

# Supplementary submission to inquiry into AI in New South Wales – Broad implications of AI in the area of labour law

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A key issue for Australian regulators in the field of labour law is responding to new forms of ‘algorithmic management’ in the workplace – that is, the increasing use of AI tools to track and manage employees and other workers.<sup>1</sup> Algorithmic management occurs in various contexts in the world of work, including: using AI to assist in employment decisions around hiring, promotion and termination/deactivation; new forms of control and surveillance of worker activities; and unprecedented collection of workers’ data with significant implications for workers’ autonomy and data privacy. While more commonly associated with low-paid and precarious work, particularly in the gig economy, AI-enabled algorithmic management is relevant to all kinds of work settings, including high-skilled and white-collar work.

Algorithmic management in the workplace therefore brings related reform implications in the fields of anti-discrimination and privacy law for workers (see further in the Reg Lab and Allens Hub Submission No 25 dated 20 October 2023). It also has additional and specific implications for labour law, including in relation to the termination of employment (or ‘deactivation’ of workers on gig apps), responding to risks of worker control, surveillance and work intensification, and in relation to worker voice and collective bargaining.

## 1. ‘Robo-hiring and firing’; the rise of algorithmic management in key HR/employment decisions and processes

AI is increasingly being used to manage processes and decision-making around hiring, promoting, retaining and dismissing of employees and other workers – particularly in large workplaces where there is a high volume of applicants. Examples of AI-assisted decision-making include:

- AI-enabled screening of applicant resumes or other application materials (e.g. videos), replacing manual scanning/reading;<sup>2</sup>

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<sup>1</sup> See generally Antonio Aloisi and Valerio De Stefano, *Your Boss Is an Algorithm: Artificial Intelligence, Platform Work and Labour* (Bloomsbury Publishing, 2022); Joe Atkinson, ‘“Technology Managing People”: An Urgent Agenda for Labour Law’ (2021) 50(2) *Industrial Law Journal* 324; Aída Ponce Del Castillo, ‘Regulating Algorithmic Management in the Platform Work Directive: Correcting Risky Deviations’, *Global Workplace Law & Policy* (22 November 2023) <<https://global-workplace-law-and-policy.kluwerlawonline.com/2023/11/22/regulating-algorithmic-management-in-the-platform-work-directive-correcting-risky-deviations/>>; Valerio De Stefano, ‘“Negotiating the Algorithm”: Automation, Artificial Intelligence, and Labor Protection Automation, Artificial Intelligence, & Labor Law’ (2019) 41(1) *Comparative Labor Law & Policy Journal* 15; Sara Baiocco et al, *The Algorithmic Management of Work and Its Implications in Different Contexts* (No Background Paper No 9, International Labour Organization, European Commission, June 2022) <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/documents/publication/wcms\\_849220.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_849220.pdf)>; Alexandra Mateescu and Aiha Nguyen, *Algorithmic Management In the Workplace* (Data and Society, February 2019) <[https://datasociety.net/wp-content/uploads/2019/02/DS\\_Algorithmic\\_Management\\_Explainer.pdf](https://datasociety.net/wp-content/uploads/2019/02/DS_Algorithmic_Management_Explainer.pdf)>.

<sup>2</sup> Amelia Bussing, ‘Generative AI and Your Career: ATS and AI in the Recruitment Process’, *UTS Careers* (27 September 2023) <<https://careersblog.uts.edu.au/ats-and-ai-in-recruitment/>>; Hilke Schellmann, ‘Finding It Hard to Get a New Job? Robot Recruiters Might Be to Blame’, *The Guardian* (online, 11 May 2022) <<https://www.theguardian.com/us-news/2022/may/11/artificial-intelligence-job-applications-screen-robot-recruiters>>; Kal Berjikian, ‘How AI Filters Millions of Qualified Candidates out of the Workforce’, *euronews* (online, 14 August 2023) <<https://www.euronews.com/2023/08/14/how-ai-is-filtering-millions-of-qualified-candidates-out-of-the-workforce>>.

- Using ‘bots’ to interview candidates;<sup>3</sup>
- ‘Contextual recruitment systems’ used to mine demographic data of job candidates;<sup>4</sup>
- Automated scoring systems in redundancy selection.<sup>5</sup>

Research indicates that these forms of algorithmic management can lead to insidious discrimination by obscuring the built-in programming biases – for example, where qualified candidates are filtered out of hiring due to their name, gender, disability, class, address etc.<sup>6</sup>

A key area of law reform is therefore explicitly requiring human oversight in employment decisions around hiring, promotion and dismissal/deactivation where AI-augmented processes are being used.<sup>7</sup> The recent EU Platform Directive, for example, introduces new requirements that a person performing platform work cannot be fired or dismissed based a decision taken by an algorithm or an automated decision-making system – with digital labour platforms now required to have human oversight.<sup>8</sup>

## 2. Digital control, tracking and surveillance of workers and the implications for workers’ privacy

Algorithmic management also raises issues regarding new forms of tracking and surveillance of workers. Examples of AI-enabled digital surveillance include:

- New forms of workforce management through workflow algorithms and analytic tools<sup>9</sup> – used in, for example, making decisions regarding the granting annual leave, managing staff absences, shift/roster scheduling, allocating workplace tasks etc;<sup>10</sup>
- AI-enabled tracking or monitoring of workers’ productivity – for example, via monitoring use and responsiveness in email/instant messaging systems; monitoring workers’ computer, web-browsing content and usage; webcam photos/recording; tracking workers’ signing in and out of shifts/arrival at work etc;<sup>11</sup>

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<sup>3</sup> Angelo Capuano, “‘Computer Says No’: More Employers Are Using AI to Recruit, Increasing the Risk of Discrimination”, *The Conversation* (online, 12 December 2023) <<http://theconversation.com/computer-says-no-more-employers-are-using-ai-to-recruit-increasing-the-risk-of-discrimination-218598>>; ‘This Bot Will Judge You in Five Questions at the First Interview’, *Australian Financial Review* (6 March 2022) <<https://www.afr.com/technology/this-bot-will-judge-you-in-five-questions-at-the-first-interview-20220302-p5a15v>>.

<sup>4</sup> Capuano (n 3).

<sup>5</sup> Atkinson (n 1) 326.

<sup>6</sup> Angelo Capuano, *Class and Social Background Discrimination in the Modern Workplace: Mapping Inequality in the Digital Age* (Policy Press, 2023); Alysia Blackham, ‘Setting the Framework for Accountability for Algorithmic Discrimination at Work’ (2023) 47(1) *Melbourne University Law Review* 63.

<sup>7</sup> Pawel Gmyrek et al, *Generative AI and Jobs: Policies to Manage the Transition* (ILO, 2023) <<https://researchrepository.ilo.org/esploro/outputs/encyclopediaEntry/995334493102676>>.

<sup>8</sup> European Parliament, ‘Platform Work: First Green Light to New EU Rules on Employment Status’, *European Parliament - News* (19 March 2024) <<https://www.europarl.europa.eu/news/en/press-room/20240318IPR19420/platform-work-first-green-light-to-new-eu-rules-on-employment-status>>.

<sup>9</sup> Valerio De Stefano and Virginia Doellgast, ‘Introduction to the Transfer Special Issue. Regulating AI at Work: Labour Relations, Automation, and Algorithmic Management’ (2023) 29(1) *Transfer: European Review of Labour and Research* 9.

<sup>10</sup> Atkinson (n 1) 326.

<sup>11</sup> Valerio De Stefano, “Negotiating the Algorithm”: *Automation, Artificial Intelligence and Labour Protection* (International Labour Office, 2018) 8 <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_policy/documents/publication/wcms\\_634157.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_policy/documents/publication/wcms_634157.pdf)>.

- Use of ‘wearables’ or other handheld devices (such as tablets) that can track worker movement and location<sup>12</sup>. Similarly, the use of GPS systems that can monitor the position and speed of trucks, vans, and delivery-rides and ride-sharing drivers;<sup>13</sup>
- Use of rating and review systems (particularly in the gig economy) that are then used to sort and rank workers and their access to work opportunities;<sup>14</sup>
- Business-sponsored wellness programs which use, for example, wearables that can track employees’ fitness, stress, sleep, pregnancy status, lifestyle and so forth.<sup>15</sup>

New forms of algorithmic management in the workplace therefore bring new risks and considerations around worker privacy (including the tracking of workers’ physical and mental health),<sup>16</sup> can risk intensifying forms of managerial control and surveillance, and lead to the intensification of work.<sup>17</sup>

Law reform in field of labour law therefore needs to consider and respond to these new risks and introduce limits upon AI-enabled worker monitoring and data collection.<sup>18</sup> This includes increased transparency requirements around what worker data is collected by employers/ businesses, giving workers the right to request access to, contest or delete their data, and prohibiting unreasonable and abusive forms of worker data collection without worker consent (e.g. data collection outside of work hours, monitoring of private communications, monitoring of workers’ private lives). For example, the National Employment Standards (NES) and Modern Awards should be updated to reflect fundamental rights and protections around the use of AI in the collection of worker data, and the Fair Work Commission’s Minimum Standard Orders in relation to employee-like workers should address AI. This should be in conjunction with strengthening existing worker rights and protections under the *Fair Work Act 2009* (Cth) to reflect the emergence of AI, such as the right to disconnect, limits on maximum weekly working hours etc.

### **3. Collective bargaining and worker voice, expanding role of the labour inspectorate to include AI**

As well introducing ‘top-down’ legislative reforms in the fields of privacy, anti-discrimination and labour law (as briefly outlined and flagged above), there is a need to strengthen collective labour rights (such as through collective bargaining and enterprise agreement making).<sup>19</sup> This is because, as labour law scholars describe, ‘[l]egal protections guaranteeing worker privacy and discretion are blunt instruments without mechanisms that also strengthen worker voice in how these protections are implemented’.<sup>20</sup>

Key areas of reform therefore include explicitly expanding the range of permitted matters for bargaining and enterprise making to include issues around AI at work, and expanding bargaining representatives’ rights of inspection/entry and information-gathering to include AI-related impacts on surveillance, data privacy and hiring and firing decision-making. It is also important

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<sup>12</sup> Ibid 7.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid 9.

<sup>16</sup> De Stefano and Doellgast (n 9).

<sup>17</sup> Ibid.

<sup>18</sup> Gmyrek et al (n 7).

<sup>19</sup> Valerio De Stefano and Simon Taes, ‘Algorithmic Management and Collective Bargaining’ (2023) 29(1) *Transfer: European Review of Labour and Research* 21.

<sup>20</sup> De Stefano and Doellgast (n 9).

to expand the role and priorities of the national labour inspectorate, the Fair Work Ombudsman, to investigate and proactively act upon emerging AI issues in the world of work.

We therefore encourage the Parliament of New South Wales to take steps to initiate a national discussion, including at the Federal level, to respond to challenges presented by AI in the world of work and consider the required updates to federal labour law, in addition to the fields of privacy and anti-discrimination law.

Kind regards

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