Submission No 9

INQUIRY INTO IMPACT OF TECHNOLOGICAL AND OTHER CHANGE ON THE FUTURE OF WORK AND WORKERS IN NEW SOUTH WALES

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Submission to the NSW Legislative Council Select Committee on the Impact of Technological Change on the Future of Work and Workers in New South Wales

Introduction

I am a lecturer at the University of Technology of Sydney Law School. I have written and researched on the topic currently before the Inquiry. My latest work on the subject of regulating technological change in the context of Australian employment law appeared in the latest issue of the *Australian Journal of Labour Law (*2020).[1] A pre-proofed version is annexed to this submission.[2] I have also presented a paper on this topic to the biennial conference of the *Australian Labour Lawyers Association* on the Gold Coast in 2018.

In respect to the impact of technological change on the employment relationship, my central concern is with the way in which the law (since the 1960s) has traditionally responded to such change: through the law of redundancy. While redundancy law is primarily a federal legislative responsibility, it is nevertheless able to be considered by the NSW Government, as discussed below.

Please note that my work does not address the issue of the 'gig economy' in great detail and is restricted to the impact of technological change on the employment relationship. In respect to gig economy regulation, I refer the Committee to the excellent and recent work of Sheldon et al.[3]

Focus of this Submission

In this brief submission, I wish to draw attention to three key things that I hope will assist the Committee with its inquiry:

[1] Eugene Schofield-Georgeson, 'Regulating the Automation of Employment through Redundancy Law: A Comparative Policy Approach' (2020) 32 *Australian Journal of Labour Law* 263.

[2] The Editors of the Australian Journal of Labour Law, Melissa Kennedy and Andrew Stewart, have confirmed that copyright for this version is vested in the author (and UTS Law School), rather than the journal and is able to be published on the NSW Parliament website.

[3] In particular, see Igor Nossar, 'Protecting 'Gig Economy' Workers through Regulatory Innovation' (Ch. 6), in Sheldon et al, *The Regulation and Management of Workplace Health and Safety* (Routledge, 2020).

i) Predictions as to the extent and nature of change to the earnings, job security and working patterns of people in NSW brought about by technological change – as discussed in my article (Annexure A);

ii) Practical suggestions for reforming the law in respect to redundancy. My article (Annexure A) outlines three key changes being:

(a) amending the statutory conception of redundancy by reviving the former legal distinction between intentional and unintentional redundancies;
(b) increasing the amount of redundancy pay; and
(c) extending the coverage of redundancy protections.

iii) Possibilities for making such change in NSW (given that the law of redundancy is mostly a Federal Government responsibility).

Points 'i)' and 'ii)' are addressed and explained in the attached article and mostly relate to the *Fair Work Act 2009* (Cth), as amended. Nevertheless, there is scope for NSW adopting parallel provisions to the federal scheme, within the NSW *Employment Protection Act 1982*, and for extending them in accordance with my suggestions as outlined in Annexure A.

Of course, any significant change to state employment law triggers the possibility of constitutional conflict (pursuant to either s. 109 or the *Melbourne Corporation* or *Cigamatic* doctrines). To avoid any such conflict, NSW might add a caveat in respect to the application of reformed redundancy laws such that they only apply to those workers covered by the savings provisions of the *Fair Work Act*, Sch 1. In this respect, the reformed redundancy laws might be said only to apply to 'deemed employees' and others under the federal legislation – such as outworkers as well as NSW public servants – whose employment is still covered by NSW industrial law (see also *Industrial Relations Act 1996* (NSW), Schedule 1). It is conceded that in a state legislative context, such laws would have rather limited scope and practical application. However, it may be that by establishing a model or setting an example, that NSW could influence federal industrial policy on the issue.

I am available for further comment and consultation.

Yours Sincerely,

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Regulating the Automation of Employment Through Redundancy Law: A Comparative Policy Approach

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This article investigates redundancy law as a policy option for regulating the rapid increase in the automation of employment and automation-led unemployment predicted to occur within the Global North by the mid twenty-first century. It critically examines these predictions before contextualising redundancy law as a policy strategy within a resurgent literature on full employment and the importance of work to human social development. The article then embarks on a substantive discussion of the current legal framework surrounding Australian redundancy law and its shortcomings. The focus here includes the definition of redundancy, the amount of redundancy compensation and the labour market coverage of current redundancy law. In response, three reforms are proposed, namely to (i) amend the statutory conception of redundancy by reviving the former legal distinction between intentional and unintentional redundancies; (ii) increase the amount of redundancy pay; and (iii) extend the coverage of redundancy protections to precarious workers. These proposals are informed by the evolution of Australian redundancy law in statute and industrial tribunals and courts between the 1960s and 80s, as well as German policy responses to automation in the automotive industry in the 1980s and 90s.

I. INTRODUCTION

The rapid increase in automation of employment predicted to occur within the Global North by the mid twenty-first century will also bring with it significantly disruptive social effects, such as machine-led mass lay-offs, rising underemployment and unemployment.[4] This article critically reviews policy and research responses to this profound social change, finding that employment protection law and regulation pertaining to this development, have largely been neglected. As a consequence, this article argues that existing employment protection law and regulation (in particular the law of redundancy) is ill-equipped to deal with these issues. Explored here is the case for urgent reform of employment protection law and regulation, with redundancy law playing a central role in managing the labour market dislocation and upheaval threatened by intensified automation of labour.

The article begins with an outline of the nature and extent of the predicted impact of automation on employment, establishing that the large-scale replacement of human labour by technology *is* a real social possibility. This is followed by an analysis of major social policy and research responses to this problem, including the Universal Basic Income (UBI), that have as this article argues, marginalised the significance of labour to human social development and

* Lecturer, University of Technology Sydney. The author thanks Dr Michael Rawling and Professor Terry Carney for their valued insights and feedback in the preparation and drafting of this pre-proofed article.

[4] C Frey and M Osborne, 'The Future of Employment: How Susceptible are Jobs to Computerisation?' (2017) *TFSC* 254; United Nations Conference on Trade and Development, Division on Globalisation and Development Strategies, UNCTAD, *Robots and Industrialisation in Developing Countries*, UNCTAD Policy Brief No 50, 2016; US Department of Labor, *Futurework: Trends and Challenges for Work in the 21st Century*, US Government, Washington DC, 1999; T Dunlop, *Why The Future is Workless*, NewSouth Publishing, Sydney, 2016; M Ford, *The Rise of the Robots: Technology and the Threat of Mass Unemployment*, Oneworld Publications, New York, 2015; J Chalmers and M Quigley, *Changing Jobs: The Fair Go in the New Machine Age*, Redback, Carlton, 2017.

psychological well-being. These 'supply-side' or neoliberal strategies dominate automation discourse and in fact encourage the replacement and augmentation of labour,[5] while claiming to 'protect workers, not jobs'[6] – over an apparently short-term period. In critically reviewing this material, this article builds on the work of policy and research proponents of full employment. This 'demand-side' policy position values meaningful long-term work for the benefit of workers, constituting a productive and stimulating contribution to the economy, in the context of increasing difficulties in obtaining decent work.[7] It is from within a framework of protecting jobs then, that this article critically examines the main provisions of Australian redundancy law, identifying its current limitations and opportunities for reform. In addressing the latter, the article focuses on how the law could respond to the challenge posed by automation-led redundancy. It proposes three reforms: (i) amending the statutory conception of redundancy[8] by reviving the former legal distinction between intentional and unintentional redundancies; (ii) increasing the amount of redundancy pay; and (iii) extending the coverage of redundancy protections. The first suggestion is informed by the foundational Australian case concerning redundancy law – the *Termination, Change and Redundancy Case* (TCR Case).[9] The second and third suggestions are based on redundancy policy that emerged from the German experience of automation in the automotive industry in the 1980s and 90s.

II. 'The Rise of the Robots': Predictions of Automation-led Unemployment

In recent times it has become commonplace to suggest that robots will take our jobs. Yet prevailing accounts of 'the rise of the robots' are deeply conflicted. Some, including the US Department of Labour,[10] envision wholesale replacement or substitution of nearly half of the workforce (47% and 70% in the Third World) by machines within the next 20 to 40 years.[11] In the Australian context, these predictions have been echoed by the work of critical technologist, Tim Dunlop, who proposes that we need to act in the present to prevent mass unemployment and wealth inequality in the future.[12] Such accounts have been challenged by economist, David Autor, who has spent an entire career defending technology from 'mythical' crises of automation. Yet even Autor has recently conceded that the next stage of technological 'revolution' will see some workers — mostly within the services sector — wholly replaced by

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[5] D West, *The Future of Work: Robots, AI, and Automation*, Brookings Institution Press, Washington DC, 2018; IBA Global Employment Institute, *Artificial Intelligence and Robotics and their Impact on the Workplace*, First Report, IBA Global Employment Institute, London, 2017; R Maxim and M Muro, 'Automation and AI will Disrupt the American Labor Force. Here's How We Can Protect Workers', *The Avenue*, 25 February 2019.

[6] R Maxim and M Muro, 'Automation and AI Will Disrupt the American Labor Force. Here's How We Can Protect Workers', *The Avenue*, 25 February 2019; Interview with E Auriol, Member of the Board of the European Economic Association (A Fuentes, University of Toulouse, 13 December 2017).

[7] M J Murray and M Forstater (Eds), *The Job Guarantee: Toward True Full Employment*, Palgrave MacMillan, New York, 2013; M J Murray and M Forstater (Eds), *The Job Guarantee and Modern Money Theory: Realising Keynes's Labor Standard*, Palgrave MacMillan, Cham, 2017; W Mitchell and T Fazi, *Reclaiming the State: A Progressive Vision of Sovereignty for a Post-Neoliberal World*, Pluto Press, London, 2017.

[8] Fair Work Act 2009 (Cth) (FW Act) ss 119(1)(a), 530(1), 785(1).

[9] *Termination, Change and Redundancy Case* (1984) 8 IR 34 (*TCR Case*); *Termination, Change and Redundancy Case* (1984) 9 IR 115.

[10] US Department of Labor, *Futurework: Trends and Challenges for Work in the 21st Century*, US Government, Washington DC, 1999.

[11] Frey and Osborne, above n 1 at p 6; Division on Globalisation and Development Strategies; UNCTAD, *Robots and Industrialisation in Developing Countries* (UNCTAD Policy Brief No 50, October 2016).

[12] Dunlop, above n 1, at p 17.

automating technology.[13] Other economists suggest that the bulk of technological innovation will merely involve 'task automation' or 'assistive intelligence' (also called 'augmented intelligence'). This will lead to a 'modest' rate of wholesale replacement of the workforce of around 9-12%, substituting much existing secure employment with lower paid and more precarious work.[14] These rates also account for future employment growth, accepted by many economists to be significantly lower over the next 40 years than in previous 'industrial revolutions', due to vast differences between artificial technologies which are self-replicating, compared with technological innovation that has generally required greater human interaction or augmentation.[15] But even if this modest prediction is accepted, when added to existing rates of underemployment and unemployment, post-automation unemployment could sit somewhere in the vicinity of between 15%-25%.[16] This figure replicates the rate of unemployment experienced throughout the Global North during the Great Depression between 1929 and 1934 and spells significant rupture for any society. Nevertheless, in 2017, economists Borland and Coelli found that average job tenure in Australia had not yet changed but that automating technologies have increasingly augmented the labour process, replacing a significant number of skilled jobs with 'non-cognitive' labour.[17] As this piece is being written, however, Australian telecommunications provider, Telstra, has just announced the largest company lay-off in Australian history with customer service workers to be replaced by an online 'all digital experience', supplemented by overseas call centres.[18]

Such 'advances' in automating technologies are owed to the onset of the fourth reconfiguration of the industrial revolution, ongoing since the late eighteenth century.[19] This is sometimes referred to as the second phase of the 'digital revolution'. The first phase occurred between the 1970s and the late 1990s and involved the automation and 'offshoring' of work in the manufacturing sector, resulting in a major workforce shift to jobs in the 'service economy'. The current period, by contrast, is defined by the 'internet-of-things' — the connection of the internet to physical objects such as those involved in production and distribution processes.[20] This 'new economy' is designed to shrink the size of the workforce required within the services sector via the deployment of automating technologies. Indeed, as labour process scholar, Harry Braverman, observed in the mid-1970s, 'the purpose of machinery is not to increase but to decrease the number of workers attached to it'.[21]

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[13] D Autor, 'Why Are There Still So Many Jobs?' (2015) 29 *JEP* 3 at 22; See also J Murphy, *Auto-Industrialism: DIY Capitalism and the Rise of the Auto-Industrial Society*, Sage, New York, 2017.
[14] H Bonin, T Gregory and U Zierahn, *Uebertragung der Studie von Frey/Osborne auf Deutschland: Endbericht*, Forschungsbericht / Bundesministerium Für Arbeit Und Soziales, FB455, Berlin, 2013; D Brougham and J Haar, 'Employee Assessment of Their Technological Redundancy' (2017) 27 *Lab & Ind* 213.
[15] Ibid. See also, IBA Global Employment Institute, above n 2; R Dobbs, J Manyika and J Woetzel, *No Ordinary Disruption*, Public Affairs, New York, 2016.
[16] Australian Bureau of Statistics, *Labour Force Statistics*, *September 2019*, Cat No 6202.0, ABS Canberra. 2019 shows that both underemployment and unemployment have increased significantly over the last decade. The rate of underemployment currently sits at 8.4%, while the rate of unemployment is 5.3% of the total labour force.
[17] J Borland and M Coelli, 'Are Robots Taking Our Jobs?' (2017) 50 *AER* 377 at 380–2.
[18] Telstra Restructures in Bid For 30% Labour Cost Reduction', *Workplace Express*, 20 June 2018.
[19] P Marsh, *The New Industrial Revolution: Consumers, Globalisation and the End of Mass Production*, Yale University Press, New Haven, 2013.
[20] H Kopetz, *Real-Time Systems*, Springer, New York, 2011, pp 307–23.
[21] H Braverman, *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century: 25th Anniversary Edition*, Monthly Review Press, New York 1998, p 266.

III. General Proposals to Address Automation-led Unemployment

In the 1980s, 'supply-side' policy responses to automation-driven job losses emphasised routines of personal improvement involving courses of expanded education, micro-credentialing or 'lifelong learning' to enhance individual 'agility' and 'flexibility'.[22] In the face of perpetual unemployment since the 1980s, together with increasing rates of under-employment, these policies have, at best, had insignificant impact on enhancing job prospects for retrenched workers,[23] while effectively blaming them for their predicament.[24] Against a predicted wave of future automation-led redundancies with little prospect of new employment growth, such unemployment policy stands to disproportionately affect older unemployed workers.[25]

Accordingly, the prospect of automation-led mass unemployment has seen the emergence of considerable debate between predominantly liberal proponents of a UBI[26] and (mostly labourist) theorists of a neo-Keynesian 'jobs guarantee'.[27] Supporters of a basic income accept the technological determinist vision of a 'future without work', along with payment of a universal wage at poverty-constraining levels.[28] Neo-Keynesians, on the other hand, take the view that

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[22] M Murphy, 'Adult Education, Lifelong Learning and the End of Political Economy' (2000) 32 *Studies in the Education of Adults* 166 at 168.
[23] A Yogev and J Dronkers, *Education and Social Change*, JAI Press, Stanford, 1993, p x.
[24] W Smith, *Unemployment Policy in Australia: A Brief History*, Per Capita Australia, Melbourne, 2017, p 6.
[25] Ibid, p 6.
[26] See, eg, P Van Parijs and Y Vanderborght, *Basic Income: A Radical Proposal for a Free Society and a Sane Economy,* Harvard University Press, Cambridge, 2017.
[27] See, eg, Mitchell and Fazi, above n 4, pp 221–47. Their work articulates seven key policy arguments in favour of a job guarantee over a universal basic income.
[28] Proponents of a UBI do not necessarily intend to reduce labour force participation rates. However, in basic income pilot programs in the US and Canada, the introduction of basic income was shown to result in a decrease in work participation rates (A Munnell, 'Lessons from the Income Maintenance Experiments: An Overview', in A Munnell (Ed), *Lessons from the Income Maintenance Experiments – Conference Series No.* 30, Federal Reserve Bank of Boston and the Brookings Institute, Washington DC, 1986, at 1–21; E Forget, *The Town With No Poverty: Using Health Administration Data to Revisit Outcomes of a Canadian Guaranteed Annual Income — Field Experiment*, University of Manitoba (via the Wayback Machine) at<https://web.archive.org/web/20170126003728/http://public.econ.duke.edu/~erw/197/forget-cea%20%282%29.pdf> accessed 6 January 2020. In contrast, other pilot studies in Finland and Africa, have shown no increase in rates of employment (L Martinelli, 'Basic income: world's first national experiment in Finland shows only modest benefits', *The Conversation*, 22 February 2019; H Hiilamo, 'Disappointing Results From The Finnish Basic Income Experiment', *University of Helsinki,* 8 February 2019 at <https://www.helsinki.fi/en/news/nordic-welfare-news/heikki-hiilamo-disappointing-results-from-the-finnish-basic-income-experiment> Despite these elusive results, the combination of largescale automation, together with provision of basic income would surely be seen by employers as a 'green light' to replace labour with 'labour-saving technology'. Indeed, this is precisely what motivates the world's richest men and tech-entrepreneurs to pursue and support basic income policy: C Clifford, 'What Billionaires And Business Titans Say About Cash Handouts In 2017', *CNBC*, 28 December 2017; Chalmers and Quigley, above n 1, pp 127–32. Leading UBI proponent, Rutger Bregman, justifies proposals for a basic income by accepting the replacement of labour by automation (R Bregman, *Utopia For Realists*, Bloomsbury, London, 2017, Chap 8) and arguing for poverty eradication (R Bregman, 'Utopian Thinking: The Easy Way To Eradicate Poverty', *The Guardian*, 6 March 2017, https://www.theguardian.com/commentisfree/2017/mar/06/utopian-thinking-poverty-universal-basic-income). His understanding of 'poverty eradication', however, does not appear to accord with the outcomes of basic income pilot programs, nor recent Australian costing studies of a basic income (of which there have been four). The highest estimate of any basic income proposal in Australia (approximately 75% higher than three other notable proposals) would see the payment of

mass automation-led unemployment is neither inevitable, nor inexorable. Rather, they propose that allowing technology to replace human labour is a political choice. Democratic governments and social movements across the globe are empowered with the authority to change technological directions. Australian economists, Bill Mitchell and Thomas Fazi, confront technological determinism by concluding that, 'if robots and computers threaten our very survival then … it is the role of the state to create a legal framework that advances the overall interests of citizens'.[29] They liken such laws to speed limits that protect citizens from vehicles with the capacity to drive dangerously fast. Their sentiments are shared by British economist, Anthony Atkinson, who, in his formulation of a wider series of economic strategies to regulate the development of robot technology and its impact on increasing social inequality, has proposed 'a legal framework that allows trade unions to represent workers on level terms' to those of employers.[30] The key problem with consigning workers to a universal basic income, say the scholars of full employment, is that it ignores the centrality of work to human social and psychological development. It is this perspective, discussed further below, that informs the argument to strengthen redundancy law. Before turning to a more detailed discussion of such a proposal, however, it is important to acknowledge the broader policy and research approach to dealing with automation-led unemployment.

According to labour market regulation scholars, Richard Mitchell and Christopher Arup, any legal intervention that seeks to reconstruct and regulate liberal labour markets, requires a broad set of interlinked or relational social policies and labour laws.[31] Current policies that address the issue include: (i) the imposition of quotas for employees in the workplace; (ii) work-sharing arrangements; (iii) employer-funded retraining programs for employees replaced by machines; (iv) a robot tax; (v) large-scale public works projects; (vi) the regulation of government funding for research and development projects and redesign of innovation policy in such a way as to emphasise human service provision; (vii) the replacement of some machinery with human labour; (viii) renewed trade protectionism in industries facing automation; (ix) employee and trade union syndication to buy-up automating technologies; and (x) the development of either a universal basic income or jobs guarantee (a jobs guarantee is the option preferred here, as explained below). Undoubtedly, such measures can be examined further by researchers and policymakers for their potential to effectively manage the serious social dislocation threatened by escalating workplace automation. What is notably absent from them, however, is any acknowledgment of the role of employment protection law, especially that pertaining to regulating redundancy. As previously mentioned, redundancy law is the dominant means by which labour law has regulated the automation of employment in the past. In this sphere, meeting the challenge of automation begins by restoring, reforming and advancing law that regulates the replacement of labour by automating technologies.

IV. Redundancy Law, Work and Human Social Development

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the amount of the single aged pension to every adult permanent resident: J Tomlinson, 'Australia: Will Basic Income Have A Second Coming?' in R K Caputo (Ed), *Basic Income Guarantee and Politics*, Palgrave MacMillan, New York, p 153 at p 168. This figure nevertheless remains below the current official Australian poverty line: P Davidson, et al, *Poverty in Australia* ACOSS/UNSW Poverty and Inequality Partnership, Report No 2, 2018, Sydney, at 21.

[29] Mitchell and Fazi, above n 4 p 223.

[30] A Atkinson, *Inequality: What Can Be Done?*, Harvard University Press, Cambridge, 2015, p 115 at p 131.

[31] R Mitchell and C Arup, 'Labour Law and Labour Market Regulation', in C Arup et al (Eds), *Labour Law and Labour Market Regulation*, Federation Press, Annandale, 2006, p 3 at p 5.

Industrial relations scholar, Guy Davidov, argues that employment protection laws are a necessary component of a contract of employment, providing workers with economic security in exchange for their subordination, while also ensuring the social and psychological well-being of workers through access to work.[32] According to Davidov, declining opportunities within the labour market, due to automation, directly threaten the security of work and the well-being of workers, subordinating workers even further in a 'one-sided' employment relationship.[33] In this way, automation-led unemployment increases the dependency of workers on the security of their jobs, further tipping the balance of power within an already uneven employment relationship, in favour of employers. In the context of a labour market in which jobs are increasingly threatened by automation, it follows that redundancy laws must be strengthened beyond their current remit to correct this imbalance of power.

The social and psychological wellbeing of workers, discussed by Davidov, features heavily in anthropological literature surrounding human social and psychological development through work. As anthropologist David Blustein argues, 'working is the central ingredient in the development and sustenance of psychological health', providing us with 'opportunities for satisfaction, and even joy, challenges and sometimes pain'.[34] Such work-induced 'pain', including mental and physical harm, is not to be underestimated, as 'post-work' scholars such as Spencer and Graeber rightly observe.[35] But as Blustein and other anthropologists, such as David Harvey, conclude, despite its challenges and costs to workers, work affords workers 'the social role in which people generally interact with the broader political, economic, and social contexts that frame their lives … as well as (being) a source of rewards, resilience, and relationships'.[36] Work provides the basis of social solidarity and continues to be a focal point for the organisation of democracy.

The importance of work to human development is, to some extent, recognised by the law of redundancy — the purpose of which is to compensate an employee whose work has been rationalised. Compensation covers four separate aspects: (i) the trauma of termination; (ii) the loss of non-transferable credits such as sick leave and long service leave; (iii) loss of seniority; and (iv) diminished security of a dismissed employee in any new employment.[37] As Ray Gunther, the British MP who introduced the world's first redundancy laws in 1965, put it (in demonstrably sexist terms characteristic of the time) the purpose of redundancy legislation:

> gives reality to the idea that … a man (sic) has some rights in his (sic) job just as an employer holds rights his (sic) property, and his (sic) rights gain in value with the years. … if a man (sic) is deprived of those rights by economic circumstances outside his (sic) control, he (sic) ought to be compensated … The purpose of redundancy pay is to

[32] G Davidov, 'In Defence of (Efficiently Administered) 'Just Cause' Dismissal Laws' (2007) 1 *IJCLLIR* 117 at 122–4.
[33] Ibid, at 124
[34] D Blustein, 'The Role of Work in Psychological Health and Well-Being: A Conceptual, Historical and Public Policy Perspective' (2008) 63 *Am Psychol* 320.
[35] D Spencer, *The Political Economy of Work*, Routledge, London, 2009, p 2; D Graeber, *Bullshit Jobs: A Theory,* Penguin, London, 2018, pp 67-100.
[36] Blustein, above n 31; D Harvey, *Marx, Capital and the Madness of Economic Reason,* Profile Books, London, 2017, pp 107–26.
[37] *Redundancy Case* (2004) 129 IR 155; *Guthrie v News Ltd* (2010) 27 VR 196; [2010] VSC 196.

> compensate a worker … for the loss of security, possible loss of earnings and fringe benefits, and the uncertainty and anxiety of change of job.[38]

Throughout the 1980s, the scale of disruption to the stability of work fuelled resistance to technological change by unions and policymakers. This 'push-back' transformed legal and policy frameworks governing the termination of employment. Operating at a time of radical economic and political change that disempowered unions, however, the largescale downturn in work during this period saw unions accept redundancy law as the most practical means to mitigate against the impacts of unemployment. The International Labour Organisation (ILO) responded by passing the *Convention concerning Termination of Employment at the Initiative of the Employer* 1982, designed to address mass lay-offs 'resulting from the economic difficulties and technological changes experienced … (at that time) … in many countries'.[39] Some of the provisions within this treaty were adopted by signatory states like Australia, at first by the Australian Industrial Relations Commission (AIRC) in 1984,[40] and later through legislation passed by the Keating Government in the early 1990s. Since that time, however, employment protection laws have been eroded by deregulation.[41] As the following explains, the current conception of redundancy, as well as patchy coverage and inadequate compensation provided by existing laws, will, if left unchanged, set the scene for the very kinds of mass layoffs and future unemployment predicted to result from automating technologies.[42]

V. The Current Australian Redundancy Law Framework and its Shortcomings

Conception and definition

In Australia, the first laws regulating dismissal from employment on the basis of rationalisation of work were implemented in state jurisdictions in the late 1960s and early 1970s, coinciding with the advent of monetarism or economic rationalism. Prior to this, a Keynesian form of 'demand-side' economics, oriented toward production, was primarily responsible for an era of full employment throughout the 1950s and 60s. Employment protection laws were mostly unnecessary, although from the mid to late 1960s, compensation was available to employees made redundant arbitrarily or intentionally (a point of central significance to the following argument).[43]

Uniform employment protection laws first appeared in Australian industrial tribunal decisions in the *TCR Case* in 1984. Throughout the 1980s, the definition of 'redundancy' expanded to include a vast array of 'economic dismissals'.[44] Current federal legislation provides no single definition of 'redundancy'.[45] Rather, the Fair Work Act (FW Act) establishes various rights and

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[38] United Kingdom, *House of Commons Debates*, 26 April 1965, vol 711 at cc 35–6 (R Gunter).
[39] *Convention concerning Termination of Employment at the Initiative of the Employer*, 1982, No 158 (*Convention No 158*) 'Preamble'.
[40] *TCR Case*, above n 6.
[41] A Chapman, 'The Declining Influence of ILO Standards in Shaping Australian Statutory Provisions on Unfair Dismissal' (2003) 29 *Mon LR* 104.
[42] A more comprehensive discussion of the effects of stronger redundancy laws, is found below in the text following n 93 and generally reflects the findings of Scandanavian scholar, Per Skedinger.
[43] *Food Preservers Union of Australia v Wattie Pict Ltd* (1975) 172 CAR 227 (*Wattie Pict*); *Merchant Service Guild of Australia v Department of Main Roads (NSW)* (1971) 140 CAR 875 *(Stockton Ferry)*.
[44] A Forsyth, 'Australian Regulation of Economic Dismissals: Before, During and After 'Work Choices' (2008) 30 *SLR* 506.
[45] *Dibb v Commissioner of Taxation* (2004) 136 FCR 388; 207 ALR 151; [2004] FCAFC 126 at [38]–[43].

obligations related to redundancy that define the concept differently. These provisions are scattered throughout the FW Act and operate independently of one another.[46] A provision on 'redundancy pay', for example, defines redundancy broadly as the termination of employment 'because an employer no longer requires the job … to be done by anyone'.[47] Meanwhile, the practical reasons for redundancy are associated with other redundancy-related procedures located elsewhere in the Act. Section 389(1)(a), for instance, is designed to assist with distinctions between 'genuine redundancy' and another category of termination. It stipulates that a redundancy exists in the case of a 'change in the operational requirements of an employer's enterprise'.[48] Such a change in requirements has been taken to include dismissals resulting from an economic downturn, a company restructure, and perhaps most importantly for present purposes, the introduction of new technology into the workplace.[49] Elsewhere in the Act, ss 530(1) and 785(1) require employers to notify social welfare services about a proposed redundancy, but only where termination is 'for reasons of an economic, technological, structural or similar nature'.[50] While there is no single definition of redundancy under the FW Act, these provisions, taken together, embody a common legislative *conception* of redundancy: that redundancy is readily permissible for economic reasons, such as those associated with automation. Indeed, the most readily accessible information regarding the termination of employment in Australia — information on the website of the Office of the Fair Work Ombudsman — lists automation as the foremost reason legitimising redundancy.[51]

In 2006, the Howard Coalition Government introduced sweeping neoliberal reforms to employment law known as *Work Choices*. While the new laws retained the form of existing redundancy provisions,[52] they prohibited awards from imposing redundancy pay obligations on small business employers (discussed further below)[53] and added a new defence to unfair dismissal claims, excluding redundancy-related claims. In effect, an employer was free to dismiss an employee, provided there was a 'genuine operational reason' for dismissal, such as automation or 'the introduction of new technology (into the workplace)'.[54] The provisions were designed to prevent employees from 'double-dipping' or claiming both redundancy and unfair dismissal payments. But as some commentators have argued, the changes to unfair dismissal legislation went beyond this stated purpose, completely eradicating 'redundancy dismissals' or rather, unfair dismissal claims associated with automation and other operational reasons.[55] Shortly after the introduction of the 'genuine operational reasons' exclusion for

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[46] A Stewart et al, *Creighton & Stewart's Labour* Law, 6th edn, Federation Press, Sydney, 2016, p 742.
[47] FW Act, s 119(1)(a).
[48] Ibid s 389(1)(a).
[49] *Spotless Catering Services Ltd v Daley* (1993) 49 IR 434; *Shop Distributive & Allied Employees Association (NSW) v Countdown Stores* (1983) 7 IR 273.
[50] FW Act, ss 530(1), 785(1).
[51] Fair Work Ombudsman, 'Ending Employment' at <https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/ending-employment> (accessed 18 September 2018)
[52] *Convention concerning Termination of Employment at the Initiative of the Employer,* above n 36: The ILO standard requiring employers to notify welfare services of impending terminations was retained, see Workplace Relations Act 1996 (Cth) (WR Act) s 660.
[53] WR Act ss 513(1)(k), 513(4)(a). The effect of redundancy pay obligations on small business is discussed further in the text at 11–12, 22.
[54] WR Act s 643(9); Commonwealth of Australia, *WorkChoices: A New Workplace Relations System* (2005) Canberra, at 51-52.
[55] Forsyth, above n 41, at 518; A Chapman, 'Unfair Dismissal Law and Work Choices: From Safety Net Standard to Legal Privilege' (2006) 16 *ELRR* 237; L Keats, 'No Logical Response Required: The Full Bench Explains Genuine Operational Reasons' (2007) 20 *AJLL* 104 at 111.

redundancy dismissals, Stewart observed that 'a broad reading of the exclusion could make it applicable to just about every termination'.[56] After an initially narrow interpretation of the genuine operational reasons clause by more progressive members of the industrial bench,[57] a Full Bench of the AIRC took up a broad interpretation with similar effects to those contemplated by Stewart.[58] With subsequent changes in Government in 2007 and 2013, as well as an overhaul of the *Work Choices* legislation by a Labor Government in 2009, employers remain shielded from liability for a genuine redundancy dismissal provided that they implicate automation as a genuine operational reason for dismissal, while also complying with any contractual or award obligations to consult about the redundancy and have reasonably attempted to redeploy the dismissed employee.[59]

As Anthony Forsyth has shown, Australian employment law has tended to treat all 'economic dismissals' similarly — legitimising their foundation in a discourse of economic rationalism.[60] Redundancies in this context are a double-edged sword. While they compensate unemployed workers, they nevertheless open the floodgates to mass layoffs, albeit by placing a (currently) small and one-off 'operational cost' on employers who choose to make their staff redundant. In this respect, redundancy legislation enables employers to perform a rational calculus or cost-benefit analysis in deciding whether to retain or terminate an employee.

If this statutory conception of redundancy remains unchanged, it stands to accelerate and facilitate any future crisis of automation-led unemployment. Outlined below are proposals to reform the current legislative conception of redundancy by distinguishing between economic dismissals in order to better regulate the replacement of human labour by automating technologies. These suggestions are accompanied by a discussion of comparative international approaches, which further highlight the inadequacy of existing Australian legislative conception of redundancy.

Amount of redundancy compensation

At present, compensation for redundancy in Australia is paid in accordance with a legislative scale that increases incrementally by reference to an employee's length of service. A job made redundant after one year of service (but less than two years) requires an employer to compensate an employee with four weeks pay. The scale is capped at a maximum of sixteen weeks pay which is payable to an employee who is made redundant after ten years of employment.[61] This legislative scale does not exclude parties to an employment contract from negotiating higher redundancy payments but there is little evidence suggesting that Australian employees do so, outside of union-negotiated enterprise agreements. Redundancy compensation is paid mostly in accordance with statutory minimum levels, after which, the welfare state pays the remainder. There are three key problems associated with the current scale of Australian redundancy pay. First, it fails to adequately compensate workers. Second, it lacks a sufficient deterrent effect on employers who would seek to automate their workforce.

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[56] A Stewart, ''Work Choices in Overview: Big Bang or Slow Burn?' (2006) 16 *ELRR* 25 at 46.
[57] *Perry v Savills (Vic) Pty Ltd* (Australian Industrial Relations Commission, Watson SDP, 20 June 2006, PR973103) at [41].
[58] *Carter v Village Cinemas Australia Pty Ltd* [2007] AIRCFB 35; (2007) 158 IR 137; Forsyth, above n 41 at 525-8.
[59] Redundancy dismissals are otherwise excluded by the FW Act ss 385(d) and 389.
[60] Forsyth, above n 41.
[61] FW Act s 119(2).

Finally, in the face of mass unemployment, it may lead to a macro-economic crisis in which the state is unable to pay for a significantly increased welfare state at a time of automation-led worklessness.

The current scale of redundancy pay threatens the economic, social and psychological security of workers, particularly older, disabled and more vulnerable workers. As Davidov explains, it is this group of workers, more than any other, who require security because they are the most vulnerable to the effects of long-term unemployment following termination.[62] Indeed, the experience of this group of workers is one in which redundancy almost always spells poverty, until they are eligible for the aged pension.[63] Australian research has shown that a large number of older, blue-collar men with low levels of formal education have even developed disability (usually mental health-related) requiring the assistance of a disability support pension, following job loss.[64] Redundancy payouts rarely compensate these workers for their loss of identity and psychological well-being.[65] The prospect of automation-led mass unemployment suggests that these experiences by vulnerable workers may, in the near future, become mainstream and widespread unless action is taken.

A further problem with low rates of redundancy pay is that the legal requirement to pay redundancy compensation has little deterrent effect on employers seeking to replace their human workforce with automating technologies. Paid at low rates in an economic environment that rewards cuts to 'ongoing costs' (such as those associated with permanent employment),[66] the current amount of redundancy compensation hardly discourages decisions to automate employment. Indeed, when the economic decision to automate is between paying ongoing wages or paying a comparatively low amount of redundancy compensation, the law in effect reinforces economic rationalist decision-making by employers within liberal labour markets. Comparative international evidence, discussed below, through 'the effect of redundancy laws on the labour market', indicates that strong employment protection regimes — associated with higher rates of redundancy pay – deter employers from rationalising their workforce.

Techno-sceptics, such as Bent Greve, have proposed that an employment crisis caused by automation will see much of the 'burden' of automation-led unemployment shifted to the welfare state. Such a shift poses a distinct economic problem in a society in which automation ensures that only a skeletal (productive or taxpaying) workforce remains employed.[67] Clearly, the problem with largescale automation is that not only will there be 'no-one to buy the cars' (Henry Ford's great paradoxical realisation), but that there will be no-one to pay the welfare bill. This conundrum also happens to be the classic post-Keynesian critique of supply-side, neoliberal economics. It also suggests a major weakness in the alternative proposal involving a universal basic income. It is proposed below that rather than shifting responsibility for largescale unemployment benefits to the State. The State should take responsibility and regulate automation — before employers undertake largescale investment in automating

[62] Davidov, above n 29, at 120.
[63] K Riach and W Loretto, 'Identity Work and the 'Unemployed' Worker: Age, Disability and the Lived Experience of the Older Unemployed' (2009) 23 *WES* 102.
[64] L Cai and B Gregory, 'Unemployment Duration and Inflows onto the Disability Support Pension Program: Evidence from FaCS LDS Data' (2005) 38 *AER* 233.
[65] Ibid.
[66] M Pusey and S Wilson, *The Experience of Middle Australia: The Dark Side of Economic Reform*, Cambridge University Press, Cambridge, 2003, pp 47–75.
[67] B Greve, *Technology and the Future of Work: The Impact on Labour Markets and Welfare States*, Edward Elgar, Cheltenham, 2017.

technologies. In these circumstances, the proposal to significantly increase redundancy pay, in-line with other comparable international jurisdictions, is canvassed below.

To be clear, the proposal to regulate the automation of employment, does not extend to regulating all forms of automation, some of which have led to largescale advances in health care and medical technology. Rather, proposals to regulate *the automation of employment* depart from orthodox 'supply-side' economics that has heralded automation of employment as 'increasing productivity and living standards' by 'reducing labour costs and prices'.[68] Current rates of social inequality, together with the reliance of orthodox claims on the now defunct notion of 'trickle-down economics', indicate that existing economic orthodoxy should be treated with some scepticism.[69] In addition, the rapidity and rate of oncoming change requires the State to respond.[70] Free-market critics will undoubtedly challenge such proposals by arguing that such regulation discourages firms from hiring workers. However, as global studies on employment protection laws show hiring freezes are not necessarily the consequence of stronger employment protection laws while there is demand for labour (discussed on pp 14–15).[71] A rather more obvious cause of a slow-down in hiring would seem to come from a drop in demand for labour, were it to be automated.

Coverage by redundancy protections

Workers in small business and those who are precariously employed will be among those most affected by automation-led redundancy. This is because Australian redundancy pay entitlements contain three major loopholes, excluding precariously employed workers from employment protection. Along with exclusions for small business, Australian redundancy pay entitlements do not apply to casual workers, nor those on fixed-term contracts.[72] Although the categorisation of workers in the 'gig economy' is a matter of controversy, it is widely believed that many such workers are self-employed,[73] with working arrangements defined by contracts for services (contracts to engage an independent contractor), rather than contracts of service (employment contracts). Independent contractors are ineligible for redundancy payments under the FW Act, s 119(1), because they are not 'employees', as prescribed by that section.

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[68] See, eg, the standard view proposed by free-market 'think-tank', L Burke and J Sherk, *Automation and Technology Increase Living Standards*, The Heritage Foundation, at <https://www.heritage.org/jobs-and-labor/report/automation-and-technology-increase-living-standards> (accessed 24 December 2019).

[69] Chalmers and Quigley, above n 1, pp 122–3.

[70] Ibid.

[71] P Skedinger, *Employment Protection Legislation,* Edward Elgar, Cheltenham, 2010; Z Adams et al, 'The Economic Significance of Laws relating to Employment Protection and Different Forms of Employment: Analysis of a Panel of 117 Countries, 1990–2013' (2019) 185 *ILR* 1.

[72] *Unilever Australia Trading Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU)* [2018] FWCFB 4463; FW Act s 123(1)(c).

[73] D Scutt, 'Here's a provocative look at the impact of Uber and the gig economy on Australia's job market', *ABC Business Insider,* 26 February 2019 at <https://www.businessinsider.com.au/gig-economy-impact-on-australia-2019-2>. A major national study has shown that only 28% of respondents who had performed platform work reported that they were 'treated' like employees: P McDonald et al, *Digital Platform Work in Australia: Preliminary Findings From A National Survey*, June 2019, Victorian Department of Premier and Cabinet, 4. This categorisation, however, does not mean that these workers were employees as a matter of law, nor that the other 72% of those surveyed were not employees. In this respect, the views of sceptics who have questioned the size and impact of the Australian gig economy, continue to hold some weight. See, eg, J Healy, D Nicholson and A Pekarek, 'Should We Take the Gig Economy Seriously?' (2017) 27 *Lab & Ind* 232 at 233.

Nevertheless, as the AIRC recognised in the *Redundancy Case* in 2004,[74] the impact of redundancy on workers in every industry, regardless of the size of the enterprise or employment structure is 'broadly the same'.[75] Similarly, when it comes to automation, there is no reason to think that automation-led redundancy will impact different sized businesses differently.

Since the 1980s, the application of redundancy provisions to small business has been a political football. In the *TCR Case*, [76] the Australian Industrial Relations Commission withheld access to redundancy pay from employees who were employed in small business. In the *Redundancy Case* in 2004, however, the AIRC removed most small business exemptions from redundancy pay entitlements. The AIRC found that 'the available evidence does not support the general proposition that small business does not have the capacity to pay severance pay'. In making this point, the AIRC pointed to evidence that over a 12-month period *prior* to dismissing employees, 'some 70 per cent of small businesses that reduced the number of persons they employed, made a profit'.[77] Two years later, the Howard Government's *Work Choices* once again removed redundancy provisions from application to small business employers in an extensive exception to 'allowable award matters'.[78] This 'small business exemption' restricted redundancy claims against employers with less than 15 employees and excluded short-term employees (those in continuous service for less than 12 months) from claiming redundancy pay.[79]

Under the Labor Government in 2009, the 'small business exemption' to redundancy pay was retained as a 'national employment standard', along with the exemption for short-term employees.[80] As a result, redundancy pay applies to around only 50% of employees within the Australian workforce.[81] As 'employment standards', redundancy provisions are now enforceable by the prospect of civil penalty provisions against non-complying employers.[82] However, as some commentators have argued, this state-based enforcement regime further undermines the enforcement role of trade unions – a process of delegitimation commenced during the Howard-era — thereby minimising impediments to the liberalisation of the labour market.[83]

The 2006 *Work Choices* amendments also removedthe 'unfair dismissal' remedies for most Australian workers: unfair dismissal was restricted to employees within businesses that employed more than 100 workers.[84] Around 70% of the Australian workforce is employed by small and medium enterprises (with fewer than 100 employees).[85] Restrictions on unfair dismissal remedies applied to a range of other employees whose work was either short term,

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[74] Above n 34.
[75] *Redundancy Case,* above n 34, at [272].
[76] Above n 6.
[77] *Redundancy Case,* above n 34, at [273].
[78] WR Act ss 513(1)(k), 513(4)(a).
[79] WR Act ss 513(4)(a), 513(5)(b)(ii).
[80] FW Act ss 61, s 121(1)(a),(b), 23(1).
[81] P Skedinger, above n 68, p 32.
[82] FW Act, s 44(1).
[83] T Hardy and J Howe, 'Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22 *AJLL* 306.
[84] WR Act s 643(10).
[85] E Connolly, D Norman and T West, *Small Business: An Economic Overview*, Reserve Bank of Australia, Sydney, 2011.

probationary, for specified tasks, above award conditions, as well as a host of other reasons.[86] Unfair dismissal laws were restored to their pre-*Work Choices* status by a Labor Government in 2009.[87] However, unfair dismissal claims are not subject to standardised compensation and usually result in an average of only four to six weeks pay as compensation[88] – a point that serves to underline the need to increase redundancy compensation, as discussed below.Current Australian redundancy provisions do not apply to casual employees, those on fixed or short-term contracts as well as independent contractors. These precarious workers now constitute around 33% of the Australian workforce.[89] While these figures have not grown within the last three years,[90] the proliferation of such employment arrangements since the 1990s is owed partly to political change and partly to contractualisation and the emergence of the gig economy.[91] The legal reclassification of employment in this way and in the new economy has been addressed by a large and emerging industrial relations literature on the 'contractualisation' of employment.[92] Contractualisation is understood to refer to the process by which employers misclassify workers as contractors to evade employment law. This article, however, focusses on the issue of employment rationalisation by automating technologies — although there is some overlap with the topic of contractualisation through a proposal to extend employment protection law to the 'gig economy'. Indeed, both automation and contractualisation are theoretically related processes. The rationalisation of employment through automation is a core component of a wider economic dynamic and neoliberal public policy in which contractualisation, deregulation, privatisation and austerity have been other key defining features. Policies of contractualisation, in particular, have contributed to the individualisation of employment relationships, leading to declining trade union membership and thereby weakening the traditional bargaining power of unions. These factors have, in turn, contributed to both the creation and subsequent erosion of employment protection laws. Such laws have historically mitigated some of the harms generated by liberal labour market-based employment, especially those related to technological change.

Indeed, the evasion of employment protection laws has been described by some commentators as a form of 'regulatory entrepreneurship',[93] which is intrinsic to the business

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[86] WR Act s 638.
[87] FW Act s 121(1)(b); s 23(1).
[88] Productivity Commission, *Inquiry Report: Workplace Relations Framework*, Report No 76, Vol 2, Productivity Commission, Canberra, 2015, at 569–70.
[89] Australian Council of Trade Unions, *Report of the Independent Inquiry into Insecure Work,* Melbourne, 2012, at 14–15.
[90] In 2016, the number of self-employed Australians remained steady at 8.5 per cent: Melbourne Institute, *Household, Income and Labour Dynamics in Australia (HILDA) Survey*, Melbourne Institute, Melbourne, 2018, at 95–102.
[91] Preliminary findings from a recent national survey of gig economy work has shown much higher participation in the gig economy than previously thought, with 7.1% of survey respondents confirming that they had undertaken digital platform work within the last 12 months, and 13.1% stating that had participated in platform work: P McDonald, above n 70, at 3. Past estimates have placed the number of participants at less than half of one per cent of Australian workers: J Healy, D Nicholson and A Pekarek, above n 70, at 233.
[92] S Marshall, R Mitchell and I Ramsay, *Varieties of Capitalism, Corporate Governance and Employees,* Melbourne University Press, Melbourne, 2008, p 5; G Anderson, D Brodie and J Riley, *The Common Law Employment Relationship,* Edward Elgar, Cheltenham, 2017; V De Stefano, 'The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy' 37 (2015) *CLLPJ* 471; A Stewart and J Stanford, 'Regulating Work in the Gig Economy: What are the Options?' (2017) 28 *ELRR* 42; G Friedman, 'Workers Without Employers: Shadow Corporations and the Rise of the Gig Economy' (2014) 2 *ROKE* 171.
[93] E Pollman and J Barry, 'Regulatory Entrepreneurship' (2016) 90 *S Cal L R* 383.

model of gig economy operators. This has led contributors to a recent Australian Government Inquiry on the 'Future of Work' to suggest that increasing deregulation and the new economy 'pose the greatest threat to security of work in the 21st century'.[94] If these arrangements become further entrenched, even fewer workers will have access to redundancy and unfair dismissal protections. When precarious work arrangements combine with automating technology, gig economy workers and independent contractors will be completely deprived of any compensation for the replacement of their labour by automating technology. Meanwhile, free-market employment lawyers continue to urge neoliberal policymakers that new labour and employment legislation is urgently needed to keep pace with rapidly increasing automation' (they propose further contractualisation).[95] Social democratic policymakers risk being left behind by failing to articulate a strong policy position in respect to technological redundancy.

VI. The Effect of Redundancy Law on the Labour Market

Proposals to strengthen redundancy law are conventionally met with free-market critique, suggesting that employment protection law stifles labour market opportunities for younger or migrant workers. The Organisation for Economic Co-operation and Development (OECD), for instance, proposes that strict employment protection laws stand to deliver a negative 'impact on employment of outsiders, encourage labour market duality and hinder productivity and economic growth'.[96] These predictions do not appear, however, to withstand scrutiny when compared with more detailed, independent research on the economic outcomes of employment protection laws that, since the 1990s, have evaluated and compared the strength of employment protection laws between various international jurisdictions.[97]

Swedish industrial relations scholar, Per Skedinger, has ranked the employment protection laws of the world's industrialised nations on a scale of 0-6, with 6 representing the most stringent legislation.[98] Of the 43 countries surveyed, the average ranking is 2.2. The United States, with the most flexible 'hire and fire' laws in the world, ranks lowest at 0.9, while Southern European states such as Spain (3.1) and Greece (3.0) ranked among the highest and most regulated employment protection jurisdictions. The legislation of Northern European states, lags only moderately behind similar law in Southern Europe, with Germany and Italy both scoring 2.6 and France 2.9. Meanwhile, Australia (1.4), the United Kingdom (1.1), Ireland (1.4) and New Zealand (1.2), appear much closer to 'free market' levels of employment protection such as those encountered in the United States. Skedinger's key conclusion is that stronger 'employment protection legislation contributes to less turnover and job reallocation',[99] thereby enhancing job security. In Germany, however, there has been a trade-off between job security and moderate wage suppression. On average, German workers earn roughly 11% less than Australian workers, while Australian unemployment figures are double those of

[94] Centre for Business and Social Innovation, *Submission to the Select Committee on the Future of Work and Workers*, Submission No 98, University of Technology Sydney, 19 February 2018, at 2–3.
[95] IBAGEI, above n 2.
[96] *OECD Employment Outlook, 2013,* OECD Publishing, Paris, 2013, at 68.
[97] See, for example, Skedinger, above n 68; ILO, *Termination of Employment Digest*, ILO Publishing, Geneva, 2000; A Forsyth, 'Protection Against Economic Dismissals: Australian Law Compared with Five Other OECD Countries' (2009) 51 *JIR* 723.
[98] Skedinger, above n 68, pp 32–3.
[99] P Skedinger, *Employment Consequences of Employment Protection Legislation*, IFN Working Paper No 865*,* Research Institute of Industrial Economics, Sweden, 2011, at 25–6.

Germany.[100] Given these existing unemployment figures, as well as what may lie ahead, there is clearly sufficient scope to increase the stringency of Australian redundancy laws.

The results of Skedinger's study were confirmed by a large and more recent comparative international study on the economic impact of employment protection laws, showing that such laws are 'associated with an increase in labour's share of national income, rising labour force participation, rising employment, and falling unemployment'.[101] Meanwhile, the work of European industrial scholars, Sandrine Cazes and Mirco Tonin, has found that it is increasingly casualised and contractualised labour marketsthat thwart employment protection laws, and not redundancy law, that disproportionately affect vulnerable and younger workers attempting to enter the labour market or seek employment.[102] Such findings plainly contradict free-market analyses, such as those referred to above. In a similar vein, Scandinavian labour scholars, Von Below and Skogman Thoursie, have shown empirically that work protection laws have 'important effects on … firms' employment behaviour'.[103] Of particular relevance were their findings that 'separation probabilities' (the termination of employment) were 'significantly increased' by weak redundancy laws. Stronger redundancy laws, on the other hand, lead employers to retain employees. Indeed, the choice to strengthen redundancy laws is not one between job security and job mobility, but fair and full employment on the one hand, and precarious or mass unemployment, on the other.

While the aim of stronger redundancy law is predominantly compensatory, these laws may nevertheless provide an obstructive effect, deterring firms (as rational actors) from shedding labour to avoid paying higher statutory minimum amounts of redundancy pay. In this respect, stronger redundancy laws might be understood as operating on a similar principle to the regulatory concept of 'deterrence' in respect to higher penalties and more stringent forms of liability in work health and safety and corporate environmental offending.[104] Indeed, the operation of redundancy payments in this way has been recognised by European demand-side economist, Giulio Fella, who has found, in welfare economic terms, that 'redundancy payments make firms internalise the external costs (or external costs of welfare) and fire less (while) aggregate employment unambiguously increases'.[105]

Currently, Australian redundancy law and its operation within a contractualised liberal market model of employment relations, rarely prevents or discourages 'economic dismissal' from employment, such as through automation-led redundancy. But Australian employment law has not always operated in this way. Its reliance on a centralised wage-setting mechanism together with various historic partnerships between labour and capital reflect aspects of co-ordinated

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[100] OECD Data, *Average Wages (Indicator) 2017* at, https://data.oecd.org/earnwage/average-wages.htm (accessed 18 September 2017); Eurostat, *Germany / Unemployment Rate 2017*, at http://ec.europa.eu/eurostat/en/web/products-datasets/-/UNE_RT_M (accessed 18 September 2017); Eurostat, *Supplementary Indicators To Unemployment, 'Underemployment' 2017*, at: http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsi_sup_a&lang=en (accessed 18 September 2017); ABS, *Labour Force, Australia, Aug 2017*, Cat No 6202.0, Canberra, 2017

[101] Adams et al, above n 68, at 1.

[102] S Cazes and M Tonin, 'Employment protection legislation and job stability: A European cross-country analysis' (2010) 149(3) *International Labour Review* 261.

[103] D V Below and P S Thoursie, 'Last in, first out? Estimating the effect of seniority rules in Sweden' (2010) 17 *Labour Econ.* 987 at 988.

[104] See, e.g., N Gunningham, 'Prosecution For OHS Offences: Deterrent Or Disincentive?' (2007) 29 *SLR* 15; D Thornton et al, "General deterrence and corporate environmental behavior" (2005) 27(2) *Law & Policy* 262.

[105] G Fella, 'Efficiency Wage and Efficient Redundancy Pay' (2000) 44 *Eur Econ Rev* 1473 at 1490.

market economies.[106] This history spells hope for renewed co-ordination in the realm of employment protection law. It is from within this tradition that the following suggestions are made to: (i) reform the statutory conception of 'redundancy' to treat automation-led redundancies differently from other types of redundancy; (ii) increase the statutory minimum amount of redundancy compensation required to be paid by employers in the case of automation-led redundancy; and (iii) extend the coverage of redundancy law to small employers, as well as employment arrangements that fall outside the accepted indicia of a common law, 'employment relationship'.

Redefining 'redundancy'

As observed above, current definitions of redundancy are inadequate to address the problem of automation-led mass unemployment. More specifically, the current conception conflates all economic dismissals, treating them similarly. Advanced here in response, is the idea that redundancy resulting from machine-led automation should be redefined, in order for it be treated differently from other kinds of economic dismissal. Such differential treatment might include significantly increased redundancy compensation, payable to employees whose work has been replaced by machines.

Layoffs arising from an economic downturn in the market, negligent mismanagement of a business or failing to secure a contract, for example, should not be categorised within the same class of redundancy as those arising from rationalisation by automating technologies. Common to the former examples of redundancy is that they are unintended and beyond the control of the employer. Indeed, compensating employees in these regrettable and ineluctable circumstances ('economic circumstances outside of … control') was the object of the very first redundancy laws.[107] By stark contrast, however, it is the essential design, the *raison d'etre* of rationalisation and indeed, automation, to augment or replace labour. From this perspective, the replacement of labour by automation is neither unintended, nor beyond an employer's control – as the original concept of redundancy said it must be.[108] Rather, redundancy by automation is entirely *intentional* – a rational economic choice made by an employer at the expense of an employee. By 'intentional', it is meant redundancies that are within a firm's control, unlike, economic downturns. Even when such a choice is made to remain competitive within a global economy, it must be seen as a choice. This would include situations where an employer's choice to make an employee redundant falls within the current ambit of a 'genuine operational reason', as critiqued above. As Mitchell and Fazi argue, if the nation state has any legitimate claim to sovereignty, one of its first priorities must be to regulate the conditions of citizens' employment as well as competition posed by international trade within its borders.[109] It is for these reasons that machine-led redundancy is substantively different from other unintended forms of redundancy. Accordingly, intentional redundancies should be treated differently to unintentional redundancies. In the case of intentional redundancies, where employers choose to rationalise employment either by automation or otherwise, they should be subject to more onerous legal requirements than employers who did not intend for the redundancy of their workers. It is noted that intentional 'economic dismissals' caused by

[106] Marshall, Mitchell and Ramsay, above n 89.
[107] Gunter, above n 35; A Chapman, 'The Development of Laws Regulating Unfair Dismissal in Australia', in T Bramble et al (Eds), *Current Research in Industrial Relations: Proceedings of the 11th AIRAANZ Conference*, University of Melbourne, 1997, at 423–31.
[108] Chapman, 'Declining Influence of ILO', above n 38.
[109] Mitchell and Fazi, above n 4, pp 4-11.

rationalising measures such as offshoring might also be included in this new alternative categorisation of redundancy, but that this article is specifically concerned with the issue of automation (rather than offshoring).

This argument, that automation-led redundancies ought to be treated differently to other categories of redundancy, is not new. In fact, it defined redundancy law prior to the *TCR Case* in 1984. Before 1984, termination for reasons related to an 'economic downturn' and those in respect to 'technological change' formed the basis of the industrial tribunals' 'case-by-case' approach to redundancy.[110] In *The Stockton Ferry Case* (1971), for instance, the Commonwealth Conciliation and Arbitration Commission recognised factors associated with 'fault'[111] in the termination of employment and distinguished between just and 'unjust' redundancy compensation on the basis of principles involving 'equity, good conscience and the substantial merits of the case'.[112] In coming to this conclusion, the Commission also considered the 'public benefit' involved in the work performed by the workers before they were rendered redundant – a principle long-since jettisoned with the legitimisation of intentional 'economic dismissals' (following the *TCR Case*). Similar principles were articulated by Justice Gaudron in the *Wattie Pict Case* in 1975, in which she emphasised that rational decisions by employers to terminate employment 'interrupt' the 'income of Australian families', causing employees 'financial hardship or the fear of it'.[113] Taken together, both the *Stockton Ferry* and *Wattie Pict* decisions emphasised that the *intentions* of an employer to terminate employment should be scrutinised when determining the quantum of redundancy compensation. In these decisions, there is the distinct sense that largescale redundancies of the kind routinely seen since the early 1980s were simply unthinkable. Both Courts adopted an authoritative position in which the enrichment of employer companies through the impoverishment and sacking of workers had distinct legal limits and that the greater the social harm caused by an employer, the higher the sanction they would incur through the Courts.

The problem with this former approach by industrial tribunals and courts, however, was that it sometimes involved negative consequences for workers. In the event of an economic downturn, there existed only a limited entitlement to redundancy pay. When economic circumstances struck particularly hard, workers were left without any entitlement at all. In the *TCR Case,* the continuation of this approach was advocated by the Confederation of Australian Industry (CAI) (Australian employers).[114] The AIRC rejected this argument, however, preferring the position of the Australian Council for Trade Unions (ACTU) that this distinction would 'engender conflict and uncertainty' for all parties while reinforcing the objectives of 'stability', 'consistency' offered by 'standard compensation' for redundancy.[115] These were sound arguments, proven correct by the experience of the standardised federal redundancy scale ever since. Indeed, it is proposed here that in treating automation-led redundancies differently from unintentional redundancies, the current standardised scale of minimum redundancy pay should be retained as a 'safety net' for unintentional redundancy – for example, those caused by an economic downturn.

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[110] See *Wattie Pict* above n 40; *Stockton Ferry* above n 40.
[111] *Merchant Service Guild of Australia v Department of Main Roads (NSW) (Stockton Ferry Case,* at first instance*)* (1971) 140 CAR 875, at 876.
[112] *Stockton Ferry*, above n 40, at 882.
[113] *Wattie Pict,* above n 40, at 229.
[114] *TCR Case*, above n 6, at 22–32, 27.
[115] Ibid at 29.

In light of recent predictions and concerns about rapidly increasing automation of employment by the mid-21st century, the continuation of a single standardised approach to both unintentional and intentional redundancy could have dire social consequences, displacing from work, a large portion of the workforce while rendering the contract of employment increasingly precarious. Accordingly, the approach to intentional redundancy (employment rationalisation) contemplated here seeks to revive the former legal distinction between termination due to economic downturn, on the one hand, and technological change, on the other. This distinction, as argued by employers in the *TCR Case*, (albeit with markedly altered consequences for both employers and employees) lies at the heart of the ability of the State to regulate the rationalisation of employment. Continuing to subsume rationalisation, particularly that associated with automation, within the general category of 'redundancy', is an open invitation to mass layoffs. It follows that intentional redundancy – particularly that associated with technological change – should be subject to more stringent legislative controls such as increased redundancy compensation.

Increasing redundancy compensation

As explained above, the current scale of compensation in respect to automation-led redundancies is inadequate for a range of reasons. It lacks a sufficient deterrent effect on employers, fails to adequately compensate workers and shifts the burden of paying social welfare to the State while stripping revenue-generating jobs from the economy. Accordingly, if redundancy was redefined such that automation-led redundancies were treated differently, the key regulatory difference occasioned by such redundancies might be a significant increase in the amount of compensation payable by employers who automate jobs. Accordingly, increasing redundancy pay fulfils a macro-economic need to fund the welfare state at a time of automation-led worklessness. The comparative example of German redundancy law and policy, discussed below, is instructive in ascertaining an appropriate quantum and method of administering redundancy compensation in cases involving automation-led termination of employment.

One regulatory solution to this decline of a productive and taxpaying workforce is to require medium and large companies who automate jobs to pay the difference between social security payments and the worker's former wage until the worker reaches retirement age or finds alternative employment. A corollary effect of this policy is that it requires employers to prioritise older workers nearing retirement age for redundancy. Hence, the policy proposed here minimises the impact of unemployment for this group of vulnerable workers by providing them with economic security at a time during which they would already be preparing to leave the workforce. Meanwhile, this proposal has the added benefit of ensuring the employment of younger workers when new positions become vacant within the firm. Such a policy was adopted by a range of German automotive manufacturers in the 1980s (discussed below) and has since been appropriated, in part, into German labour law.

In the mid-1980s, industrial sociologists, Brumlop and Ulrich, studied 'protection against rationalization' agreements in action at the Volkswagon plant.[116] At the height of automation in the automotive industry, these agreements saw Volkswagen adopt a policy of 'no dismissals

[116] E Brumlop and U Juergens, 'Rationalisation and Industrial Relations: a Case Study of Volkswagen' in O Jacobi et al (Eds), *Technological Change, Rationalization and Industrial Relations,* Croom Helm, London, 1968, p 73 and pp 85–7.

as a result of rationalisation'. Any job loss to automating technology was restricted to 'voluntary quits' and 'natural attrition'.[117] Severance pay for redundancies was increased to four months (12 weeks) per employee (equivalent to the current maximum amount of statutory redundancy compensation in Australia), irrespective of the time that a worker had been employed with the firm. Meanwhile, the retirement age of workers was lowered to 58 and included early retirees. Those who accepted early retirement were paid the difference between their previous wage and unemployment benefits – in effect their full working wage – until they reached retirement age of 60. As German economist, Wolfgang Streeck, observed, the protection against rationalisation agreement 'allowed for the automated final assembly of the Golf motor car at Volkswagen Wolfsburg (Halle 54) and, on paper, eliminated about 1000 jobs. But where this policy was introduced with works council and union support, the number of workers in full-time employment actually increased due to growing production volume'.[118]

Since this time, Mercedes-Benz and BMW have undertaken analogous measures.[119] A similar agreement existed between German State Railways and the *Gewerkschaft Deutscher Lokomotivführer* (rail workers union) in the 1990s, providing that older railworkers forced to take on lower paid work as a result of rationalisation and change in technology would be guaranteed 100% of their previous wage until retirement.[120] This agreement in this services sector industry also serves to show such redundancy arrangements are transferrable from the manufacturing sector to the services sector. Indeed, the services sector is the labour market that predominates in Australia and that is most at risk as a result of the 'fourth industrial revolution', discussed above. The application of these arrangements to both public and private enterprise also demonstrate the versatility of these redundancy laws in the face of recent developments privatising large parts of the state services sector in Australia.

These German accomplishments surrounding redundancy and automation were, in part, enabled by a co-operative culture of industrial relations that has prevailed in Germany since the advent of works councils in the late nineteenth century. Some of the social outcomes of this co-operative industrial culture have already been mentioned above in relation to the comparative earnings and unemployment figures for both Germany and Australia (pp. 25-26). Meanwhile, rates of social inequality are also markedly lower in Germany than in Australia.[121] Conversely, German firms have seen higher rates of labour productivity than in Australia, yielding more profit for employers and shareholders across the board.[122] Rogers and Streeck have found that such outcomes are a direct result of co-operative work culture — workers participate in decisions by company management to increase productivity.[123] Much has been said of the possibilities for transplanting the co-operative system of German works councils to

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[117] Ibid.
[118] W Streeck, *Social Institutions and Economic Performance: Studies of Industrial Relations in Advanced Capitalist Economies,* Sage Publications, London, 1992, p 184.
[119] P Ryznar, 'Bye, Robot? Bringing Back Human Workers Bucks Manufacturing Trends', *Forbes*, 26 March 2018.
[120] German State Railways Collective Agreement No. 4, point 8, cited in ILO, *Recent Developments in Inland Transportation Report*, ILO, Geneva, 1990, at 78-9.
[121] GINI Co-efficient (international comparison), cited in Atkinson, above n 27, p 22.
[122] OECD, *Level of GDP per capita and productivity*, Paris, 2017 at<*http://stats.oecd.org/Index.aspx?DataSetCode=PDB_LV*> (7 January 2019).
[123] J Rogers and W Streeck, 'The Study of Works Councils: Concepts and Problems', in J Rogers and W Streeck (Eds), *Works Councils: Consultation, Representation, and Cooperation in Industrial Relations*, University of Chicago Press, 1995, p 3 at p 4.

Australia.[124] In 2003, former ACTU leader, Greg Combet, specifically realised the progressive potential of the works council system of industrial bargaining for Australian redundancy policy.[125] Short of an overhaul of the entire Australian industrial relations framework, however, what is proposed here merely involves a discrete replication of German policy with respect to redundancy law. Imposed via legislation, such a policy would not necessarily replicate the German spirit of co-operation within firms. It would, however, protect employment from automation-led redundancy with apparently minimal disruption to firm productivity, as evidenced by current German redundancy law.

German redundancy law (independent of co-determined redundancy agreements) currently provides that when employment is terminated on 'operational grounds', workers are entitled to rates of severance pay equal to half a month's wage for each year of employment.[126] This is twice the amount payable under s 119(2) of the FW Act in Australia. The maximum amount payable under German law is 12 months worth of wages.[127] This equates to three times the maximum amount payable under Australian law. Alternatively, where workers are aged 50 or older with 15 years of service, they are entitled to 15 months worth of wages, while workers aged 55 years or older with 20 years of service, are entitled to 18 months worth of wages.[128] This sum is roughly *five times higher* than the maximum amount payable under Australian redundancy law. These German laws provide compelling evidence for the feasibility of increasing existing statutory Australian redundancy payments. They also illustrate that higher compensation for automation-led redundancy is possible while maintaining high levels of productivity.

Such comprehensive redundancy policies have seen German employers invest in redundancy insurance schemes.[129] Similar policies in respect to redundancy insurance also existed in the UK between 1965 and 1996, although redundancy compensation was paid at levels equivalent to those in Australia.[130] To ensure payment for redundancy compensation, particularly in the event of corporate insolvency, employers were required to make an annual contribution to a state-run redundancy compensation fund (in a similar manner to that provided under existing Australian superannuation and workers' compensation schemes).[131]

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[124] R McCallum, 'Crafting a New Collective Labour Law for Australia' (1997) 39 *JIR* 405 ; P J Gollan, R Markey and I Ross, *Works Councils in Australia*, Federation Press, Annandale, 2002; P J Gollan and G Patmore, *Partnership at Work,* Pluto Press, London, 2003; E Davis and R Lansbury, *Democracy and Control in the Workplace,* Longman Cheshire, Melbourne, 1986.

[125] G Combet, 'The Works Council Debate and Trade Unions', in Gollan and Patmore (Eds), *Partnership at Work*, Pluto Press, London, 2003, p 134, 135–6.

[126] Kündigungsschutzgesetz; Betriebsverfassungsgesetz (1a Employment Protection Act) s 112–3 (Works Constitution Act). See Eurofound, Germany: Severance Pay/Redundancy Compensation: https://www.eurofound.europa.eu/observatories/emcc/erm/legislation/germany-severance-payredundancy-compensation (accessed 4 August 2018).

[127] Ibid.

[128] Ibid.

[129] Brumlop and Juergens, above n 113.

[130] H Scarborough, 'The Politics of Technological Change at British Leyland', in O Jacobi et al (Eds), *Technological Change, Rationalization and Industrial Relations,* Croom Helm, London, 1968, p 95 at p 109.

[131] Redundancy Payments Act 1965 (UK), ss 26–39; Employment Protection (Consolidation) Act 1978 (UK), ss 81–127. The scheme was abolished by the Major Government in 1996 as part of that government's overall policy shift from collective bargaining to an individual rights model of industrial relations: W Brown et al, 'The Employment Contract: From Collective Procedures to Individual Rights' (2002) 38 *BJIR* 611.

There is some evidence to suggest that increasing redundancy pay and severance costs works as a deterrent to redundancy. The comparative work of Per Skedinger and the particular case of Germany (discussed above) illustrates this correlation. A recent Australian example of this relationship involved proceedings for dismissals of trolley collectors at Coles supermarkets, in which a Federal Court threatened orders for repayment of wages and large penalties, resulting in reinstatement of workers.[132] Generally increasing redundancy payments also enforces the idea that an employer should attempt to redeploy employees to perform another role within the organisation rather than terminating their employment. In practice, this might mean that automating technologies are used to augment, rather than to replace, labour.

Once again, the German approach to redundancy in the automotive manufacturing sector is illuminating — particularly during the first phase of the digital revolution in the late 1970s and early 1980s. For Streeck, the balance struck between the deployment of new technology and stable employment in the German automotive industry has made it the best and most productive industry (for employers) and the most secure and well-paid relative to conditions (for workers) in the world.[133] According to Streeck, writing nearly a quarter of a century ago, 'employment protection (legislation, including higher redundancy pay) ensured that new technologies were not used for classical rationalization involving workforce cuts, but rather had to be put to the purpose of diversified quality production'. Within firms, this was achieved by maintaining a 'conservative attitude towards technology (by placing) more emphasis on perfection, than on being the first in the market' and taking a 'long-term investment perspective on the part of both firms and workers' representatives'.[134] In other words, new technology was used to add value to production, rather than being deployed to rationalise labour. Such a strategy might also apply to a services sector model of production, in which investment in technology might simply be seen as 'freeing-up' more time to allow employees to concentrate on other tasks that add value to their organisation. What is clear from the German examples is that a strong industrial bargaining or legal framework must exist that requires or encourages employers to augment labour with automating technologies, rather than incentivising the wholesale replacement of labour by technology. Indeed, US economic sociologists, Erik Olin Wright and Robin Hahnel, have recently endorsed this approach as having continuing relevance as a democratic alternative to the current state of liberal market economies.[135]

Australian lawmakers should follow the German example in respect to automation-led redundancies. Where an intentional 'economic dismissal' resulting from automating technology is involved, employers should be required to pay workers whose employment has been made redundant, an amount in accordance with the higher German scale of redundancy payments. Further, where a worker is nearing retirement age (from 55 and over), employers should be required to pay the difference between social security payments and the worker's former wage until the worker reaches retirement age or finds alternative employment. Worth noting is that determinations of compensation on the basis of 'years of service' are already the same in both jurisdictions. In both jurisdictions, such a calculation is taken to reflect ownership of the job': (i) the investment that an employee has made in a job that is going; (ii) firm-specific

[132] *Fair Work Ombudsman v Al Hilfi* [2012] FCA 1166.
[133] Streeck, above n 115, at pp 180–9.
[134] Ibid, p 183.
[135] R Hahnel and E O Wright, *Alternatives to Capitalism: Proposals for a Democratic Economy*, Verso Books, New York, 2016, p 2 and pp 11-60.

skills acquired throughout their employment; and (iii) loyalty to an employer.[136] As the German experience shows, such policy is both a deterrent to automation-led redundancy and a form of social insurance, ensuring the economic security of workers and the society in which they live.

Extending Coverage

The final proposal made here is that redundancy laws should extend to workers employed under precarious work arrangements, including small business employees as well as casual, fixed-term contract and gig economy workers. There is little compelling evidence to justify the continued small business exemption to redundancy laws. Since 2004, small business profits have decreased only moderately and in response to the global financial crisis.[137] But wages growth too has declined and is, in fact, at a 20-year low.[138] These circumstances are further supported by the average annual household income of small business owners ($103,000 per annum), which is some 26% higher than the median household income ($76,838 per annum) in Australia.[139] On this view, small businesses are even better placed now, than at the time of the *Redundancy Case* in 2004, to financially withstand a comprehensive restoration of redundancy laws. In a similar vein, there is no logical, nor compelling reason for continuing to withhold compensation for the automation-led redundancy of long-term casual employees.

Australian Fair Work Commission Deputy President, Val Gostencnik, recently urged the Federal Government to act in this space, commenting that, 'perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to …broaden protection to participants in the digital economy'.[140] Such an evolution in protections for participants in the digital economy and other independent contractors, might involve bringing these workers within the umbrella of the employment relationship, for the purposes of redundancy. The process of selecting and classifying independent contractors as eligible for reclassification, in this respect, is beyond the scope of this article. Suggestions to require gig economy platforms to pay workers' compensation,[141] minimum pay and abide by other employment conditions[142] are only near to being narrowly implemented in one Australian state, Victoria, where a Labor Government is in the process of setting minimum hourly rates of pay for a narrow legal class of owner-driver contractors.[143] Nevertheless, the application of redundancy provisions to a wide range of gig economy and

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[136] *TCR Case*, above n 6, at 41–9; B Casey, 'Redundancy and Early Retirement: The Interaction of Public and Private Policy in Britain, Germany and the USA' (1992) 30 *BJIR* 425 at 433–4.
[137] M Clarke, *Australian Small Business: Key Statistics and Analysis*, Department of Industry, Innovation, Science, Research and Tertiary Education, Canberra, 2012, at 51; and, as indicated by Department of the Treasury, 'Small Business Data Card', Canberra, 2017 at https://treasury.gov.au/publication/small-business-data-card (accessed, 6 October 2019).
[138] J Dixon and J Borland, 'FactCheck: Is Wage Growth at Record Lows?', *The Conversation*, 27 October 2016.
[139] HILDA, above n 87, at 28–30; S Holmes, M Sargent, M T Schaper, 'Wealth and Small Business Ownership in Australian Households: What Rewards for Business Proprietors?', in B Kotey et al (Eds), *Meeting the Globalisation Challenge: Smart and Innovative SMEs in a Globally Competitive Environment*, Tilde University Press, Prahran, 2014, p 216 at 216-218.
[140] *Kaseris v Rasier Pacific VOP (Uber)* (2017) 272 IR 289; [2017] FWC 6610 at [66].
[141] 'Make Gig Platforms Pay Workers' Compensation: Review', *Workplace Express*, 3 July 2018.
[142] 'AMMA Pushing for Fixed-term Appointments to FWC', *Workplace Express*, 4 July 2018; 'NSW Opposition Looking to Protect Gig Workers', *Workplace Express*, 27 June 2018.
[143] Owner Drivers and Forestry Contractors Amendment Bill 2019, cl 5. The Bill passed the Legislative Assembly on 20 June 2019 and, at the time of writing, is being debated in the Legislative Council.

contractualised work arrangements is critical in ensuring that the redundancy provisions proposed here are not circumvented by regulatory entrepreneurship.

VII. Conclusion

The suite of reforms canvassed here has included reforming the conception of 'redundancy', increasing redundancy compensation and extending the coverage of redundancy law. Reforming the conception of redundancy to distinguish between different categories of redundancy, allows for intentional automation-led redundancies to be treated differently to other, less socially harmful forms of unintentional redundancy. This, in turn, means that intentional automation-led redundancies may be subject to an increased legislative scale of payments to ensure the individual well-being and security of workers as well as the economic prosperity of the society in which they live. The extension of redundancy laws to small business, as well as precariously employed workers would further ensure the efficacy of redundancy law by minimising regulatory evasion and doubling the number of Australian workers covered by employment protections.

Together, these proposals are the beginning of a plan to protect the jobs of Australian workers from the mass-automation of employment. They are intended to create more secure and productive employment while retaining what is left of meaningful work. It is noted, however, that the strategies discussed here are not a complete panacea to the replacement of labour by automating technologies. They do not, for instance, cover the situation in which emerging enterprises commence operations by substituting new automating technology in the place of labour. Rather, these proposed reforms engage with an existing discourse of employment protection law by advancing policy that is evidenced by legal precedent and existing practice. Historically, and in overseas jurisdictions, redundancy law has been used to regulate the effects of automating technologies on the labour market. As technology rapidly advances once again, it is necessary for policymakers to keep pace by once again reforming work protection law, thereby ensuring the continuation of labour market fairness and security.

While the advance of automating technology is already escalating and replacing labour, the proposals discussed here advance a broader practical perspective from which it is possible to see that automation-led mass unemployment and insecurity is not a fact of life. The State retains the power to intervene in the labour market to ensure that employees are treated with dignity and are afforded economic and psychological security in the workplace in the face of increasingly 'disruptive' and rationalising technologies. In this sense, the reforms discussed here aim to reinvigorate a redundancy jurisdiction that protects employment security from instrumentalising economic 'market logic' and technological determinism. Such a system comprises one component among many possible fair and proportionate responses by the State to better co-ordinate and plan for increasing automation in market economies.