election outcome, combined with the absence to date of any Coalition proposals to implement the Productivity Commission’s recommendations, means that there is limited prospect for significant workplace reform in the near future.8

Rather than detailing policy proposals, new legislation and major cases (as in past Mid-Year Reviews), this time we have adopted the thematic approach outlined earlier to discuss the five key issues that we consider Australian employers need to engage with.

Throughout our treatment of each key theme, we have threaded a discussion of safety, risk and culture. This reflects the increasing integration of issues that were traditionally siloed into the categories of employment, discrimination and workplace and safety. Human capital issues cannot be resolved in the absence of integrated thinking and action.

Before we discuss those issues, here is a brief snapshot of major economic indicators from the last 12 months.
Key Economic Indicators

Economic Growth

In the 2016-17 Budget, the Government noted that the Australian economy is heading into its 26th consecutive year of economic growth, with household consumption, dwelling investment and exports supporting a forecast of increased growth.

Against projections for growth in the global economy of 3.25% in 2016 and 3.5% in 2017, and growth in our major trading partners at 4.00%, in Australia:

... the transition to broader based growth is well underway, supported by historically low interest rates and a lower exchange rate. **Real GDP is forecast to grow by 2½ per cent in both 2015-16 and 2016-17 before strengthening to 3 per cent in 2017-18 ...**

There are positive and negative risks to the forecasts for the Australian economy. A lower exchange rate than that underpinning the forecasts would generate stronger economic growth and provide further impetus to broader based growth. Alternatively, uncertainty around the global economic outlook could result in households becoming more cautious, leading to more saving and less consumption than expected. Growth in non mining business investment also remains a key source of uncertainty as the economy transitions from capital intensive resource investment to labour intensive service sectors.9

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Source: ABC News Online, 4 May 2016

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Growth in 'real' GDP
Employment

According to the Reserve Bank, labour market conditions in Australia are currently ‘much better than a year ago’: the unemployment rate has fallen from 6.25% in 2015 to around 5.75% in recent months.

The RBA forecasts that unemployment will remain at around that level for the next 12 months, then decline gradually as economic activity strengthens.

This is consistent with the Government’s 2016-17 Budget forecast of a fall in unemployment to around 5.25% by the June quarter next year. 

Source: Australian Bureau of Statistics (ABS), Labour Force: Australia, April 2016 (Cat No 6202.0)
Wages

Annual wages growth in Australia has fallen to its lowest level since 1998, according to the ABS Wage Price Index (WPI).\(^{12}\)

- The WPI for the March 2016 quarter showed **annual wages growth in the private sector of only 1.9%**.

- Overall wages growth was at 2.0% in trend terms over the last 12 months (2.1% seasonally adjusted).

The RBA has observed that while wages growth is low across the economy, it is lowest in industries exposed to the end of the mining boom such as resource-related construction, transport, administrative and technical support.\(^{13}\)

Higher wages growth has been seen in the financial/insurance, education/training and manufacturing sectors as shown in the table above.

Wage increases continue to come in higher for workers covered by enterprise agreements made under the Fair Work Act. However, wages growth under agreements has also been subdued at 2.7% overall to the March quarter 2016.\(^{14}\) This includes:

- 2.6% average annualised wage increases (AAWI) for workers covered by public sector agreements.

- 2.9% AAWI under private sector agreements.
Stagnation of median wages is often cited as evidence that automation is having an effect on the economy. The impact of global wages competition is also likely to be impacting growth.

On 31 May 2016, the Minimum Wage Panel of the Fair Work Commission (FWC) granted a 2.4% wage increase to Australia’s lowest-paid workers.15

The ruling increased the minimum wage for award-reliant employees, and those not covered by any award, from $17.29 to $17.70 per hour [$672.70 per week for a full-time employee] - with effect from 1 July 2016.

In reaching its decision, the Minimum Wage Panel indicated that:

Currently, wages growth is neither a source of inflationary pressure within the economy, nor a source of declining capacity for Australian firms to compete in international markets. The outlook for the Australian economy remains generally positive. Inflation and wages growth are expected to continue to be below average levels in the coming year or so.16

Yet despite the evidence that wage outcomes have flattened across the Australian economy, employers in strongly-unionised sectors (e.g. manufacturing, construction, electrical contracting/maintenance) continue to be met with high wage demands. This creates some difficulties in managing employee expectations, and ensuring wage outcomes that are consistent with those in the general community.
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Future Organisations: Digital Disruption & The Future Of Work

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The rise of the ‘peer-to-peer’ or ‘sharing’ economy, along with the ‘digitisation’ of production (the ‘fourth industrial revolution’\textsuperscript{17}), continue to generate considerable speculation as to what work will look like into the future. Some of the scenarios are confronting to traditional views around work but, most likely, realistic.

A report by the Committee for Economic Development of Australia (CEDA) suggests that technology will radically reshape Australia’s workforce in the next 10-15 years, with the jobs of up to 40% of the workforce being replaced by computers:\textsuperscript{18}

- Jobs that involve low levels of social interaction, creativity, or mobility/dexterity are the most vulnerable.
- CEDA maintains that Australia must embrace economic reform and ‘incentivise innovation’ to ensure future job creation and global competitiveness.\textsuperscript{19}

The ‘Future of Work’ Report by Deloitte Access Economics and Chartered Accountants\textsuperscript{20} found that two-thirds of workers with less than five years’ experience expect their jobs will not exist in the next 15 years – or will fundamentally change over that time. A further 47% hold the view that their job will require quite different skills or tasks. Based on a survey of 1,400 Australian workers, the report also found that:

Technology, globalisation and changing worker demands are fundamentally changing where, how, and when knowledge workers work. The confluence of these forces is resulting in new performance drivers for today’s workplace and a series of new and exciting questions about what the workplace is and – more importantly – what it should be.

Source: Deloitte Access Economics and Chartered Accountants Australia and New Zealand, *The future of work: How can we adapt to survive and thrive?* [2016]
our careers and perceptions are evolving rapidly, as the norm shifts in a more flexible, knowledge-based economy. The combination of greater global economic integration and technological advancements have led to the rise of the ‘virtual global worker’, which means that we are increasingly competing on a global scale.”21

Another research report commissioned by the Foundation for Young Australians22 showed 57% of students (and 71% of vocational education students) are studying or training for occupations where at least two-thirds of jobs will be automated. The ‘New Work Order’ Report also showed (based on analysis of 405 Australian occupations) that 60% of all workers will need capacities in configuring digital systems or building digital technology in the next 2-3 years. Typical young Australians starting work today will be employed in 17 different jobs across five careers in their lifetime.23

It is also worth remembering that predictions that humans will be made redundant have been made before, going back to the Industrial Revolution. As the Economist recently reported one view is that this reflects the “renewal of an ‘old argument’”. And it is worth remembering that in the past technology has ended up creating more jobs than it destroys. But what will the nature of these new jobs be?

The direct economic impact of peer-to-peer platforms is considered to be relatively small at this stage – although the sharing economy has quite significant reach. Around 61% of Australians have used a peer-to-peer service (e.g. Uber, Airbnb), while 85% intend to do so within the next year.24

However, the Grattan Institute’s ‘Peer-to-Peer Pressure’ Report identifies several challenges for policymakers arising from the sharing economy.25

Automation in Australia – a snapshot of the impacts

According to Hugh Durrant-Whyte, Professor and Director of the Centre for Translational Data Science at the University of Sydney:

- Australia is the world’s biggest user of automation, especially in the resources, maritime and agricultural sectors.
- Almost all of Patricks’ Brisbane container terminal is now run from Sydney, with 700 jobs reduced to 200.
- Rio Tinto runs mines in Australia and globally from a single room in Brisbane.
- Certain roles can’t be automated, e.g. highly qualified professionals and many in the services sector such as restaurant staff.

(quoted in “‘Profound’ impacts for Australia in use of automation”, Workforce, Issue No 20121)
Existing regulations, such as in the transport sector, act to obstruct those who want to use peer-to-peer platforms – limiting productivity and income growth.

Some platforms create tensions as the market grows, for example short-stay accommodation platforms conflicting with local council regulations.

Tax, data access and privacy regulations are also having to be re-visited.

The Grattan Institute attempted to measure the impact of peer-to-peer platforms on work and the job market:

- It estimated that around 80,000 people – fewer than 0.5% of adult Australians – work on these platforms more than once a month.
- This is closely comparable with the number of American workers engaged through platforms (about 0.4% of US adults).

But these figures represent rapid growth over a fairly short period – Australian Uber driver numbers tripled in 2015, and jobs posted on Freelancer have risen 25-30% per year.

‘New technologies offer opportunity for the creation of innovative businesses, a greater range of products, and new ways for governments to address policy problems. In this way, they can generate higher productivity growth and improve living standards … However, technological change involves winners and losers. People whose skills lock them into a dwindling occupation may find it hard to maintain employment. … Formerly viable businesses may fail.’

Disruption and Future Forms of Work – Implications for Australia’s Traditional Approach to Labour Regulation

As more Australian businesses embrace disruptive technologies, questions are increasingly being raised as to how well-suited our system of workplace regulation is to new models of service provision. It’s not just about productivity, but whether it is tailored to the needs of future organisations and their employees.

A major shift in the nature of ‘gig’ or peer-to-peer work noted by the Productivity Commission is that it is mainly task-based, with consequent potential to change the nature of the employment relationship. Platforms offer considerable benefits to workers, including flexible working hours and the opportunity to supplement income. However, this may come at the cost of employment security, stability of income and health and safety protections, which may not apply to some forms of task-based work. Further, workers may need to accept engagement as an independent contractor in order to remain in their chosen industry (e.g. journalists, designers).

The issue of the categorisation of sharing economy workers looms large in these debates: the common law distinction between employees and independent contractors does not readily apply to workers engaged as service providers through new technological models (e.g. Uber drivers).

This has led to some suggestion that the common law test should be redefined, with an intermediate category of ‘platform’ workers sitting between employees and contractors and receiving only some of the protections afforded to employees. The Grattan Institute considered this to be unnecessary at this stage because: ‘platform roles are diverse and the sector is developing fast. Any such change will have to wait until the shape of platform work becomes more evident.’

The Grattan Institute did, however, recommend that the Fair Work Act protections against ‘sham contracting’ be tightened to deter the misclassification of employees as independent contractors. It adopted the Productivity Commission’s proposal that the ‘not reckless’ defence available to employers in sham contracting cases be altered to a ‘reasonableness’ test. The Commission recently reaffirmed this proposal, as part of a perceived need to protect some workers who may be vulnerable to cost-shifting as employers move into the gig economy.

Equally, an approach that too heavily seeks to restrain the sharing economy and stifles its growth is not likely to be welcome. The success of this economy reflects its popularity.
The Business Council of Australia (BCA) and major employers, including Myer Group and McDonald’s Australia, have argued that the traditional view of working hours regulation – and what are considered ‘unsociable hours’ (which should attract penalty rates) – needs reconsideration in the modern economy with changing customer expectations.34

A Safety Perspective on Automation and Digital Disruption

Historically, industry focus has understandably been on the benefits of automation (increased productivity, decrease in human error elements and increased safety potential). However, these advancements are not without increased risk from a physical and psychological safety perspective and from a security standpoint.

As the technology is developed to improve outcomes including the reduction of known risks, we inadvertently introduce new unknown, and sometimes unforeseeable, risks.

The practical result is that safety impact assessments, continual risk reviews and policy, and procedures and training need to be continuously and regularly updated to respond to changes and advancements.

Aside from the health and safety risks associated with automation itself, there will likely be significant risks associated with other consequential changes. These ‘change’ challenges will pose huge psychological risk for many in the middle class who have traditionally felt that their skills and expertise could never be automated.

“I think one thing that’s different in the next 10 or 15 years is the fact that that automation is occurring ... in the middle-classes, in the middle jobs, and not just at the bottom end. Fundamentally, the big difference now is machine learning and artificial intelligence in particular are actually solving jobs that we thought traditionally were very highly qualified jobs, people like lawyers and doctors and accountants and bankers and these sorts of things. They’re actually changing those. So in fact it’s eating out the middle of the job market, rather than the bottom end”.

Source: Professor Hugh Durrant-Whyte, quoted in ABC, ‘Future Proof: are we preparing our children for the workplace of the future?’, Four Corners, 4 July 2016

Companies engaging new forms of service providers are also encountering difficulties with the application of deeming provisions in workers’ compensation and superannuation laws. While some task-based work does not attract these types of worker protection, they do apply to many forms of worker engagement other than employment. However, assumptions are often being made, incorrectly, that worker protection laws do not apply to all engagements in the context of the sharing economy.
Businesses sometimes establish workforces that are principally comprised of independent contractors and labour hire workers on the basis that there is no requirement to take reasonably practicable steps to ensure their health and safety. That flawed assumption exposes the company to significant financial penalties for breach, and places its directors and officers at personal risk of custodial sentences and significant fines.

The same flawed assumption also means that workers who are not employees are less likely to work in accordance with credible safety systems. As a consequence, their own and their co-workers’ safety is likely to be put at risk. In those circumstances, the business may be in breach of its statutory duty to take reasonably practicable steps not to put the health and safety of ‘other persons’ (i.e. persons who do not have any workplace relationship with the business) at risk. For example, if a tradesperson is engaged to perform work in Business A, through a labour hire company, then the tradesperson is a ‘worker’ in Business A, and Business A has a duty to ensure that the work performed by the tradesperson does not put the health and safety of ‘other persons’ at risk.

Finally, a consequence of our increased interconnectedness through technology and the sharing economy is that we are all, regardless of how we work, exposed to increased security threats personally (although this is more of an issue in some industries than others). Ensuring the safety of workers and other persons at the workplace involves providing for their security. Workplace security is not a new concept, however over recent years its importance has increased due to a more flexible, mobilised workforce and a number of terrorist-related incidents.  

‘Australia is well-positioned to respond to the emerging workforce challenges with its highly educated workforce, prosperous and stable society, and geographic proximity to the emerging economic powerhouses of Asia. However, the world economy is increasingly becoming one in which the ‘winner takes all’ as technological developments allow the widespread diversion of successful innovations. … To succeed in this global environment: Australia needs a new social contract, one that recognises the role of government in developing the enabling environment for industry to flourish, [and] which maximises the application of the nation’s human capital …’

Source: CEDA, Australia’s Future Workforce? (June 2015)
Australia’s 21st Century Infrastructure Needs
Australia’s 21st Century Infrastructure Needs

Productive, sustainable infrastructure is essential if we are to drive economic growth, increase employment and enhance the quality of life of all Australians.

Our roads, rail, ports and airports are all critical to the movement of people, goods and resources. When our transport and logistics networks work effectively, they raise productivity levels and strengthen the economy.

Similarly, telecommunications infrastructure is a powerful driver of connectivity and modernisation, while our energy and water infrastructure is at the core of Australia’s success in industry and trade. Efficient operation of these sectors will be essential to sustain our quality of life.

But experiences of transport networks failing to keep pace with demand, water quality standards being uneven, energy costs being too high, telecommunication services being outdated, or freight corridors being neglected are now so common that they necessitate a strategic response.

Source: Infrastructure Australia, Australian Infrastructure Audit (April 2015)

In 2015, infrastructure investment recorded its largest increase since the end of the resources boom, and is forecast to increase by $3.2 billion in the next decade. Victoria and NSW are leading the way, having recycled public assets such as electricity networks and ports to fund new vital infrastructure.36

The economic benefits of infrastructure projects are widely known. According to a recent report by KPMG, infrastructure development in areas like urban public transport is also essential to ensure investment in high quality education and training, boosting labour productivity and (ultimately) maintaining social cohesion and equality.37
In May, Infrastructure Australia released its priority list of infrastructure projects which represent ‘a credible pipeline of qualified potential infrastructure solutions’ to address key national problem areas: urban congestion, national connectivity and corridor preservation.\textsuperscript{38}

The list identified the following projects as high priority:

<table>
<thead>
<tr>
<th>Project</th>
<th>State</th>
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<tbody>
<tr>
<td>M4 Motorway Upgrade (Parramatta to Lapstone)</td>
<td>NSW</td>
</tr>
<tr>
<td>WestConnex (Sydney inner west)</td>
<td>NSW</td>
</tr>
<tr>
<td>Ipswich Motorway (Rocklea-Darra)</td>
<td>Queensland</td>
</tr>
<tr>
<td>Perth Freight Link</td>
<td>WA</td>
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</tbody>
</table>

Other priority projects and priority/high priority initiatives included:

<table>
<thead>
<tr>
<th>Project</th>
<th>State</th>
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<tbody>
<tr>
<td>M1 Pacific Motorway Upgrade</td>
<td>Queensland</td>
</tr>
<tr>
<td>Inland Rail (Melbourne to Brisbane via NSW)</td>
<td>Victoria/Qld/NSW</td>
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<tr>
<td>Sydney Metro</td>
<td>NSW</td>
</tr>
<tr>
<td>Cross River Rail (Brisbane)</td>
<td>Queensland</td>
</tr>
<tr>
<td>Gawler Line Rail Upgrade</td>
<td>SA</td>
</tr>
<tr>
<td>Melbourne Metro Rail</td>
<td>Victoria</td>
</tr>
<tr>
<td>Hoddle Street Capacity Upgrade (Melbourne)</td>
<td>Victoria</td>
</tr>
<tr>
<td>Perth CBD (North Corridor Capacity)</td>
<td>WA</td>
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Delivery of these critical infrastructure projects (and others which have commenced in recent years like Victoria’s Level Crossings Removal project) is a major focus of governments at all levels.

The Productivity Commission’s 2014 inquiry into public infrastructure\textsuperscript{39} recommended a major overhaul of the processes for assessing and developing major projects, to ensure better ‘value for money’ from infrastructure selection and investment. The Commission also urged governments to consider a range of public and private financing models for projects, and wider utilisation of user charging for infrastructure services.
In response, the federal Government introduced reforms to Infrastructure Australia and the Infrastructure Investment Programme to:

- support long-term planning for major land transport projects;
- prioritise initiatives with strong economic productivity benefits; and
- implement robust post-build evaluations for Commonwealth-funded projects.40

The Better Infrastructure Project at the University of Sydney has called for a more fundamental shift in thinking about infrastructure investment. It argues for a shift in focus from ‘asset building’ to ‘service delivery’, and better use of existing infrastructure to develop more scaled, targeted and feasible projects.41 This is consistent with the Grattan Institute’s view that ‘return on investment’ is not properly evaluated in Australian infrastructure spending, and further, that decision-making is often focused on road projects in marginal electorates ‘where federal elections are won and lost’.42

Labour Costs in Infrastructure Projects

The Productivity Commission’s 2014 Report also highlighted significant increases in the costs of constructing major public infrastructure in Australia – a legacy of the mining boom, combined with poor labour productivity growth in the construction sector.43 This followed earlier findings of both the Business Council of Australia and Deloitte Access Economics:

- The BCA’s Project Costs Task Force identified several aspects of the workplace relations system which contributed to higher project costs in Australia than other developed countries. These include union-centred negotiation processes, limited capacity to achieve productivity offsets for wage increases and constraints on the use of contractors to manage workforce numbers through different project stages.44

- Deloitte’s report for the Australian Constructors Association highlighted greater increases in labour costs under construction sector enterprise bargaining agreements than in other sectors of the economy. These costs are composed not only of wage increases, but other conditions which negatively impact productivity such as rostered days off, site access and restrictions on sub-contractors. Deloitte also pointed to high levels of cost over-runs on completed economic infrastructure projects in Australia.45

‘Properly designed infrastructure investment not only stimulates activity in the construction stage, it also adds to economic output and national income and reduces the nation’s debt burden when the construction is finished.’

The debate over the Coalition’s policy to re-establish the Australian Building and Construction Commission (ABCC) has seen claims and counter-claims about the effects of removing that regulator (in 2012) on productivity and the level of industrial disputes in this vitally important sector of the economy.46 Whatever the true position may be, it is clear that after several years of instability – including uncertainty over the impact of the Government’s proposed Building Code on enterprise agreements already being negotiated – the construction sector needs a stable, consistent regulatory framework.

This should include a role for a strong regulator and higher penalties for unprotected industrial action, coercion and other unlawful conduct by building industry unions.47 However, there is considerable doubt about whether the Coalition’s legislation to implement precisely those measures will be passed by the new Parliament, with key cross-bench and minor party representatives opposed to the re-introduction of the ABCC and increased regulation of trade unions.48 Much will depend on the final make-up of the Senate and, consequently, whether the Government can get the legislation through a joint sitting of both Houses of Parliament.

‘Across the nation, we have an enormous task over the next few years to deliver massive projects such as the Sydney Metro and West Connex in Sydney, that will provide our growing cities with 21st century infrastructure.

Reinstating the ABCC will ensure that these projects are not frustrated, delayed or made more costly by unlawful union action of the kind that the Heydon [Royal Commission] Report so comprehensively documented.’

Source: Graham Bradley, Chair of Infrastructure NSW, quoted in A Hepworth and D Kitney, ‘Reviving ABCC key to economy’, The Australian (Business Review), 5 July 2016

Whether or not the ABCC is ultimately revived, construction sector employers can consider how the existing Fair Work Act framework could be utilised to deliver better outcomes. In particular, the new negotiation process available for greenfields projects49 has the potential to fast-track the agreement making process and reduce pressure on labour costs on major infrastructure agreements.
Using the New Greenfields Agreement Negotiation Procedure for Infrastructure Projects

- If an employer is not making progress in negotiating a greenfields agreement with a union (or unions), it has the option of notifying the union bargaining representatives of the commencement of a six-month ‘negotiation period’. If no agreement has been reached at the conclusion of that period, the employer can lodge its proposed agreement with the FWC for approval, after giving the union(s) a reasonable opportunity to sign the agreement.

- Greenfields agreements are typically a requirement for participants in infrastructure projects to provide certainty with respect to labour costs. However, prior to this important amendment in late 2015, the lack of an ability to break an impasse between construction unions and employers of labour on projects often resulted in escalation in labour rates in order to finalise a greenfields agreement before employees were engaged on the project.

- This reform will allow project employers to submit an agreement to the FWC for approval, and the tribunal will then be required to apply the test of whether the agreement ‘provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work’.

- The meaning of this in a particular industry context is certain to be tested by construction unions in greenfields agreement approval proceedings brought by employers in reliance on the new provision.

- Project proponents will now be able to weigh up the risk of an unsatisfactory outcome from such an argument (i.e. the agreement not being approved because the FWC is not satisfied that the pay and conditions are consistent with the prevailing pay and conditions in
that industry), against the outcome of protracted negotiations or negotiations extending into the time it becomes necessary for employees to be engaged on the project. This would thereby expose the project to the risk of bargaining related protected industrial action (i.e. the opportunity to make a greenfields agreement will have passed).

Safety In Infrastructure Projects

Safety in infrastructure is 'safety in construction' – construction is one of Australia’s most high risk industries. In 2013, the construction industry accounted for 10% of the total 191 fatal injuries for workers.51

Ensuring the health and safety of construction workers and others affected by their work always presents obstacles, regardless of a project’s size. However, safety is more complex in large-scale infrastructure projects, where the 'design and construct provider' is often comprised of three or more separate companies that come together in an unincorporated alliance.

The “Alliance Management Committee” often performs a role similar to the Board of a single company, and “Integrated Delivery Teams” operate like a senior leadership team. The safety challenge for the unincorporated Alliance is three-fold.

- First, it must ensure that safety responsibilities are clearly articulated by the Alliance members, and that they ensure that safety activity, ranging from resources to processes, is the subject of consultation and co-operation and is transparently co-ordinated and implemented rigorously. Alliance members are the ultimate example of “current duty holders” (i.e. persons who each owe a safety duty for the same matter). They are therefore expressly compelled under WHS legislation to “consult, co-operate and co-ordinate” their activities to keep safe the people in relation to whom they share a duty.52 However, it is challenging forming and implementing a co-ordinated “project approach” to safety in large scale infrastructure Alliance projects because the project workforce is comprised of people drawn from multiple organisations and (usually) different approaches to construction and safety. This is a structural hazard that must be risk assessed and have appropriate controls put in place to mitigate it.

- Secondly, the Alliance members must ensure that the members of the “Board” and the “Integrated Delivery Teams” understand their likely “officer” status under WHS laws and what this means for them personally, in terms of compliance and liability.

- Thirdly, the members of the “Board” must understand their WHS reporting duties to the Alliance members they represent, and those Alliance members must be aware that they are each liable for safety.

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The Public Sector Workforce
Federal, state and territory governments around Australia need to deliver public services in the context of constrained budgets and increasing citizen demand. The public sector is not immune from disruption. Effective management of human capital in the public sector is therefore critical to service delivery and cost containment.

At the federal level, the Coalition Government has continued its policy of reduced public sector funding and the imposition of increasing efficiency dividends (from 1% to 2.5% in 2016-17, reducing to 2% in 2017-18 then 1.5% in 2018-19).

The Government has estimated that overall staffing levels in the Australian Public Service (APS) have fallen by around 16,000 jobs (as at 2015-16, compared with 2011-12).53

**APS Workforce Composition and Challenges54**

- A major issue for the APS is its ageing workforce: 31.7% of its 152,340 employees across 103 agencies were 50 years of age or over in June 2015 (up considerably from 20.2% in June 2001).55

- Women make up 58.4% of the overall APS workforce, and 41% of senior executive service positions.

- Attendance management is a key problem in the APS, with continued increases in personal (sick/carer’s leave) and absences on other forms of leave (11.6 days per employee in 2014-15, up from 9.8 days in 2011-12). The data also show ‘a complex but clear relationship between employee engagement and sick leave use.’

‘Australians want services from Government with similar features to those they receive from the private sector: fast, online, personalised, competitively priced and open to feedback.’

Workforce bullying and harassment are another major issue. 17% of APS employees claimed they had experienced bullying/harassment (by a client, colleague or manager) in 2014-15 – reflecting levels of 15-18% over the previous decade.

In line with research indicating 96% of Australian private sector firms have changed or will change their approach to performance management, ‘a number of [APS] agencies are revisiting their performance management systems in parallel with enterprise bargaining’.

In 2015, 59% of APS employees believed they were fairly paid for their work (down from 67% in 2014).

Workforce Management in the APS

A major review of APS workforce management, released in May 2016, identified a number of problems in public sector recruitment and appointment practices. These include:

- a lack of clarity around the ‘merit’ principle which underpins APS recruitment;
- overly complex selection criteria;
- lengthy timeframes for appointment processes (60-68 working days);
- rigid classification structures; and
- unwieldy appeal processes for review of promotion decisions.

Various recommendations were made to address these deficiencies and to introduce a more effective, skills-focused approach to talent attraction, management and retention in the APS.

‘In an environment of increased fiscal pressure and rapid change, APS employees are expected to be more agile, innovative, risk savvy and responsive. Effectively managing and continuously improving employee performance is critical if the APS is to meet these demands.’

State of satisfaction with government (Australian citizens cf. OECD countries):

<table>
<thead>
<tr>
<th>% of Australian citizens satisfied with government</th>
<th>% of citizens from other OECD countries satisfied with government</th>
</tr>
</thead>
<tbody>
<tr>
<td>80%</td>
<td>70%</td>
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<tr>
<td>67%</td>
<td>67%</td>
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<tr>
<td>60%</td>
<td>54%</td>
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<tr>
<td>45%</td>
<td>42%</td>
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</tbody>
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**Federal Public Sector Bargaining**

The stringent approach to enterprise agreement negotiations during the Coalition Government’s first term resulted in a stalemate between public sector unions and most departments and agencies. The imposition of a 1.5% wage cap (later lifted to 2%) and other limits under the Public Sector Bargaining Policy, led to few agreements being reached and saw widespread protected industrial action over this three-year period.

Proposed agreements were voted down more than once in the Department of Human Services, the Australian Taxation Office and Department of Defence (among others), with non-renewal of agreements affecting around 120,000 public sector workers. In the Government’s view, the Community and Public Sector Union (CPSU) has maintained an inflexible position throughout the negotiations.

Perhaps the most stark illustration of the bargaining stand-off was the CPSU’s campaign of protected industrial action by immigration and border protection staff at international airports around Australia. The union had called off the industrial action over the Easter period this year, in response to a request from Prime Minister Turnbull following the terrorist attack in Brussels. When the union subsequently sought to pursue protected action affecting the airports, the Government applied to the FWC to have the action suspended on national
security grounds under section 424 of the Fair Work Act.

The Government’s application was ultimately successful, with the FWC accepting that the CPSU’s planned escalation of industrial action presented a ‘serious and compelling risk’ justifying a suspension of the action for three months.60

State Public Sector Bargaining

By and large, enterprise bargaining outcomes have been less constrained in the state public sector than at the federal level. Wage increases continue to be higher in the public sector than in the private sector, as demonstrated by the following graph:

Award wage increases in the state public sector have followed a similar pattern. By way of example, on 2 June 2016, the Queensland Industrial Relations Commission approved annual increases of 2.5% per year for 13 Queensland state public sector awards ranging from the Award for Operational Employees in Disability and Forensic Services – State 2016 to the Youth Detention Centre Employees Award – State 201661 [as against increases in the private sector of around 1.9%].62

State employees will receive wage increases of 2.5% per annum under a new enterprise agreement covering the Victorian public service, finalised in December 2015.63

Another trend in state public sector employment, running counter to federal developments, is the expansion of job numbers in Victoria, Queensland, South Australia and the ACT.64
Judicial Review/
Natural Justice Issues
in State Public Sector
Employment

Judicial review/natural justice type proceedings continue to be a preferred mechanism by which disgruntled employees and ex-employees litigate against adverse disciplinary decisions in the public sector. The recent case of *Wirth v Mackay Hospital and Health Service and Douglas* is another example where an employee, in this case a doctor, successfully contested disciplinary findings and action taken against him in the Supreme Court of Queensland on the basis that he was not afforded natural justice. This case follows a line of other similar decisions in various courts and tribunals across Australia which demonstrate the problems public sector employers face when investigating and implementing disciplinary matters. Public sector employers should expect more activity in this area.

‘The public sector in Australia represents around a third of the nation’s GDP. Declining public sector productivity cannot be allowed to be a handbrake denying all Australians a better future.’

Source: Vince Graham, former head of Networks NSW, quoted in M Coultan, ‘Outsource public jobs for better results: expert’, *The Australian*, 15 April 2016
Health and Safety Challenges for the Public Sector

As noted earlier, the public sector workforce is undergoing significant change in response to demands for services that are delivered more quickly and with greater accountability. It is also responding to demands that public service benefits be trimmed.

This reshaping exercise will continue in response to budgetary pressures, and will require well planned change management processes to minimise foreseeable psychosocial health and safety risks. While some are less than sympathetic to affected public servants, many have worked long careers with expectations of job security and certain working conditions. The removal of that form of security, and changes in conditions including greater work intensification, will pose significant health and safety risks if their consequences are not properly risk assessed, and if appropriate actions in mitigation are not undertaken.

In addition, the public sector workforce is dealing with safety concerns posed by issues affecting the Australian workforce generally, including:

- the automation of roles;
- the increasing use of technology;
- safety issues associated with 'working flexibility';
- an ageing workforce;
- the blurring of work and private life boundaries;
- increased complaints of bullying and harassment; and
- skyrocketing psychological injury claims.
Social Enterprises, Social Impact Bonds & The Not-For-Profit Sector*

* The section on social enterprises/social impact bonds was written with assistance from Jeremy King, Partner in Corrs’ Banking and Finance Team, who has examined the potential use of social benefit bonds in addressing various social problems such as domestic and family violence – see e.g. http://www.corrs.com.au/thinking/insights/creating-a-lasting-bond-utilising-social-benefit-bonds-to-help-combat-family-violence-in-australia/*
Social enterprises combine commercial trading with overriding or intrinsic social or environmental objectives. Found in both for-profit and not-for-profit sectors, they derive a substantial portion of their income from trade and reinvest the majority of their surplus in the fulfilment of their mission. Social enterprises have been supported through the federal Government’s $20 million Social Enterprise Development and Investment Funds.

‘Impact investing’ is emerging as a significant new avenue for delivering social services and infrastructure internationally, with slower yet gradually increasing take-up in Australia recently.

Social impact bonds ‘are a subset of impact investing and allow governments to outsource the risk associated with novel programs for tackling social disadvantage’. Bond-issuing organisations raise capital from investors based on government contracts to obtain better social outcomes.

Increasingly, social impact bonds are viewed as having an important role to play in funding early intervention and prevention measures that will help reduce the social services expenditure of federal and state governments.

Source: P Shergold and R Addis, ‘Impact investing is the way to go’, The Australian, 16 March 2016
The NSW Government has pioneered social impact bonds in Australia, launching two initiatives to promote resilient families in 2013. In addition to the successful Newpin project [see below], another partnership between the government and The Benevolent Society, Westpac and Commonwealth Bank raised $10 million.73

NSW has followed up with two further social investments: one with Uniting Care and St George Community Housing to support young wards of the state to make the transition to independent living, and another to work with ACSO and Arbias to reduce recidivism by adult offenders and parolees.74 The Queensland Government is currently pursuing social impact bonds addressing two intractable problems: recidivism and homelessness. The Victorian and South Australian Governments are likely to be the next jurisdictions to launch social impact bond pilot programs.75

The number of organisations established to catalyse social investment funding is growing – examples include Impact Investing Australia, Impact Investment Group, Blue River Group, Capital Collaboration, The Difference Incubator, One10 and NAB’s Impact Investment Readiness Fund.76 Superannuation funds including HESTA and VicSuper, and financial institutions such as QBE and Perpetual, are also starting to examine social impact investment opportunities more closely.77

The 2016 Investor Report from Impact Investing Australia identified around $18 billion in projected social investment over the next five years, intended for projects to assist children and older Australians, housing, health, the arts, culture and the environment.78 Addressing family violence has been another major focus. However, there is some indication at this stage that the conversion of available investment into actual projects and deals is slow due to minimal government backing,79 and a somewhat haphazard pipeline of deals in which to invest. There are also certain tax settings in Australia that are restricting a more active embrace of this new approach to philanthropy.

Social Impact Investment – Success Story

A $7 million NSW Government bond has funded Uniting Care’s New Parent and Infant Network (Newpin), in collaboration with Social Ventures Australia. Newpin is aimed at reuniting children from out-of-home care with their families and preventing others from entering care. As well as helping 101 families to date, the bond is scheduled to deliver an 8.9% return on investment.80
Employment and IR Issues in Social Enterprises and Impact Investing

Social impact investment raises a number of industrial relations and employment issues. Depending on the type of social services programme that is the subject of the investment, there can be concerns among unions and public sector employees about the state effectively outsourcing part of its function. At its heart, social impact investment proceeds on the basis that non-government actors (charities, NFPs or other private sector entities) can perform services that would otherwise be undertaken by the public service.

Social impact bonds to date have not entailed the funding of projects dependent on large workforces, but even where there is minimal or even no displacement of public sector employment, some will fear ‘privatisation by stealth’. Governments considering the use of social impact bonds, as well as sponsors and reformers advocating their use to governments, need to think through the industrial relations ramifications of the proposals.

A second set of issues relates to the terms and conditions that will apply to the workers undertaking the relevant work. These may be employees of the entity which contracts with the government for the provision of services, or a labour hire firm or some other entity. They might be independent contractors. If the work to be performed is in sectors where union representation is high, it is likely that enterprise bargaining will need to be considered; and in any event, proposed conditions will need to be sufficient to attract appropriately qualified individuals.

It is important to note that labour rates and conditions will directly affect the question of ‘value for money’ for government, and hence the rate of return for investors. Labour issues will therefore be of central importance to the ultimate success of the venture.

Work Health and Safety Issues arising out of Government Funding of Third-Party Delivery of Services

The increasing divestment of services delivery from the Government to the not-for-profit (NFP) sector imposes new forms of health and safety liability on government and on the recipient NFP.

Government learnt many safety lessons from the Royal Commission into the Rudd Government’s Home Insulation Program (HIP). In 2014, the Royal Commission found significant failures in the design and implementation of the HIP. The HIP was rolled out before the Model WHS legislation commenced operation. If that legislation had been in place, the breadth of the Crown’s
WHS duties means that it would have significantly breached the legislation through its failures in the design and implementation of the HIP, which led to the deaths of several workers.

Accordingly, any Government agency that funds the third party delivery of services must now have a reasonable basis for assuming that the relevant third party can deliver the service safely for relevant workers, and any “other person” who is affected by work performed in relation to the service delivery.

Governments that fund third party service delivery will therefore require the NFPs who they fund for that purpose to establish that they have adequate work health and safety systems that are rigorously implemented, and that the “officers” of the NFP understand their personal WHS duty as an officer and comply with it. Most NFPs have a separate legal existence and because they are artificial entities, they can act only through the humans who direct and manage their “businesses” – these are the officers of the NFP. In addition to ensuring the adequacy of WHS systems and officer compliance, government funders must actively monitor NFP and officer performance in that regard. They must also be prepared to intervene as required to ensure that the funded activity is not placing workers or “other persons” at a health and safety risk.

NFPs that want to deliver the services that Government is divesting in favour of the NFP sector must comply with the contractual duties imposed on them by Government in relation to the safe delivery of the services. NFPs must also comply with the statutory duties imposed on them to take all steps reasonably practicable to ensure the health and safety of their workers who perform the work to deliver the services.

Traditionally, WHS regulators tended to view NFP WHS breaches with a degree of tolerance. Such tolerance appears to be diminishing as the services of NFPs expand, they obtain increased funding and necessarily become more sophisticated. The key take-out for NFPs is that they need to be compliant with WHS systems that are properly implemented; and the officers of the NFP must understand their personal WHS duty and comply with it (or face significant penalties and possibly custodial sentences).
Business Culture & Risk
In this section, we examine three central issues that inform the ability of businesses to increase their value and minimise risk through enhanced organisational culture:

- changing expectations about leadership and culture;
- workplace mental health; and
- managing security threats.

Does the Fish Rot from the Head? Changing Expectations about Leadership and Culture

Workplace culture, and safety culture as a subset, has long been regarded as a critical driver of how an organisation operates and performs. Yet limited work has been done on a ‘nuts and bolts’ level to understand the component parts of workplace culture, and critically, how to manage it.

There has been a great deal of scrutiny of the concept of organisational culture in the Australian financial sector over the last few years. In 2014, a Senate Committee Report found Commonwealth Bank customers lost hundreds of millions of dollars after financial planners put their clients’ money into high-risk investments without their permission. The Report called for a Royal Commission into the issue.
In March this year, the ABC’s *Four Corners* program examined the Commonwealth Bank’s insurance business (CommInsure). This led to an investigation by the Australian Securities and Investments Commission (ASIC) into the corporate culture of the bank. ASIC Chairman Greg Medcraft said:

“What I have said before is that, clearly, there is an issue of culture in some parts of, well a lot of, the banks... I think what has happened to CommInsure should be a signal to the industry more broadly.”

The suggestion that organisational culture should be regulated has not been greeted favourably by parts of corporate Australia. David Murray, who led the Financial System Inquiry which recommended significantly increased powers for ASIC, stated that:

“ASIC is pursuing this notion that you can have liability for a culture breach, it is absolutely impossible to legislate for that in fact you could argue that it’s anticompetitive, because you can’t have the same culture for everyone.”

The recent federal election outcome means we are less likely to see a Royal Comission.

It is also unlikely that we will see a decrease in the pressure on organisations in the financial sector, and beyond, to take greater responsibility for their organisational cultures. And the organisations in the financial sector have stated that they intend to address these critical issues.

Interestingly, our thinking about safety culture is far more developed than in relation to broader organisational culture. Academic works abound about safety culture, the safety regulators all issue guidance about how to develop positive safety cultures, and numerous safety culture ‘diagnostic tools’ are available. Safety culture focuses on the importance of an organisational culture that values workplace safety. Safety cultures are not optional: there is always a safety culture and it is either positive or negative. Indeed it is argued that in risk assessment terms, safety culture is either a hazard or a safety enabler and should therefore be given close consideration.
The importance of safety culture ties closely with the rationale for imposing a personal safety duty on the “officers” of organisations that attracts onerous sanctions for breach. The officer’s personal safety duty is based on the belief that a strong commitment to safety from the very top of the organisation has not only a positive impact on safety outcomes, but a defining impact. It is clear that “safety culture” is affected by (and some say directed by) the views of the very top of the organisation – so that ultimately, the systems and their enforcement are dependent on the officers of organisations.

From a safety perspective, the business community and others have always debated whether it is fair for individual directors or managers of companies to be held liable if their company breaks the law. Although a company has a separate legal personality, it is an artificial one and it can act only through the humans who direct and manage its business.

Ultimately, the debate has been resolved in favour of imposing a positive duty on “directors and officers” that requires them to be proactive about safety and (intends to) give them a sense of personal control and fairness by linking their liability only to their personal failure to undertake “reasonable steps” in six specific areas of safety related activity.

Early officer prosecutions suggest that health and safety regulators are not taking an overly harsh approach in relation to director and officer prosecution. For example, McKie v Al-Hasani and Kenoss Contractors, the first contested prosecution under the officer’s duty, showed that the courts will not readily find that a person is an officer. This case is viewed as authority for the proposition that only the very top of an organisation will be regarded as an officer and prosecuted in that capacity. That said, it is also clear that officers will be penalised if they do not comply with the officer’s duty and the provision will not be left unutilised.

Workplace Mental Health – the Duty to Protect and the Duty not to Discriminate

Workplace mental health is emerging as a key issue, however it is wrought with confusion. There is a widespread failure to understand the distinction between:

- not unlawfully discriminating against people with mental illness in the workplace (i.e. not breaching laws to protect persons with disability); and
not breaching health and safety laws that require a business to take all steps reasonably practicable to ensure the health and safety (physical and psychological) of workers and other persons who are affected by work performed for the business.

It is important to distinguish between these two issues because each calls for a different response. Of course, the limitations of that clear delineation become obvious when a business is required to consider how it ensures that a pre-existing mental illness is not exacerbated by workplace issues. The complexity of these issues means that even though psychological injury claims are increasing much faster than physical injury claims, and unlawful discrimination claims on the ground of mental illness are also increasing, many are adopting a ‘head in the sand’ approach. However, the cost of responding to these issues instead of preventing them, together with the legal duty to take proactive preventative action, will pressure businesses into adopting a systematic approach that mirrors that applied to safety risks for physical injuries and issues.

Unlawful discrimination on the ground of mental illness

Those responsible for equal employment opportunity, performance management, human resources and careers are acutely aware that many members of our workforces suffer from mental illness. They are also aware that it is unlawful to discriminate against a person on the ground of mental illness. However, even though community tolerance and understanding about this issue has improved vastly, there is still stigma at play, which makes it difficult for people to seek assistance. It also creates problems in managing those who may have uninformed expectations about the conduct of persons suffering mental illness. Businesses will increasingly be challenged to establish systematic and educative responses to mental illness amongst their workers.
Taking all steps reasonably practicable to ensure that workers’ psychological health is not put at risk of injury

The potential cause or aggravating factors for mental illness include:

- bullying;
- poorly designed work;
- work intensification;
- business disruption; and
- changing forms of work and job insecurity.

Unfortunately, solutions for the workplace are readily touted by the probably well-intentioned but often uninformed ‘safety industry’. This industry is currently ‘selling’ a range of sometimes disconnected solutions to protecting workplace psychological health. These include resilience training, vague concepts of ‘wellness’ and the now infamous ‘colouring-in rooms’. While these responses might be part of fulfilling the legal duty of ‘taking all steps reasonably practicable’ to ensure workers’ psychological health and safety, they are not sufficient and may even be harmful if implemented outside a systematic and integrated response. Systematic responses require risk assessments, the implementation of appropriate ‘risk controls’ and the consideration of workplace culture and mental health literacy.

Businesses that are looking for a place to start when planning their own systematic response to the duty to take all steps “reasonably practicable” to ensure workers’ psychological health and safety should look at the relevant Canadian National Standard. This standard sets out the principles of a management system for psychological health. It should also be noted that the business case for dealing with workplace risks to psychological health is as pressing as the legal duty to do so.

Security Threats in the Workplace and to Business

Ensuring the safety of workers and other persons at the workplace involves providing for their security. Workplace security is not a new concept. However, over recent years, it has increased in importance due to a more flexible, mobilised workforce and a number of terrorist-related incidents. Security needs to be managed and form part of any organisation’s risk management system.

How is workplace security regulated?

In addition to general health and safety laws, there are industry-specific laws (e.g. rail, maritime and aviation) which govern security in the workplace. Prosecutions under health and safety laws for breaches of security have occurred in the past. Notably, the Finance Sector Union successfully prosecuted banks under predecessor laws in NSW a number of times for failures with their security measures. Criminal and anti-terrorism laws are also at play when there are such
failures, and more often than not, this interplay will result in criminal or anti-terrorism laws taking precedence.

Organisations need to be vigilant in relation to potential security threats, including by monitoring the National Terrorism Threat Level (currently ‘probable’), as part of an overall strategy to ensure that workers and other persons are not exposed to harm.

Relevant Australian Standards


An important first step is establishing the context, both internal and external, to the organisation. Most threats to workplace security come from the external environment and include:

- community [e.g. levels of local crime, anti-social behaviour, public demonstrations];
- stakeholders [e.g. customers, clients, lobbyists]; and
- geopolitical [e.g. political stability of countries in which the organisation operates].

Organisations should implement a variety of security measures to eliminate or reduce the risk posed by the threats identified. Of course, organisations should consult with other organisations that they operate with [or operate near] when identifying such measures, and ensure that those measures are consistent with any emergency management plans already in place. The Australian Federal Police and local police forces all have information on their websites to assist in managing threats to security.

Australian Government’s Critical Infrastructure Resilience Strategy

On a national scale, the Australian Government established the Trusted Information Sharing Network for Critical Infrastructure Resilience, which is the main national engagement mechanism for business-government information sharing and resilience-building initiatives on critical infrastructure.

Basically, the aim of the strategy is the continued operation of critical infrastructure in the face of all threats – ‘all threats’ includes natural disasters, pandemics, accidents, negligence, criminal activity, computer network or terrorist attacks.

Organisations responsible for critical infrastructure are encouraged to build their capacity to respond to such threats and are advised to ensure that their risk management strategies are always evolving.
Looking Ahead
Looking Ahead

The Coalition’s slender majority following the July 2 federal election – and the complex composition of the Senate – signal that the political landscape in Australia over the next few years will be volatile. This is consistent with the volatility that is evident globally in the Brexit vote and its aftermath in the UK,103 and in the United States presidential election campaign.104

As noted already in this review, the Turnbull Government’s workplace reform agenda – which is centred on improving regulatory arrangements in the construction industry and clamping down on union misconduct – may not be fully enacted in this term of Parliament.

The business community has been waiting on other necessary reforms, including some which were recommended by the Productivity Commission such as reductions to penalty rates and measures to enhance access to enterprise bargaining for small-medium employers.

The changes to employment regulation that appear to have the best prospect of passing in this term are the Coalition’s proposals to crack down on exploitation of vulnerable workers engaged through franchises and other business structures.

These include:

- the introduction of joint liability on the part of franchisors and parent companies for workplace law breaches by franchisees and subsidiaries;
- increased penalties for award breaches; and
- new compulsory evidence-gathering powers for the Fair Work Ombudsman.105

It can be expected that these measures will have support from Labor and most of the independents and minor parties. There may also be pressure on the Government to adopt an even stronger position on worker exploitation, particularly in respect of migrant workers.106

Therefore, managing and reducing
the risks of non-compliance with awards and other workplace laws within the supply chain will be a major issue for Australian businesses in the near-medium term.

While this is happening, employees will embrace the excitement of new digital solutions and artificial intelligence with both fear and enthusiasm in equal measure. And employers will focus on how to use technology and artificial intelligence to better deliver their business models and, by doing so, create new work opportunities. This will continue the focus on whether the current employment structures are future ready or stuck in a 20th century model.

In addition, the key issues addressed in this review – future organisations and disruption, infrastructure development, the public sector workforce, social investment and business culture – will increasingly occupy the minds of managers, employee representatives and policy-makers over the next 12 months and beyond.
1 Weil was appointed by the Obama Administration as the Wage and Hour Administrator in the US Department of Labor in May 2014.


4 Liberal/National Coalition, The Coalition’s Policy to Protect Vulnerable Workers (May 2016); ALP, A Fairer Temporary Work Visa System – Fact Sheet (2016); ALP, Protecting Rights at Work: Licensing Labour Hire (2016).


6 Building and Construction Industry (Improving Productivity) Bill 2013 [No 2].


8 See further the section below on ‘Australia’s 21st Century Infrastructure Needs’ and the final section of this review: ‘Looking Ahead’.


10 Reserve Bank of Australia, Statement on Monetary Policy (May 2016).


12 ABS, Wage Price Index, Australia, March 2016 [Cat No 6345.0].

13 Reserve Bank of Australia, Statement on Monetary Policy (Wage Developments by Industry) (May 2016).


18 CEDA, Australia’s Future Workforce? (June 2015); a similar view is taken in Productivity Commission, Digital disruption: what do governments need to do? (Research Paper, 2016). See also Stefan Hajkowicz et al, Tomorrow’s Digitally Enabled Workforce: Megatrends and Scenarios for Jobs and Employment in Australia over the Coming Twenty Years (Report commissioned by ACS, BCG, Department of Employment, ANZ and CSIRO, January 2016); ABC, ‘Future Proof: are we preparing our children for the workplace of the future?’, Four Corners, 4 July 2016.

19 Ibid. For a global perspective on these trends see Organisation for Economic Cooperation and Development, Automation and Independent Work in a Digital Economy (May 2016); Foresight Alliance LLC, The Futures of Work: Report Overview (2016).


22 Foundation for Young Australians, The New Work Order: Ensuring young Australians have skills and experience for the jobs of the future, not the past (2015).

23 See also R Morton, ‘Two-thirds of students chasing careers that won’t exist’, The Australian, 24 August 2015.

25 J Minifie, ‘Peer-to-Peer Pressure: Policy for the sharing economy’ (Grattan Institute, April 2016).

26 Ibid.


28 Ibid; see also J Minifie, ‘Peer-to-Peer Pressure: Policy for the sharing economy’ (Grattan Institute, April 2016).

29 An issue that has to some extent been litigated in US class actions: see e.g. Sarah Kaine and Emmanuel Josserand, ‘Uber’s quasi union could be a Faustian bargain for drivers’, The Conversation, 12 May 2016. Test cases are also imminent in the UK and Australia: see H Osborne, ‘Uber faces court battle with drivers over employment status’, The Guardian, 19 July 2016; ‘Sham contracting test case to challenge disrupters’, Workplace Express, 21 July 2016.

30 J Minifie, ‘Peer-to-Peer Pressure: Policy for the sharing economy’ (Grattan Institute, April 2016).

31 Ibid.

32 Productivity Commission, Workplace Relations Framework: Final Report (December 2015). The change to the defence would mean an employer alleged to have misrepresented an employment relationship as independent contracting could only escape liability if they believed the arrangement to involve a contract for services, and could not reasonably be expected to know otherwise.


35 We discuss this issue further in the “Business Culture and Risk” section in this publication.


37 KPMG, Deficits will Climb and Growth will Suffer without Productivity Revival (16 May 2016); see also J Greber, ‘All downhill without infrastructure’, Australian Financial Review, 16 May 2016.


42 M Terrill, Roads to Riches: Better Transport Investment (Grattan Institute, April 2016).


46 See e.g. ‘Fact check: Did industrial disputes fall under the ABCC and rise after it was abolished?’, ABC Online, 18 April 2016.


See Fair Work Act, section 187(6).


‘Budget to further crimp federal public sector’, Workplace Express, 3 May 2016.


See also N Towell, ‘Young public servants thinner on the ground: expert’, Canberra Times, 18 September 2015.


Commonwealth of Australia [represented by the Department of Immigration and Border Protection]/[2016] FWC 2526 [27 April 2016].

State Government Entities Certified Agreement 2015 [CA/2016/22].

ABS, Wage Price Index, Australia, March 2016 [Cat No 6345.0].

N Toscano, ‘Victorian public servants win 13 per cent pay rise over four years’, The Age, 18 December 2015.


See e.g. Griffith University v Tang [2005] HCA 7; Hocking v Medical Board of Australia and Anor [2014] ACTSC 48; Vega v Hoyle & Others [2015] QSC 111.


See e.g. ‘Blended finance: trending, blending’, The Economist, 23 April 2016.


See e.g. J Mather, ‘Morrison keen on social impact bonds’, Australian Financial Review, 10 September 2015; S Larkin, ‘Quality control is crucial when “impact investing”’, The Australian, 10 October 2015.


76 K Mahlab, ‘Looking for returns beyond yields allows social impact bonds to make their mark’, The Australian, 23 February 2016.
82 Ibid.
86 Quoted in Sydney Morning Herald, 8 April 2016.
89 Section 27 of the Model Work Health and Safety Act 2011.
90 See the definition of ‘officer’ in section 4 of the Model Work Health and Safety Act 2011; see also section 9 of the Corporations Act 2001.
91 Section 27(15) of the Work Health and Safety Act 2011 (NSW) [a mirror version of this statute applies in all states and territories of Australia other than Victoria and WA].
92 [2015] ACTIC 1 [Industrial Court of the Australian Capital Territory].
94 National Standard for Canada, Psychological health and safety in the workplace — Prevention, promotion, and guidance to staged implementation [Standards Council of Canada, 2013].
95 For those interested in the “numbers”, these are well communicated to the lay-person in the appendices to H Gardner, A Wagner and J Rash, Mental illness in the workplace: Psychological disability management [Gower Applied Business Research, 2014]. These figures show the cost/benefit information and are a clear incentive for change that goes beyond legal imperatives.
99 For example, telephone bomb threat, mail bomb threat and suspicious package and other items checklists. For more information, see Australian Federal Police, Australian Bomb Data Centre – Bombs, Defusing the Threat [Edition 5][2009].
100 See: http://www.tisn.gov.au/Pages/default.aspx
101 ‘Critical infrastructure’ includes physical facilities, supply chains, IT and communication networks central to national social or economic wellbeing or national defence/security.
105 Liberal/National Coalition, The Coalition’s Policy to Protect Vulnerable Workers [May 2016].
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