



LEGISLATIVE COUNCIL

SELECT COMMITTEE ON THE IMPACT OF TECHNOLOGICAL CHANGE ON  
THE FUTURE OF WORK AND WORKERS IN NEW SOUTH WALES

# Impact of technological change on the future of work and workers in New South Wales

## Discussion Paper



October 2020

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Select Committee on the impact of technological and other  
change on the future of work and workers in New South  
Wales

# **Impact of technological and other change on the future of work and workers in New South Wales**

Discussion paper

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## Terms of reference

1. That a select committee be established to inquire into and report on the impact of technological and other change on the future of work and workers in New South Wales, with particular reference to:
  - (a) changes in the earnings, job security, employment status and working patterns of people in New South Wales,
  - (b) the extent, nature and impact on both the New South Wales labour market and New South Wales economy of:
    - (i) the 'on-demand' or 'gig-economy',
    - (ii) the automation of work,
    - (iii) the different impact of (i) and (ii) on regional New South Wales,
    - (iv) the wider effects of (i) and (ii) on equality, government and society,
  - (c) the impact of the 'on-demand' or 'gig economy' and the automation of work on long-term productivity growth, economic growth, as well as the overall attractiveness of New South Wales as an investment destination for the advanced technological sector,
  - (d) the effectiveness of Commonwealth and New South Wales laws in promoting fair competition and preventing monopolies and other anti-competitive behaviour in the 'on-demand' or 'gig-economy',
  - (e) the adequacy of the New South Wales skills and education system in helping people adjust to the changing nature of work,
  - (f) the impact of the 'on-demand' or 'gig economy' and the automation of work on:
    - (i) accident compensation schemes, payroll or similar taxes,
    - (ii) Commonwealth taxes which support New South Wales Government expenditures,
  - (g) the application of workplace laws and instruments to people working in the 'on-demand' or 'gig-economy', including but not limited to:
    - (i) the legal or work status of persons working for, or with, businesses using online platforms,
    - (ii) the application of Commonwealth and New South Wales workplace laws and instruments to those persons, including, superannuation and health and safety laws,
    - (iii) whether contracting or other arrangements are being used to avoid the application of workplace laws and other statutory obligations,
    - (iv) the effectiveness of the enforcement of those laws and regulations,
    - (v) regulatory systems in other Australian jurisdictions and in other countries, including how other jurisdictions regulate the on-demand workforce and are adapting to the automation of work,
    - (vi) Australia's obligations under international law, including International Labour Organization conventions,

- (h) whether current laws and workplace protections are fit for purpose in the 21st century, including workplace surveillance laws and provisions dealing with workplace change obligations and consequences,
- (i) whether workers should have agency over the way the data they generate at work is used and, if so, what legal framework is required to provide this,
- (j) how employers and other businesses should manage and use the information generated by the workforce,
- (k) how government as a best practice employer should manage and use the information generated by its workforce,
- (l) whether, and what, legislative or other measures should be taken to:
  - (i) reform workplace laws and instruments to account for the emergence of the 'on-demand' or 'gig economy' and the automation of work,
  - (ii) reform the skills and education systems to help people adjust to the changing nature of work,
  - (iii) reform taxation laws to promote economic growth and protect public finances,
  - (iv) reform competition laws to promote fair competition and prevent monopolies in the on-demand or gig-economy,
  - (v) reform accident compensation schemes and other social insurance schemes to account for the emergence of the 'on-demand' or 'gig economy' and the automation of work, and
- (m) any other related matter.

## Committee details

<b>Committee members</b>		
<b>The Hon Daniel Mookhey MLC</b>	Australian Labor Party	<i>Chair</i>
<b>The Hon Mark Banasiak MLC</b>	Shooters, Fishers and Famers Party	<i>Deputy Chair</i>
<b>Ms Abigail Boyd MLC *</b>	The Greens	
<b>The Hon Wes Fang MLC**</b>	The Nationals	
<b>The Hon Courtney Houssos MLC</b>	Australian Labor Party	
<b>The Hon Natasha Maclaren-Jones MLC</b>	Liberal Party	
<b>The Hon Shayne Mallard MLC</b>	Liberal Party	
<b>The Hon Mark Pearson MLC</b>	Animal Justice Party	
<b>The Hon Adam Searle MLC</b>	Australian Labor Party	
<b>Mr David Shoebridge MLC</b>	The Greens	

\* Ms Abigail Boyd MLC is a participating member from 23 June 2020 for the duration of the inquiry.

\*\* The Hon Wes Fang MLC replaced the Hon Sam Faraway from 3 August 2020.

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## Discussion paper

### The inquiry

- 1.1 The Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales was established by the House on 24 March 2020. The full terms of reference are set out on pages iv-v.
- 1.2 The aim of the inquiry is to examine how work will change, in large part due to technological change, and what this means for the workers of New South Wales. It aims to be the most expansive inquiry undertaken into the future of work to date in this country.
- 1.3 The inquiry terms of reference cover a range of issues including the impacts of the 'on-demand' or 'gig economy' and automation, the adequacy of current workplace laws and the appropriateness of laws currently regulating workplace surveillance in New South Wales.
- 1.4 Broadly, the terms of reference explore the following overarching questions:
  - How is the world of work changing and how will it continue to change?
  - What are the main challenges and opportunities that changing work will bring for workers, workplaces and the people of New South Wales?
  - How can government ensure that New South Wales takes advantage of the coming opportunities while protecting workers from the pitfalls of insecure work?
- 1.5 The inquiry will particularly focus on how major changes in work such as the 'gig economy' and automation have changed and will further change work for workers, including existing workplace protections. It will also examine how changes to work will impact on the current system of workplace laws and regulations, the economy and taxation.
- 1.6 At the time of the inquiry's establishment, it was difficult to anticipate the full effect of the COVID-19 pandemic. With the effect of the pandemic still being felt across many sectors of the economy, particularly the hospitality, retail and arts industries, it is both expected and understandable that discussion of its impact will be a likely focus of this inquiry. Notwithstanding its significance, the committee is keen to consider the issues raised as part of discussions around the pandemic in their full context, given that many of these issues are longstanding and have occupied public policy debates well before the pandemic.
- 1.7 At the conclusion of the inquiry, the committee hopes to have gained a comprehensive understanding of the changing world of work. This will allow the committee to make recommendations to government on how to effectively manage changes to work and modernise workplace laws to adapt to the changes.
- 1.8 The final report is likely to be published in late 2021.



## Structure of the discussion paper

- 1.9** This discussion paper is designed to assist witnesses participating in hearings by reflecting key themes and issues raised in submissions. In this sense, quotes and excerpts from submissions have been selected in an attempt to capture the spectrum of stakeholder views on these key themes.
- 1.10** Broadly speaking, the paper has been organised according to the inquiry's terms of reference, noting that not all terms of references were addressed in the same depth by submission authors.

## The gig economy

### What is the 'on-demand' or 'gig' economy?

- 1.11** Defining what is meant by the 'on-demand' or 'gig' economy was a key theme throughout a number of submissions. Authors referred to these terms as describing 'a digital marketplace', as well as 'a broader label of work' and 'shorthand for many of the broader trends of technological change':
- 'On-demand work relates to work that is obtained from online digital platforms such as Fiverr, Airtasker, TaskRabbit, Expert360, Deliveroo, Ola and AmazonFlex. These platforms are marketplaces, where a 'worker' may connect with a 'customer' and do some sort of 'gig' or task for a fee'.<sup>1</sup>
  - 'The gig economy refers to a broader label of work, that is any individual that works as a sole trader, or a micro-enterprise. This may be through on-demand work obtained from online digital platforms, or it may be through more traditional means. Traditional sectors of the gig economy include: support workers, handymen and tradespeople, management consultants, nannies, removalists, taxi drivers, or handymen or women'.<sup>2</sup>
  - 'The term "gig economy" is often used as shorthand for many of the broader trends of technological change ... and has taken on an almost symbolic meaning in future of work discussions. Here, the gig economy refers to digital platform on-demand work'.<sup>3</sup>
- 1.12** Submissions also discussed the prevalence of this type of work. Whilst some noted a perceived increase, others suggested that the proportion of the workforce involved in this type of work remained small:
- 'The Victorian Inquiry into the Future of Work (2018-2020) indicated there were more than 40 digital platforms with which individuals found their work ... [t]his has dramatically increased ... [to] 71 digital platforms in the fields of at-home-services, mobility, freelancers, insurers, and more'.<sup>4</sup>

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<sup>1</sup> Submission 15, upcover, p 3.

<sup>2</sup> Submission 15, upcover, p 3.

<sup>3</sup> Submission 6, United Workers Union, p 52.

<sup>4</sup> Submission 15, upcover, p 3.

- 'The emergence of the gig economy has not fundamentally altered the NSW labour market or the earnings, job security, employment status and working patterns of the people of NSW. While the gig economy is growing, it remains a small component of the NSW labour market ... Very few workers depend on the gig economy to meet their basic needs. There are ten employees for every independent contractor, with gig economy workers representing only a subset of this group. Recent growth in the gig economy has not led to an observable increase in the prevalence of independent contracting. Independent contractors comprise a smaller share of the workforce than they did in 2014'.<sup>5</sup>
- 'Main job independent contractors account for only 8.1 per cent of the workforce, and digital platform workers are only a subset of this group. While digital platforms may account for an increasing share of independent contractors, the increasing prevalence of digital platforms has not given rise to an increase in independent contracting (independent contractors accounted for 8.6 per cent of the workforce in 2014).<sup>6</sup>
- '[A 2019 study conducted by the submission authors] indicated that New South Wales had the highest levels of participation in digital platform work at 14.3% compared with other States and Territories. Of those 14.3% of NSW internet users, 6.4% had at some time undertaken digital platform work, while 7.9% were currently participating in the gig economy. Not surprisingly, participation was highest in major cities, and further analysis showed that survey respondents located in regional and remote areas were less likely than those in a major city to participate in digital platform work. ... the study also identified over 100 different platforms through which people in Australia are currently working or offering to work. The five most popular platforms for seeking work were Airtasker (34.8%), Uber (22.7%), Freelancer (11.8%), Uber Eats (10.8%) and Deliveroo (8.2%), and the most common type of work undertaken via digital platforms was transport and food delivery – 18.6% of current platform workers were providing transport and food delivery services.'<sup>7</sup>
- 'Platform-work is still a relatively new labour market phenomenon in Australia, however as a form of work organisations and source for workers to derive a primary or supplementary income it is becoming increasingly prevalent. A recent labour market survey found that 7.1% of respondents were working, or had sought to participate in platform work, in the past 12 months, with NSW being the jurisdiction with the highest level of participation.'<sup>8</sup>

**1.13** Some submissions discussed broader themes associated with the work itself. These included both positive aspects, namely, the flexible nature of the work as well as negative aspects, particularly the insecure nature of the work:

- 'In the on-demand economy, people can choose whether or not to work, where to work, when to work, can reject work at any point, who will perform the services, and can work for multiple companies simultaneously'.<sup>9</sup>

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<sup>5</sup> Submission 7, Business NSW, p 1.

<sup>6</sup> Submission 7, Business NSW, p 2.

<sup>7</sup> Submission 14, QUT Centre for Decent Work and Industry, p 3, 5.

<sup>8</sup> Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 2.

<sup>9</sup> Submission 10, Deliveroo, p 6.

- 'Work in the gig-economy can be viewed as an extension of established trends which have seen the fissuring of work (the fragmenting of work whereby tasks are completed by third parties, contractors or employees of other organisations such as labour hire) and increasing work insecurity.'<sup>10</sup>
- '... [T]he flexibility that app based work offers is providing an attractive option for many. Thanks to the genuine two way flexibility offered by Uber, as well as the relatively low friction and low cost access to the app, Uber can help people who have traditionally struggled to find meaningful, reliable work ... Nearly four in five driver-partners said they chose to drive using Uber because it gives them flexibility to balance work and family life.'<sup>11</sup>
- '... [R]ather than established forms of labour hire or temporary agency work, most platforms do not offer employment to workers, but rather access to 'one off' gigs. This increases worker precarity, decreases their ability to express worker voice ... and increases their marginal status in the labour market.'<sup>12</sup>

**1.14** Other submissions referred to general trends about the type of person employed in the 'on-demand' or 'gig' economy:

- 'The [on-demand and gig-economy] workforce is predominantly made up of two types of skill groups. This is divided by labour based work of delivery, courier and rideshare workers, with skilled based work of management consultants and IT contractors. Typically, the labour based work is lower paid, with lower levels or prospects for education or gaining alternative sources of work'.<sup>13</sup>
- '... [We] have found in our research that certain attributes attached to certain parts of the gig economy workforce as either:
  - Permanent resident or international student visa holders
  - Possibly primary carer, retiree or requiring flexible working hours.
  - Used the gig work as a supplement to other white collar work'.<sup>14</sup>
- 'Temporary migrants, for instance, have been shown to be three times more likely to participate in platform work than an Australian citizen .... Temporary migrants were also over-represented in our app-based food-delivery research sample, with many selecting into this work because of work restrictions of their visa, difficulty finding employment, lack of access to social security, poor experiences of low wage employment in Australia'.<sup>15</sup>

## How has the way we work in New South Wales changed?

**1.15** Submission authors also examined changes in the earnings, job security, employment status and working patterns of people in New South Wales. Along with themes around the emergence of the 'gig' or 'on-demand' economy (discussed above), some stakeholders referred to issues such

<sup>10</sup> Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 2.

<sup>11</sup> Submission 13, Uber, pp 10-11.

<sup>12</sup> Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 2.

<sup>13</sup> Submission 15, upcover, p 3.

<sup>14</sup> Submission 15, upcover, p 3.

<sup>15</sup> Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 2.

as underemployment and insecure work. Submissions also discussed the effect of COVID-19 on employment. Commentary on these topics included:

- 'Insecure work has been particularly rampant in service-based, female-dominated industries, however it is also on the rise in traditionally male-dominated industries that once boasted some of the most secure jobs in the country, including mining and manufacturing. This is particularly the case with labour hire. While the original purpose of labour hire companies was to provide workers to fill short-term gaps in the workforce during peaks of activity, the industry has now evolved into a profitable business model of systemic worker exploitation. It is estimated that there are approximately 5,800 labour hire companies across the country, generating a revenue of around \$18.5 billion'.<sup>16</sup>
- 'The COVID crisis has undeniably had a major impact on our workforce and economy, the impacts of which are still being measured and likely yet to be fully realised. However, even prior to this crisis, the state of the labour force in Australia was deeply troubled. While unemployment pre-COVID was relatively low, underemployment and insecure work were high. In 2018, approximately 12.5 million Australians were employed, however fewer than half of those were in a permanent full-time paid job with leave entitlements—commonly casual or labour hire jobs'.<sup>17</sup>
- 'Industries hit hardest by the economic shut-down – food services, hospitality, retail and the arts – are big employers of young Australians. In accommodation and food services, 70% of businesses have temporarily reduced staff hours ... Young people accounted for 45% of the total decline in employment in May (16% pop'n) and the youth employment to population ratio fell to the lowest rate since Labour Force Surveys began. Over the 2 months to May, youth underemployment rate increased to 21.7% ... representing the largest fall in actual hours worked of all age cohorts'.<sup>18</sup>
- 'An apparently growing issue for regulators of employment is the problem of noncompliance—referred to by Australian unions as 'wage theft' ...

There are many ways in which this specific type of exploitation can occur. Examples include being underpaid for regular hours; not receiving premiums for work at unsocial times on nights or weekends (penalty rates); unpaid working hours or overtime; unpaid trials or internships; failing to receive entitlements like pension contributions (superannuation); having illegal deductions made from pay for alleged poor performance or breakages; being sexually harassed; being unlawfully or unfairly dismissed; inadequate breaks; mistreatment or excessive control; or being exposed to danger'.<sup>19</sup>

## Flexible working

- 1.16** Various types of flexible working arrangements have existed for decades. These culminated the introduction of an “All Roles Flex” policy by many companies over the last 5 years, including the NSW Government.

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<sup>16</sup> Submission 12, Australian Manufacturing Workers' Union, p 3.

<sup>17</sup> Submission 12, Australian Manufacturing Workers' Union, p 3.

<sup>18</sup> Submission 14, QUT Centre for Decent Work and Industry, p 6.

<sup>19</sup> Submission 17, Professor David Peetz, p 337.

- 1.17 The adoption of flexible working, especially working from home, is was accelerated earlier this year during the COVID-19 pandemic. But it's still unclear if this will be a lasting change to the way workplaces operate.
- 1.18 The committee is particularly interested in:
- Your experience of flexible working arrangements: whether it was positive, negative or neutral and any productivity gains or losses as a result of it
  - The current flexible working arrangements your company has in place
  - Best practice flexible working arrangements from Australia or internationally
  - Any future plans (both during the pandemic and beyond) that your company has made
  - Any suggestions for legislation / regulatory / policy change for the NSW Government

## The role of technology

### Technology and the automation of work

- 1.19 The role of technology and the automation of work was discussed by many stakeholders, including both positive and negative aspects. In this regard, some spoke of how workplace technology has grown and adapted over recent years, as well as the extent to which it has become part of working culture:
- '...[In] Australia, investment in new technology has actually been slow for the past decade, reflecting a broad failure of the business sector to innovate, accumulate capital, create new jobs and improve living standards. Widespread automation, robots and artificial intelligence has captured the Australian imagination, but not yet the Australian economy. ... Australia lags behind benchmarks set by other industrial countries and by some measures, technology-intensity of Australian workplaces is actually regressing'.<sup>20</sup>
  - 'Workplace technologies confirm [sic] to path dependencies; once installed it's very difficult to wind back their use or have them uninstalled. Particularly in the case of technologies that are designed to be ubiquitous, their use is rapidly normalised. As such, interventions must happen at the outset to protect against issues of function creep'.<sup>21</sup>
  - 'Rapid technological advancement brings with it a host of public policy challenges, in particular the question of how (and whether) to regulate the application of new fields of knowledge to economic and social life'.<sup>22</sup>
  - '...[T]echnology should open the prospect of better lives, with more security, higher incomes, and more leisure time. Technology can be mis-used in ways that damage the lives of many people (including workers), but those uses reflect deliberate human choices,

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<sup>20</sup> Submission 6, United Workers Union, p 43.

<sup>21</sup> Submission 6, United Workers Union, p 8.

<sup>22</sup> Submission 23, The Australian Workers' Union, p 3.

not the innate characteristics of the technology ... It is not feasible to 'stop' new technology, nor would we want to.<sup>23</sup>

- 'Since the industrial revolution, workers have always worried what will happen to their jobs when machines can do the work faster, cheaper, or better. But the historical record shows that technology has not produced mass unemployment or impoverishment – although dislocation and adjustment to technological change can be severe for some groups of workers, and some regions.'<sup>24</sup>
- 'It is clear that some existing jobs will be eliminated by new technologies, and others will be significantly changed. But there will also be significant new work associated with new technologies. An obvious response to this dichotomy is to assist displaced workers to fill new positions which arise. This means providing notice, support, and access to training and adjustment programs, so that workers can adapt their capacities in line with the emerging opportunities.'<sup>25</sup>

**1.20** Some submissions suggested that the effect of technology on workers varied across genders:

- ... [W]orking women express great enthusiasm about the potential for technology to improve work processes and to help them achieve positive social impact through their work. However, this enthusiasm is stymied, in many instances, by poor working conditions, particularly within the low-status jobs and feminised occupations where most Australian women work. ... In sum, women see opportunities for empowerment through work technologies, but the poor quality of feminised jobs hinders their ability to harness the potential of technological innovation for their own careers and for the benefit of Australian society'.<sup>26</sup>
- '... [W]omen, similar to men, seek security at work and see this as lacking in their current work environments. Both women and men are concerned by the prospect of automation-driven job loss, but they are notably more concerned with poor company management. This suggests that technological innovation is not seen as a threat in and of itself, but rather workers are distressed by how organisational leaders might apply new technologies within the workplace. Importantly, in contrast to men, women must balance these concerns with other pressing issues, namely pervasive disrespect and inequality at work'.<sup>27</sup>

**1.21** Others explored the perceived negative consequences of technology, including increasing the insecurity of work:

- 'There is a strong interrelationship between technology and insecure work. Insecure employment relationships are more amenable to exploitative uses of technology, and in turn, this exploitation creates a downward pressure on the quality and security of other forms of work'.<sup>28</sup>

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<sup>23</sup> Submission 5, Centre for Future Work, p 22.

<sup>24</sup> Submission 5, Centre for Future Work, p 4.

<sup>25</sup> Submission 5, Centre for Future Work, p 19.

<sup>26</sup> Submission 1, Australian Women's Working Futures, p 3.

<sup>27</sup> Submission 1, Australian Women's Working Futures, p 2.

<sup>28</sup> Submission 6, United Workers Union, p 12.

- 'Recently the preferred mode of railway for the NSW Government in Sydney has become a “metro” style, single deck, train similar to trains seen on the London Underground ... these “metro” trains are driverless. This method of operation does not provide any tangible benefits to commuters, and beyond a gimmick able to be sold to the public by the Government, seems only to benefit the private foreign owned company that won the right to operate the railway, Metro Trains Sydney Pty Ltd (MTS)'.<sup>29</sup>

## Workplace laws and instruments

1.22 Submission authors also discussed the application of workplace laws and instruments to people working in the 'on-demand' or 'gig-economy'. Many referred to the fact that the benefits and entitlements of a traditional employment relationship might not extend to those working in the gig economy, who were often employed as independent contractors or in casual roles. At the same time, other submissions suggested that existing protections were sufficient:

- 'Many employment entitlements are determined by the existence of an employment relationship. This relationship is determined by the nature of contract and common law, and is generally not defined in statute ... some industries deliberately attempt to misclassify employees in order to avoid their employment obligations... this sort of sham contracting and misclassification of employees often occurs in sectors where there is a pronounced power difference between the worker and the employer; there is a general industry practice to use insecure forms of work; the business operates within a highly competitive industry; and the workers feel powerless to do anything about unfair practices due to the fear of losing their jobs or residential status'.<sup>30</sup>
- 'While in the Australian platform economy, in areas such as food-delivery services, there is a prevailing tendency of platform firms to engage workers as independent contractors rather than employees, there are notable distinctions between different platforms, whereby their specific contractual arrangements and work arrangements in practice should be considered. It also has to be noted that certain platform-based firms, such as temporary staffing platform SideKicker2 engage workers as casual employees rather than independent contractors'.<sup>31</sup>
- 'I wish to address the issue of the increasing casualisation of the workforce through the use of “independent contractors” who are, on any sensible measure, employees ... Classifying a worker as an employee not only benefits the worker by providing the protection of awards and unfair dismissal rights, it also provides societal benefits by both recognising the dignity of work and avoiding cost-shifting. If a worker is actually an employee it is not in the public interest for the costs of that worker’s injuries or the consequences of that worker’s negligence to be borne by the public as opposed to the worker’s employer ... Legislative intervention is required to make it clear that where a worker is not running his own business ... that worker is treated as an employee as opposed to the current situation where the worker can be classified as an independent contractor'.<sup>32</sup>

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<sup>29</sup> Submission 16, Australian Rail Tram and Bus Industry Union, NSW Branch, p 1.

<sup>30</sup> Submission 2, Australian Lawyers Alliance, p 5.

<sup>31</sup> Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 4.

<sup>32</sup> Submission 4, Mr John Moratelli, p 1.

- '...[Australian Road Transport Industrial Organisation NSW Branch] believes the absence of a regulatory framework governing gig workers engaged in freight transport in NSW and elsewhere in Australia puts at risk existing legislative arrangements and associated systems which govern relationships between those who hire and those who are hired'.<sup>33</sup>
- "The legal concepts of "employee" and "independent contractor" evolved at a time before technology transformed the economy and allowed a platform, such as Deliveroo, to exist and give people the opportunity to choose new ways of working. We argue that this traditional dichotomy cannot be resolved so that Deliveroo can provide both the flexibility that riders want and the security we believe riders deserve'.<sup>34</sup>
- 'In light of the increasing participation in the "gig economy," issues such as whether a worker is, in fact, an "employee" or "independent contractor" have become increasingly prevalent... [Restaurant and & Catering Association] submits that the current laws and workplace protections are not fit for the purpose in the 21<sup>st</sup> century, particularly as the world of work continues to change in the current and post pandemic climate. R&CA notes that there is no definition of "employment" under the *Fair Work Act 2009* (Cth) and classifying a worker as an "employee" or an "independent contractor" has largely been determined by way of a consideration of a number of key factors on the evidence of an employer-employee relationship'.<sup>35</sup>
- 'The [Australian Lawyers Alliance] is concerned that with the increased reliance on the 'on-demand' and 'gig economy', the legislative framework governing industrial laws and occupational health and safety has not sufficiently kept pace with this development and can easily be circumvented by entities to avoid their employer obligations'.<sup>36</sup>
- 'Workers in contingent, contractor, and 'gig' positions should be protected by the same provisions regarding unfair dismissal, even if they are not considered 'employees' according to traditional legal definitions'.<sup>37</sup>
- 'The gig economy, or on-demand work, does not present anything novel with respect to the contractual relationships entered by its workers. Individuals in gig economy arrangements remain engaged under either a contract of service (employment) or a contract for services (an independent contractor). The gig economy can be thought of as a 'digital dockland'. Instead of standing on the wharves offering their labour for a short period of time, individuals can now do so via an online platform ... [w]e do not believe there is a sufficient basis to conclude current arrangements are incapable of satisfactorily accommodating the emergence of the on-demand or gig economy'.<sup>38</sup>

**1.23** To remedy these issues, some submissions called for reform at the Commonwealth level, whilst others suggested that any reform must involve a harmonisation of laws across jurisdictions:

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<sup>33</sup> Submission 21, Australian Road Transport Industrial Organisation NSW Branch, p3.

<sup>34</sup> Submission 10, Deliveroo, p 9.

<sup>35</sup> Submission 22, Restaurant and Catering Australia, p 2-3.

<sup>36</sup> Submission 2, Australian Lawyers Alliance, p 5.

<sup>37</sup> Submission 5, Centre for Future Work, p 17.

<sup>38</sup> Submission 7, Business NSW, p 1.



- 'Deliveroo has argued previously for a Commonwealth 'Future Work Act'. This could, for example, outline the relationship between platforms and contractors that ends the trade-off that currently exists in legislation between flexibility and security ...'<sup>39</sup>
- 'We want to continue to offer a better experience and more support and benefits through our apps for driver and delivery-partners in New South Wales and across Australia. However, providing additional benefits to independent workers is not something contemplated by the existing employment regimes and could create the risk of having partners lose their independent status ... This issue could be remedied by the Commonwealth amending the Fair Work Act to provide that the provision of safety protections and entitlements to independent contractors is not disincentivised because of the potential impact on work status'.<sup>40</sup>

**1.24** In addition to legislative change, some unions discussed additional changes that could improve the situation for those working in these emerging industries:

- '... we need to ensure that there is genuine and consistent consultation between employers and workers regarding changes to the nature of their work. A good first step would be to formally establish forums for government, employers, and unions to enable ongoing consultation – including through the creation of an industry-wide authority to oversee and manage industry transition'.<sup>41</sup>
- 'Establish an independent tribunal to hear worker disputes regarding unethical use of technology in the workplace. ... The tribunal can also capture a holistic view of issues and trends as they arise, providing lawmakers with information regarding persistent workplace issues. The tribunal could also provide important oversight over the fairness of algorithmic and automated decision making in the workplace'.<sup>42</sup>

### **Paid parental leave**

**1.25** The committee is particularly interested in:

- Best practice paid parental leave policies from Australian companies, and internationally
- The current paid parental leave policy of your company and how it interacts with the Federal Government entitlements
- Issues with current Federal Government paid parental leave entitlements

### **The New South Wales skills and education system**

**1.26** On the adequacy of the New South Wales skills and education system, a number of submission authors referred to reductions in government funding for the vocational education and training sector:

<sup>39</sup> Submission 10, Deliveroo, p 12.

<sup>40</sup> Submission 13, Uber, pp 14-15.

<sup>41</sup> Submission 12, Australian Manufacturing Workers' Union, p 4.

<sup>42</sup> Submission 6, United Workers Union, p 9.

- 'Successive government cuts have seen a marked deterioration in educational quality and enrolment throughout NSW's VET sector. This gap is particularly felt in regional and outer-suburban communities already experiencing higher unemployment and economic disadvantage. Many TAFE and VET facilities in these communities have either closed or been reduced to cutting courses due to lack of funding, resulting in little to no options for local workers and young'.<sup>43</sup>
- 'NSW Government funding to the VET sector increased by over 20 per cent – from \$836 million to \$1 billion – between 2017 and 2018. This is a commendable start in ensuring the long-term viability of the sector. However, this level of funding still represents a decrease in real-terms funding compared to 2009. Funding in VET has not kept pace with the growth in population, growth in salaries and infrastructure investment, nor with the growth of government funding to other education sectors.'<sup>44</sup>
- 'Many workers in our industries will look to TAFE and VET programs for further education opportunities in their field of work. Funding in these areas has decreased, this must change urgently to ensure good quality education at an affordable cost is made available to workers to enable them to reskill or upskill as the nature of work changes.'<sup>45</sup>

1.27 Others suggested more needed to be done to support young people to transition into employment, particularly in light of the COVID-19 pandemic. Commentary on how the systems could be improved included:

- 'The transition from education to work has long been defined by insecurity. Young people today remain in insecure and low paid work much longer than their parents and grandparents did and the problem has intensified in the decade since the GFC ... A recent [International Labour Organisation] analysis of the youth labour market impact of COVID-19 internationally exposes the devastating and disproportionate effect on young workers. ... Industries hit hardest by the economic shut-down – food services, hospitality, retail and the arts – are big employers of young Australians. In accommodation and food services, 70% of businesses have temporarily reduced staff hours. Young people accounted for 45% of the total decline in employment in May ... [o]ver the 2 months to May, youth underemployment rate increased to 21.7%, representing the largest fall in actual hours worked of all age cohorts'.<sup>46</sup>
- 'There are now urgent calls for large-scale, targeted policy responses to support youth, including broad-based employment/training guarantee programs linked to broader stimulus and recovery packages. Referred to as the Youth Guarantee, this approach has four pillars:
  - Publicly funded post-secondary education and training systems are crucial.
  - Study and training allowances that provide a living wage
  - Increased demand for entry level positions
  - Employment services that direct young workers towards skill shortages

<sup>43</sup> Submission 12, Australian Manufacturing Workers' Union, p 8

<sup>44</sup> Submission 7, Business NSW, p 4.

<sup>45</sup> Submission 19, Shop, Distributive and Allied Employee's Association (NSW Branch), p 13.

<sup>46</sup> Submission 14, QUT Centre for Decent Work and Industry, p 6.

The pillars provide a basis upon which to design policy that ensures every young person and recent graduate is offered either a place in employment, education or training no later than three months after registering as unemployed. Countries which have implemented a Youth Guarantee demonstrate the potential to make youth labour markets more resistant to recession by reducing long-term unemployment and addressing the systemic under-utilisation of young workers that has characterised the Australian labour market since the GFC.<sup>47</sup>

- 'Investment in education and training plays a critical role in improving productivity, job creation, and adapting to the impacts of new technologies on the workplace. We should look to incentives to enroll in courses catering to skills shortages in our domestic industries, as well as courses catering to future growth industries. Consideration should be given to making these courses either fee-free or low-fee to ensure greater accessibility, particularly for existing workers who are retraining or upskilling for work in strategic industries of the future like renewable energy and high-tech manufacturing'.<sup>48</sup>
- 'A skills audit must be conducted to assess current skill levels and identify opportunities for retraining and upskilling to build a workforce for strategic sectors and future growth industries. We need to create new rights for workers to undertake training, including providing financial support and making sure that opportunities to access retraining are made available to impacted workers prior to any retrenchment or redundancy'.<sup>49</sup>

## Workplace surveillance laws

1.28 The appropriateness of NSW workplace surveillance laws was discussed in a number of submissions. In this regard, many submissions noted a perceived increase in surveillance throughout workplaces:

- 'There is an increasing prevalence in Australian workplaces of employers utilising surveillance equipment to monitor their employees. Too often it used for purposes that do not justify the intrusion into the privacy of those being monitored ... The [Australian Rail Tram and Bus Industry Union, NSW Branch] rejects the use of workplace surveillance where there is not a legitimate safety purpose to be achieved. In circumstances where there is such a purpose identified, the footage, data, or recordings should have their use limited by legislation to that purpose'.<sup>50</sup>
- 'There has been dramatic growth in the range of potential surveillance by employers and collection of data about employees' activities, both in employer-provided workplaces and elsewhere. Those means are increasingly automated and remote from the employee: unobserved by the employee and potentially covert'.<sup>51</sup>
- 'Medical surveillance of workers is an issue of increasing concern. This is expected to accelerate amid Covid-19 and as medical and health data grows in strategic importance

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<sup>47</sup> Submission 14, Centre for Decent Work and Industry, p 6.

<sup>48</sup> Submission 12, Australian Manufacturing Workers' Union, p 8

<sup>49</sup> Submission 12, Australian Manufacturing Workers' Union, p 8

<sup>50</sup> Submission 16, Australian Rail Tram and Bus Industry Union, NSW Branch, p 4.

<sup>51</sup> Submission 8, The Law Society of New South Wales, p 1.

for firms. ... Workers must be able to refuse employer's requests for access to their medical histories.<sup>52</sup>

- 'Employers are less concerned with motivating and retaining employees on the basis of positive incentives (like job security, promotion, and wage increases). Digital surveillance and freedom to fire give them greater power to elicit compliance in workplaces with the threat of negative sanction.'<sup>53</sup>

**1.29** Others discussed the appropriateness of surveillance laws to both the working-from-home environment and for independent contractors:

- 'The transition to working from home in particular raises complicated issues in relation to the surveillance of employees by employers outside of the workplace, an issue which, in our view, necessitates a rethink of existing workplace surveillance legislation in NSW to achieve protection of privacy in the workplace.'<sup>54</sup>
- 'The *Workplace Surveillance Act 2005* (NSW), which governs surveillance of workers by employers in New South Wales, is not fit for 21<sup>st</sup> century workplaces. Workplace surveillance laws must be reformed to protect workers and remain relevant and adapted to the widespread use of advanced and comprehensive surveillance in workplaces.'<sup>55</sup>
- 'Employers regularly introduce surveillance under the guise of safety concerns, yet use it to monitor, supervise, manage performance and discipline workers. The WS Act should be clear that the workplace surveillance will only be used for the purposes which workers were consulted on.'<sup>56</sup>
- 'The current basis of the *Workplace Surveillance Act 2005* (NSW) is the employment relationship. This is not appropriate at a time when more and more workers do not fit into this model.'<sup>57</sup>
- 'Due to the inadequacies of workplace surveillance laws and privacy laws, workers are powerless to prevent any misuse or unfair handling of their personal information gathered by way of surveillance.'<sup>58</sup>

**1.30** On the legislative frameworks governing such surveillance, many authors referred to issues caused by inconsistencies between laws across Australian states and territories:

- 'We note the surveillance law provisions across Australian states and territories are inconsistent and consider this creates confusion for individuals. It also creates difficulties for businesses operating across jurisdictions, for example, in relation to telephone call recording ... The Australian Law Reform Commission has previously noted that the inconsistencies in the provisions between jurisdictions results in 'uncertainty and complexity, reducing privacy protection for individuals and increasing the compliance burdens for organisations.'<sup>17</sup>

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<sup>52</sup> Submission 6, United Workers Union, p 10.

<sup>53</sup> Submission 5, Centre for Future Work, p 11.

<sup>54</sup> Submission 24, The New South Wales Society of Labor Lawyers, p 1.

<sup>55</sup> Submission 23, The Australian Workers' Union, p 5.

<sup>56</sup> Submission 23, The Australian Workers' Union, p 8.

<sup>57</sup> Submission 23, The Australian Workers' Union, p 9.

<sup>58</sup> Submission 23, The Australian Workers' Union, p 8.

- 'The Law Society has previously supported a uniform approach to surveillance regulation to ensure consistency of protections across Australia. We continue to support this position.'<sup>59</sup>
- 'A key conclusion regarding the protection of employees in relation to modern EMS in Australia is the inconsistency and inadequacy of current laws at the Commonwealth and State/Territory levels; in that regard NSW has an opportunity to develop model legislation.'<sup>60</sup>
- 'Our Society's view is that workplace surveillance laws in Australia are unnecessarily complex ... The inconsistency across jurisdictions creates regulatory confusion for employees, employers and industrial associations. It also creates unequal privacy rights as between employees in different states and within the same companies'.<sup>61</sup>

## Conclusion

- 1.31** The committee hopes that in providing a high-level overview of submissions, this discussion paper assists witnesses in their hearing preparation. The committee also notes that as this will be a long-running inquiry, submission authors are welcome to respond to issues raised in other submissions. This may be done by giving evidence at a hearing, as well as through supplementary submissions.
- 1.32** The committee looks forward to exploring the many important issues raised in submissions to date at its upcoming hearings in late 2020, and to further engagement with stakeholders as the inquiry continues into 2021.

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<sup>59</sup> Submission 8, The Law Society of New South Wales, p 4.

<sup>60</sup> Submission 5, Centre for Future Work, p 11.

<sup>61</sup> Submission 24, The New South Wales Society of Labor Lawyers, pp 2-3.



