Submission No 17

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

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NEW SOUTH WALES LEGISLATIVE COUNCIL:
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Submission to Inquiry into the impact of technological and other change on the future of work and workers in New South Wales

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OVERVIEW

The first part of this submission is the Overview. I have separated this submission into various headings that correspond to those used in the terms of reference of the Inquiry, and under those headings referred to material in the appendices.

Most of the substantive content of this submission is in the subsequent appendices. Appendices contain previously unpublished text on approaches to regulation relevant to the future of work. The remaining appendices are the text of relevant research or other publications that are relevant to the terms of reference and to the committee's deliberations. The most significant of these is the open-access book, *The Realities and Futures of Work*, which is reproduced without the bibliography (but references can be found in the relevant footnotes).

1. THE EXTENT, NATURE AND IMPACT OF THE PLATFORM ECONOMY

TOR:

(a) changes in the earnings, job security, employment status and working patterns of people in New South Wales,

(b) the extent, nature and impact on both the New South Wales labour market and New South Wales economy of:

(i) the 'on-demand' or 'gig-economy',

(iv) the wider effects of (i) and (ii) on equality, government and society,

(l) whether, and what, legislative or other measures should be taken to:

(i) reform workplace laws and instruments to account for the emergence of the 'on demand' or 'gig economy' and the automation of work.

Response:

Please see Chapter 6, in particular pages 159-177, of *The Realities and Futures of Work.* Some conclusions from this are:

- there are limitations in the extent to which employers can minimise costs through searching for greater flexibility and lower costs, arising from the need to maintain control, but the platform economy seeks to partially solve some of those limitations'

Please also see Appendix A, in which I refer extensively to some ways in which principles of 'directed devolution' can be used to help find solutions to problems arising from the emergence of the platform economy.

The Realities and Futures of Work is attached as Appendix D to this submission.

2. THE EXTENT, NATURE AND IMPACT OF AUTOMATION

TOR:

(b) the extent, nature and impact on both the New South Wales labour market and New South Wales economy of:

(ii) the automation of work,
(iii) the different impact of (i) and (ii) on regional New South Wales,
(iv) the wider effects of (i) and (ii) on equality, government and society.

Response:

Please see chapter 4, in particular pages 91-108, of *The Realities and Futures of Work.* Conclusions from that discussion include that:

- there are major constraints on the extent to which automation will affect employment;
- nonetheless, there are likely to be significant disruptions and these need to be responded to.

Please also see pages 325-328 of *The Realities and Futures of Work.*

In Appendix B, I refer to some key policy considerations in responding to digital jobs displacement.

The future of work is highly gendered, but in ways that are quite complex. To explore some of these complexities, please see chapter 7, especially pages 236-238, of of *The Realities and Futures of Work,* and my jointly authored article (with Georgina Murray), 'Women's employment, segregation and skills in the future of work', *Labour and Industry*, 29(1), 2019: 132-48. It is reproduced at Appendix F.

3. WORKERS COMPENSATION

TOR:

(f) the impact of the 'on-demand' or 'gig economy' and the automation of work on:

(i) accident compensation schemes, payroll or similar taxes,
(ii) Commonwealth taxes which support New South Wales Government expenditures,

(l) whether, and what, legislative or other measures should be taken to:

(v) reform accident compensation schemes and other social insurance schemes to account for the emergence of the 'on-demand' or 'gig economy' and the automation of work.

Response:

Please see chapter 10 of my report to the Queensland Parliament on the Operation of the Queensland Workers Compensation Scheme. That report appears as Appendix E to this submission.

That chapter made recommendations proposing that:

- the coverage of the Act should be redefined to include any person engaged via an agency to perform work under a contract (other than a contract of service) for another person. This would exclude employees of licensed labour hire businesses and employees of firms that engage contractors, and specify that it applied where at least two parties were in the state at the time the work was undertaken;

- intermediaries or agents who engage any person to perform work under a contract (other than a contract of service) for another person should be required to pay premiums, based normally on the gross income received by the intermediaries or agencies;

- the Regulator should have the capacity to exempt intermediaries or agents from the obligation to rehabilitate injured workers. This would normally be done unless the Regulator considered that the agent had the capacity to perform this role. In such circumstances, injured agency workers would immediately come within the scope of an extended return to work program.

- There should be a two-pronged information campaign, designed to build awareness of new arrangements for 'gig economy' workers, making use of both the processes by which workers are signed up to platforms, and the online environment that they frequent.

4. LEGAL STATUS OF WORKERS

TOR:

(g) the application of workplace laws and instruments to people working in the 'on-demand' or 'gig-economy', including but not limited to:

(i) the legal or work status of persons working for, or with, businesses using online platforms,
(ii) the application of Commonwealth and New South Wales workplace laws and instruments to those persons, including, superannuation and health and safety laws,
(iii) whether contracting or other arrangements are being used to avoid the application of workplace laws and other statutory obligations,
(iv) the effectiveness of the enforcement of those laws and regulations,
(v) regulatory systems in other Australian jurisdictions and in other countries, including how other jurisdictions regulate the on-demand workforce and are adapting to the automation of work,
(vi) Australia's obligations under international law, including International Labour Organization conventions.

(l) whether, and what, legislative or other measures should be taken to:

(i) reform workplace laws and instruments to account for the emergence of the 'on demand' or 'gig economy' and the automation of work.

Please see pages 285-292 of *The Realties and Futures of Work,* along with chapter 3 of my report to the Queensland Parliament on the Operation of the Queensland Workers

Compensation Scheme and the last paragraph in chapter 10 (page 111) of that report (Appendix E to this submission). See also the last two paragraphs of the section 'the platform economy' in Attachment A to this submission (page 12), which refer to the recommendations of the Victorian Inquiry and the AB5 legislation in California.

My article 'Debt in Paradise: On the ground with wage theft', *Griffith Review*, 61, July 2018, 185-191 (Appendix G to this submission), also provides an example of an organisation that uses 'contractor' status to avoid its legal obligations. There is discussion of how other jurisdictions regulate the on-demand workforce, and how we can learn from that, is in Appendix A.

5. WORKPLACE SURVEILLANCE AND INFORMATION

TOR:

(h) whether current laws and workplace protections are fit for purpose in the 21st century, including workplace surveillance laws and provisions dealing with workplace change obligations and consequences,

(i) whether workers should have agency over the way the data they generate at work is used and, if so, what legal framework is required to provide this,

(j) how employers and other businesses should manage and use the information generated by the workforce,

(k) how government as a best practice employer should manage and use the information generated by its workforce,

(l) whether, and what, legislative or other measures should be taken to:

(i) reform workplace laws and instruments to account for the emergence of the 'on demand' or 'gig economy' and the automation of work.

Response:

Please refer to pages 109-112 (chapter 4) of *The Realities and Futures of Work,* and pages 333-338. Amongst other things, chapter 4 refers to the need for some simple regulations promoting things like transparency of code, but also the existence of major issues that require a lot of thought and action.

In Appendix B, I make specific recommendations regarding algorithms used by management to process information generated at, or outside, the workplace.

6. PRODUCTIVITY

TOR:

(c) the impact of the 'on-demand' or 'gig economy' and the automation of work on long-term productivity growth, economic growth, as well as the overall attractiveness of New South Wales as an investment destination for the advanced technological sector.

Response:

Please see pages 13-15 of *The Realities and Futures of Work*, along with pages 96-99, 107-108 and 328-329.

7. MONOPOLY AND COMPETITION

TOR:

(d) the effectiveness of Commonwealth and New South Wales laws in promoting fair competition and preventing monopolies and other anti-competitive behaviour in the 'on demand' or 'gig-economy',

(l) whether, and what, legislative or other measures should be taken to:
(iv) reform competition laws to promote fair competition and prevent monopolies in the on-demand or gig-economy.

Response:

Please see pages 316-318 of *The Realities and Futures of Work*, and pages 333-335.

8. SKILLS AND EDUCATION

TOR:

(e) the adequacy of the New South Wales skills and education system in helping people adjust to the changing nature of work,

(l) whether, and what, legislative or other measures should be taken to:
(ii) reform the skills and education systems to help people adjust to the changing nature of work.

Please see pages 91-93 and 104-107 of *The Realities and Futures of Work.*

9. PUBLIC FINANCE

TOR:

(f) the impact of the 'on-demand' or 'gig economy' and the automation of work on:
    (ii) Commonwealth taxes which support New South Wales Government expenditures,
(l) whether, and what, legislative or other measures should be taken to:
    (iii) reform taxation laws to promote economic growth and protect public finances.

Please see pages 329-333 of *The Realities and Futures of Work.*

10. APPENDICES

APPENDIX A

INSTITUTIONAL EXPERIMENTATION, DIRECTED DEVOLUTION AND THE SEARCH FOR POLICY INNOVATION

Transformations in the world of work have led to policy and institutional experimentation by many actors, including unions, unorganised workers, employers, and policy-makers (Wright et al. 2019; Minter 2017; Stewart and Stanford 2017). This appendix is relevant to part of that last groups — those policy makers sympathetic to the needs of workers — and, by implication, it is relevant to unions and worker bodies trying to get good policy developed. Those actors are part of a system characterised by gaps in protections and in the transmission of ideas between jurisdictions about the successes or failures of each other's experimental interventions.

This appendix proposes an institutional arrangement, referred to as 'directed devolution', rather than a specific policy. It is a form of multi-level policy-making — that is, its application occurs at more than one level of government. 'Directed devolution' means that legal entitlements or obligations are set and a higher (say, national) level, subsequent to which a lower level is required to determine the detailed application of the standard set by the higher level policy and in doing so to protect the interests of the workers concerned.

I propose some general principles for institutional interventions in digitally disrupted work, using the example the platform economy. We start with background on how we got to this situation, including the situation in the platform economy itself, before discussing directed devolution in more detail. In that discussion we see the example of New York passenger transport, consider different forms of multi-level regulation, discuss some criteria for using directed devolution, and then return to elaborate on how the principle of directed devolution can be applied in the platform economy, before concluding.

How we got here

Over the past three decades corporations have sought to minimise their costs, risks and accountability while maximising control, within a general model that can be called 'not-there employment' (Peetz 2019). The focal point for public attention has been the 'platform economy' (De Stefano 2016), but the general problem of transferral of risk and income alongside shifting accountability and control is widespread. 'Not-there' employment takes different forms in different industries: for example, the growth of franchising in retailing (Weil 2014), of labour hire in mining and manufacturing (Forsyth 2016), of temporary or casual employment in education (May 2014), of subcontracting in food services (Rees and Fielder 1992) and of platform work in passenger transport and food delivery (Veen, Barratt, and Goods 2019; Rosenblat and Stark 2016). While institutional

contexts vary (Kalleberg 2018), the common feature is that contracts enable the core corporation to maintain control but the costs of and accountability for labour conditions are outsourced away from the core corporation to some peripheral entity. An outcome has been the decline of the pre-existing 'web of rules' that governed employment relations (Wright et al. (2019) referring to Kerr and Siegal (1955) and Dunlop (1958)). This institutional experimentation has led to the rise of a 'patchwork of rules' in place of the 'web of rules' (Wright et al. 2019) but this patchwork lacks consistency or efficient transmission of knowledge. In the context of weakening protections, work has become more insecure (Kalleberg 2018).

Observers often talk of how 'disruption' in the economy has made regulation difficult or impossible. The term 'disruption' emerged in modern discourse through the work of Clayton Christensen (1997), and more recently Gans (2016), referring to 'disruption' in product markets. When a dominant firm in an industry was dethroned by a new competitor with an innovative technological base that appealed to consumers, disruption was said to occur. Hence online streaming disrupted Blockbuster Video, digital cameras disrupted Eastman Kodak and Uber and Lyft disrupted the taxi sector. Now, governments are not firms and they do not offer services that can be likened to firms competing in markets. However, disruption of a market may render difficult or obsolete some of the concepts upon which prior regulation had been based. Labour inspectors or worker representatives may end up chasing firms down metaphorical rabbit-holes in attempts to identify and protect employees (Patty 2016; Ferguson and Toft 2015; author ref). Digitalisation enables minimisation of costs and makes workarounds and evasion of obligations easier.

In the face of capitalist strategies and this decline of the web of rules, the complexity of policy problems in a range of areas has been so great that different policy makers have come up with a variety of solutions that are inadequate, contradictory or confused. Policies relying on various forms of market mechanisms often failed to meet their objectives, frequently delivering the greatest benefits to those already with the most resources, and away from those with low resources that may have been targeted by the policy (Quiggin 2010). The phrase 'wicked problems' emerged to describe policy problems that seem almost intractable to policy makers due to their complexity, multiple stakeholders and conflicting solutions (Head 2008). Powerful interest groups have been able to mutilate or corrupt the policy process, using extensive resources to 'buy' support and minimise opposition (Stratmann 1998; Holmes et al. 2019; Borkholder et al. 2018), reflecting the strong power of capital over the state in capitalism (Poulantzas 1980). Moreover, even on those infrequent occasions when labour interests, through electoral politics, come to head the state, policy is hard, full of contradictions, competing interests and problems of implementation, with no single objective that can be optimised with a sufficiently informed algorithm (Pressman and Wildavsky 1973). New institutional arrangements and inter-organisational learning by policy-makers has been recognised as a key element in overcoming 'wicked problems' in policy (Ferlie et al. 2011).

The platform economy

Of all the areas that relate to work, perhaps the most visible as a location of disruption is the platform or 'gig' economy (Gandini 2018; De Stefano 2018; Woodcock and Graham 2020). It is not the only one — for example, human resource management activities such as recruitment, selection and employee monitoring are being disrupted by artificial intelligence (O'Neill 2016; Rogers 2019), and throughout the labour market many jobs are seen as threatened by automation or other new digital technologies (Arntz, Gregory, and Zierahn 2016; Frey and Osborne 2013). But the platform economy is notable for how digital technologies are creating new modes of 'algorithmic' management and for the apparent substitution of employment with contracting relationships (Wood et al. 2018; Stewart and Stanford 2017), much like in the piece work of centuries past (Alkhatib, Bernstein, and Levi 2017). Digital apps enable workers to be classed by firms as contractors rather than employees and for core corporations to exercise control while working around the minimum standards that legislators would impose regarding employees, as they do not operate under conventional hourly wage models (Dubal 2019b).

The 'platform economy' is a broad term that covers very diverse experiences, including situations where workers have considerable autonomy and control (often some 'high end' work), and 'low end' work where much power rests with the organisations that control the platforms (Wood et al. 2018; Woodcock and Graham 2020). Most policy concerns relate to the lower end, and these include: low pay (with many receiving pay below the equivalent of the minimum wage in their jurisdiction); lack of health and safety protections; poor or no access to injury compensation; underemployment; income and employment insecurity; lack of training and career development; and low practical discretion in the face of algorithmic management (Smith 2016; Chartered Institute of Personnel and Development 2017; Berg 2016; Wood et al. 2018; Peetz 2018; Lepanjuuri, Wishart, and Cornick 2018; Unions NSW 2016). Much of this happens because platform economy workers are commonly classified as contractors rather than employees, and so are deprived of most of the protections of employment law. Resistance grows but locational fragmentation of workers and contractor status makes platform workers difficult (but not impossible) to organize (Johnston and Land-Kazlauskas 2018; Woodcock and Graham 2020), and a variety of innovative responses (e.g. worker cooperatives) have arisen (Scholz and Schneider 2017). A series of potential public policy responses were examined in the Australian context by Stewart and Stanford (2017), including clarifying or expanding definitions of 'employment'; creating a new category of 'independent worker'; creating rights for 'workers', not employees; and reconsidering the concept of an 'employer'. The key issue of whether gig economy workers are employees or contractors is also the focus of Forsyth (2020).

Meanwhile, the technology enables capital to find new ways to control the labour process, there are unclear or inconsistent indications from governments and courts on workers' employment status, and many firms and many workers insist on the benefits of flexibility for workers. Probably nowhere has the difficulty of making policy been more evident than in those areas newly infiltrated by digital technology (Meil and Kirov 2017), though other factors in the rise of the platform economy have included consumer behaviour and globalisation (Woodcock and Graham 2020). Digital technology has brought about rapid changes in relative market power of groups, individuals or corporations, and often rendered

redundant policy measures painstakingly introduced. Policy makers have been slow to adjust, because of confusion as to what should be done (Veen, Barratt, and Goods 2019). There have been various attempts to regulate the gig economy or at least to regulate some aspect of it—through judicial regulation (by courts or tribunals) or executive regulation (through legislation or executive fiat). The outcome has been an absence of any clear, consistent direction.

An example of how policy makers have responded is in the July 2020 Report of the Inquiry into the Victorian On-Demand Workforce, in Australia's second-largest state (N. James 2020). This identified many of the problems described above, and came up with 'balanced' proposals it described as 'revisionist, not revolutionary' (ibid p188). The key recommendation was to 'clarify the work status test including by adopting the "entrepreneurial worker" approach, so that those who work as part of another's enterprise or business are "employees" and autonomous, "self-employed" small business workers are covered by commercial laws' (ibid. p193). Crucial to whether this would make any difference is how directive any resultant legislation would be — allowing courts or tribunals substantial discretion could well lead to little change from the status quo, especially as platform firms claim to be facilitating entrepreneurship (Dubal 2019a; Stewart and McCrystal 2019). At time of writing, it was unclear what legislation would follow. But even with highly directive legislation, whichever workers were still ultimately defined as not being employees would not obtain labour protections.

One, perhaps more ambitious legislative experiment was the passage of the AB5 legislation in California that defined whether particular workers were employees or independent contractors. It followed the precedent set by a state Supreme Court decision (the *Dynamex* decision) (Kun and Sullivan 2018; Dubal 2019a). There are multitudinous other policy experiments from which others can learn. For example an inquiry into the regulation of workers compensation (injury insurance) in Queensland, Australia (Peetz 2018) that examined injury compensation in the gig economy, came up with a proposal that meant that coverage for certain types of firms did not rely on the outcome of the vexed question as to whether gig workers were employees or independent contractors, but it was not so readily translatable to other conditions of employment. Another is the regulation of New York passenger transport, discussed below. There are many others. What stands out is the diversity of circumstances and the diversity of approaches to regulating the platform economy and, more broadly, the fragmenting world of work. There are a range of approaches to and experiments in regulation. Policy-makers need a way not only of collecting and synthesising lessons from these experiments but also of enabling them to be applied. The application needs in turn to take account of the diversity of circumstances and situations affecting vulnerable workers, yet protect the most vulnerable workers.

Directed devolution

Under directed devolution, the legal entitlements or obligations are set at a higher level (say, a national jurisdiction), subsequent to which a lower level is required to determine the detailed application of the standard set by the higher level policy and in doing so to protect the interests of the workers concerned. For example, a specially established national body

may set a minimum hourly wage. Then, where it is not immediately obvious how an hourly wage rate may apply, a series of subsidiary bodies (the 'agencies of detail') might separately determine how the minimum wage should be calculated to apply in specified circumstances (e.g. for a particular industry). Hourly wage rates might be easily identifiable for the vast majority of workers — those in an established employment relationship — but less obviously calculable for workers who are working in 'ride share', food delivery or elsewhere in the platform economy. Those subsidiary bodies might cover particular industries or groups of industries. There may, for instance, be one for passenger road transport ('ride share' and taxi drivers), there might be another for food delivery, and so on. These subsidiary bodies may need to be quite innovative in how they determine the equivalent of a minimum wage — the calculation of minimum rates for passenger transport operate in New York, discussed below, provides an illustration of how innovative they may need to be. There would be a legal obligation on the subsidiary body to come up with a method for determining a minimum rate of payment that is the closest approximation for the nationally determined minimum hourly wage. The lower level has adequate time to work out how to achieve it in the context of entitlements determined at the higher level, but it nonetheless must do it. The standard that is set at the higher level is the standard that the lower level must achieve.

Crucially, such an approach must be designed to account for power. That is the key aim of the 'directed' in 'directed devolution'. Whatever way the responsibilities are divided between central and detailed agency, it must be done such that it does not reduce the power of those whom regulation is meant to protect. This is not a minor consideration. Centralisation of decision-making is often seen as a way of increasing the power of labour vis-à-vis capital, and decentralization as a means of increasing the real power of capital (Katz 1993). Regulation of work is typically aimed at protecting the most vulnerable elements of labour. So devolution of decision-making in itself can, if handled poorly, worsen the situation of the people that regulation is meant to protect. Directed devolution, by tightly constraining the room to manoeuvre of those at the more decentralized level, should minimise the likelihood of a power shift against the most vulnerable. At the same time, it should still allow the flexibility to account for differences in situation-specific circumstances.

New York Passenger Transport

To see how the lower level might enact a minimum wage for workers not covered by a traditional hourly wage model, we can turn to the example of the road passenger transport industry in New York. In 2019 New York State already had a minimum wage that was high by US (but not international) standards, presently USD 15 per hour in New York City itself (and less outside it). The arrival of 'rideshare' corporations Uber and Lyft created major concern amongst taxi drivers who, if they owned the vehicle they drove, had paid large sums of money for a license (a 'medallion'). New York faced the same dilemma faced by most major cities, where frequently the focus has been on the issue of whether 'gig workers' are employees or independent contractors and adjudicators have at times expressed concern about the adequacies of the law. In an Australian case on the classification of 'rideshare' drivers, the tribunal observed it might be that notions about what was necessary for an employment relationship to be established 'are outmoded in

some senses and are no longer reflective of our current economic circumstances'.[1] The judge in a US case commented that Uber and Lyft 'present a novel form of business that did not exist at all ten years ago' and added, 'With time, these businesses may give rise to new conceptions of employment status'.[2] In both cases, the non-employee status of the workers concerned, as claimed by the corporations concerned, was reaffirmed—but in both cases, the adjudicators made clear that their decisions were based on the law as it stood, not the law as it should be, once lawmakers work out what they actually want to do.

In New York, as in many other jurisdictions, the value of licenses plummeted with the entry of 'ride share' firms and many drivers faced financial ruin due to stranded assets and falling incomes as low-priced competition undercut taxi fares. There was also extensive concern for the incomes of the Uber and Lyft drivers themselves: over time their incomes fell as the corporations tightened their budgets. Yet regulating hourly pay was very difficult either for taxi drivers or 'rideshare' drivers, as payment was from individual customers and was output-based, derived primarily from distance travelled, not hours worked. Moreover, much of drivers' time was spent between jobs, either sitting in ranks or driving around waiting for a job to appear. How could any regulation take account of this? Rather than focusing on how 'ride share' drivers could be reclassified as employees, New York focused on finding an equivalent for contractors of the hourly minimum wage.

After extensive consultation (though not consensus), policy-makers came up with a solution that involved setting a minimum charge based on what an equivalent hourly minimum wage would be after taking account of the time spent waiting between paying jobs as well as the value of other benefits such as leave (International Transport Forum 2019). A 'utilisation rate' was calculated, based on detailed research by Parrott and Reich (2018), and used to convert hourly standards into a type of piece rate. It was based on research into time utilisation by drivers. On implementation, it was immediately and unsuccessfully challenged in the courts by Lyft, but not Uber, as drivers for the former in practice had a higher utilisation rate than those for the latter, and so it would be a bigger financial burden on Lyft (AFP 2019). The key thing is, though, that it was a highly innovative attempt to convert a high level time-based minimum standard into a practical solution that took account of the specific circumstances of the sector.

This solution found was innovative and, in some ways, brilliant but it was specific to that sector and could not be readily applied to the rest of the gig economy. Yet the idea that regulators and parties with deep experience and knowledge of the particular sector would be in the best position to work out solutions specific to that sector is quite striking. But the experience was also quite isolated. Most local regulators, if not required to find a way to implement an entitlement, are unlikely to do it, because the ability of industry to capture regulators would potentially prevent any action from taking place if there was not a

[1] [2017] FWC 6610 (21 December 2017), at [66].
[2] *Razak v. Uber Technologies Inc.*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:16-cv-00573, p. 25.

legislative obligation for action. Rideshare firms have themselves shown this to be the case (Borkholder et al. 2018).

The New York passenger transport model may be relevant to other jurisdictions in relation to passenger transport, but it could need modification to local circumstances (utilisation rates may vary substantially between locations) and could be unusable in activities outside passenger transport (a 'fare' has a different or no meaning to a care worker or a food courier). A law that specified precisely the entitlements for workers defined as non-employees would be very hard to draft. One that broadened the definition of employees would solve part of the problem, but would not solve it for workers who remained outside the definition.

Multi-level regulation alternatives

Directed devolution is a form of multi-level policy-making. To understand its particular institutional form, its strengths and weaknesses, we consider various historical forms of multi-level regulation. Multi-level regulation is not new, and the right 'balance between the top-down and the bottom-up' has been found to be quite 'fruitful' in dealing with public policy problems (Ferlie et al. 2011, 322).

An obvious similarity is with the concept of subsidiarity. This concept is seen as originating in Roman Catholic social thought. It 'means that government should be as close as possible to the governed' (Kamarck 2000, 240). It was applied in the context of the European Union (Franzese and Hays 2006). It signified the 'preserving [of] substantial space for separate domestic political processes', with an example being the World Trade Organisation 'allowing domestic politics to sometimes depart from international' (Keohane and Joseph S. Nye 2000, 37-38). The European Union project, to some extent reliant on the concept of subsidiarity, was originally supported by many as a means of achieving social objectives, yet most of the key institutions were captured by 'neoliberal' interests. Meanwhile voters at the local level were alienated from decisions at higher levels, ultimately promoting the rise of populist, anti-market and perhaps quasi-fascist politics (Fougère, Segercrantz, and Seeck 2017; Walby 2018).

Directed devolution is a more tightly integrated form of regulation than subsidiarity. In the former, legal obligations and entitlements apply at both levels. While the concept of subsidiarity is itself contested (Hecke 2003), it ultimately provides discretion to the lower level, if that feels the need, to depart from the standards applied at the higher level, standards which are often really principles or guidelines for the lower level.

ILO Conventions are a mechanism for multi-level regulation, similar to subsidiarity, but again lower level compliance is voluntary: countries can decide whether or not to ratify a convention, and then what legislation shall contain. Moreover, the conventions themselves usually set obligations that are expressed as principles only. While there are some conventions that specify more explicit rights (such as those on freedom of association and rights to collective bargaining), the great latitude available to countries in choosing whether

and how they implement a convention means that adherence is varied and very incomplete (Boockmann 2001; Hartlapp 2007).

Another, quite different, international example of multi-level regulation was the Bangladesh Accord on apparel manufacturing. The Accord was established in response to the deadly collapse of the Rana Plaza building that housed factories for over 1000 workers. It imposed legal obligations on lead brands and local factories. It only covered safety, not pay and conditions, but it required lead brands to set up audit processes that ensured Bangladeshi factories were complying with safety standards, forced to remediate or removed from the supply chain (Reinecke and Docherty 2015). The ILO was involved through chairing the oversight committee. The existence of legal obligations at the lower level (in this case, on the firm through the audit process) was central to the effectiveness of the Accord, unlike many other instances of voluntary codes of conduct or corporate social responsibility (Harpur 2006). The fixed-term (five year) lifespan of the Accord became a problem, leading to uncertainties about the future of regulation in this area due to political opposition by local employers and the Bangladesh government (BDApparelNews Desk 2019; UNI Global Union 2019).

A form of multi-level regulation more like directed devolution can be seen in occupational health and safety (OHS) regulation in Australia and New Zealand. National standards set a tight framework within which most Australian states and the government of New Zealand legislate. In essence, this legislation imposes obligations on employers to ensure a safe workplace—though, crucially, the relevant concept is actually of a 'person conducting a business or undertaking' (PCBU), meaning that contractors have the same protections as employees and PCBUs are responsible for the safety of both. That said, in many areas the detailed prescription of safety standards (how wide should a particular piece of gasket insulation be? what form of guard must be used on a specific machine?) is too complex for national regulation, and instead legislation imposes obligations on individual employers to establish certain procedures (health and safety committees or officers) to ensure that appropriate safety standards are in place in each workplace. In effect, each organisation is forced to take a risk management approach to handling safety. The lower level is obliged to design workplace regulations (practices) that enact the standards set at the state (effectively national) level.

Australian industrial 'awards' provide another illustration, though the form and content of 'direction' varies over time and by issue (author ref). Typically, a 'test case' by a tribunal (presently the Fair Work Commission or FWC) established a standard which would be applied, sometimes with minor local variations, into awards covering particular industries or occupations. Inter-award variation reduced over time in the face of pressure for reduced complexity. The people making awards are in the same institution as those determining the test cases, and sometimes awards are set by the same people who set the test case standards. But the FWC also showed one limitation of both the upper and lower levels, with successive conservative governments seen as 'stacking' appointments to the tribunal with appointees sympathetic to employers (Karp 2018).

Perhaps the most relevant example from that country's industrial system to the issues canvassed here was the Road Safety Regulation Tribunal (RSRT), a specialised, legislatively-

established offshoot of the FWC. This was an attempt to apply what were in effect minimum wage standards in a contractor context, specifically owner-drivers of trucks. The RSRT sought to establish minimum piece rates for long-distance truck drivers delivering freight between varying locations. These took account of the time normally taken to drive these distances, thereby seeking to achieve both the equivalent of minimum hourly pay for contractor truck drivers and to increase incentives for safe practices (the rates of pay being described by unions as 'safe rates'). It heard evidence from competing parties over a long period. Its weakness was political: it faced a concerted campaign by a conservative national government and the core corporations who benefited from low-cost owner-driving. This campaign was assisted by opposition from many owner-drivers themselves, the intended beneficiaries of the system. They failed to support it because of the RSRT's failure to account for the 'backload problem': the 'safe rates', while adequately compensating for the major long distance hauls, did not allow for the situation of the much smaller 'backloads' that drivers would take back to their home base at cheaper rates, but which were important to their financial viability. It was essential that the RSRT be able to take full account of these local circumstances, but it did not devise a system that did this. And it needed to account for power. Taking advantage of this campaign, the conservative government abolished the RSRT, and a worker challenge to the power of core corporations collapsed.

Another Australian example of multi-level regulation illustrates a quite different way *not* to do devolution. The move to 'enterprise bargaining' from 1991, by which wage determination was decentralised from national tribunal-based determination to bargaining between unions and individual employers, was certainly an instance of devolution. Bargaining at the enterprise level was constrained, to varying degrees, by the minimum standards established in awards. However, this move radically shifted the balance of power towards management and away from workers. In effect, it failed to adequately take account of power. A move from tribunal-based awards to direct bargaining between unions and employers would have probably enabled greater account to be taken of local circumstances, but the simultaneous forced move from multi-employer to single-employer bargaining weakened unions critically, because of their reliance on collective power to provide a countervailing power to employers. Australia's union movement was the only one in the OECD to support decentralisation in bargaining (Katz 1993; Briggs 2001). Progress to reducing the gender pay gap has halted and inequality has widened (Whitehouse 2017; Stewart, Stanford, and Hardy 2018). A shift from awards to bargaining, without the shift in bargaining level, would have simply made Australia's system consistent with that applying in many other OECD countries. This example shows that directed devolution and decentralisation are not the same thing, and that the implementation of directed devolution needs to be done in a way that recognises the reality of the distribution of power, and avoid undermining the power of workers.

At the same time, it should be clear that directed devolution is *not* several things. As a form of multi-level regulation, it is not a variety of soft or voluntary regulation. The promotion of corporate social responsibility (CSR), seen as a 'soft regulation' alternative to direct regulation, has failed to deliver socially responsible behavior by corporations, with recent examples including the collapse of tailings dams, financial institutions raiding the savings of the dead, and cladding fires incinerating building residents (Burchell 2008; Sisson and

Marginson 2001; McKee 2017; Santamarina, Torres-Cruz, and Bachus 2019; Gilligan 2019). Where corporate objectives have been at odds with those of labour and the state, which has been commonly the case, the lack of enforceability of CSR has shown it to be meaningless (Doane 2005). Likewise, directed devolution is not a form or 'self regulation', nor a new version of 'New Labour', nor a form of deregulation; by contrast, it is a means by which effective regulation can occur. Nor, though, is it a mode of uniform regulation. It is not a policy in itself. Rather, it is an approach to a potential range of policy issues. It is an attempt to identify a means of validly approaching some difficult policy problems.

This discussion of firms of multi-level regulation also shows us that, while it is good to experiment, actors and policy makers need to have long term strategies, including plans to make mechanisms permanent if appropriate (and avoid, if possible, the dangers of temporary or fixed-term arrangements), to be careful in the selection processes for institutional members, and to be prepared to deal with powerful opposition, at both the higher and lower levels, from well organised and well-resourced interests.

Criteria for directed devolution

The examples discussed above suggest not only some of the problems to be avoided but also some criteria that we can use to determine where directed devolution may be a useful approach to take to policy.

Directed devolution can be useful where general principles can be determined, but there are complications with implementation. The general principles are determined at the national level, and the complications with implementation are sorted out at the lower level.

Directed devolution is useful where establishing enforceable general principles is important, and it can make a real difference. It is useful there when there are large variations in circumstances between organisations or industries, such as in payment systems or methods of generating surplus, where these can affect how a standard should be expressed. This means where the variations are not just a result of different degrees of exploitation or bad behaviour, but are inherent in the issues. It is not the differences in exploitation or bad behaviour between, say, the hospitality and food delivery sectors that warrant consideration of a directed devolution model; it is the great differences in how workers are paid and in how corporations are organised to create profit that make directed devolution relevant. In short, the 'devolution' part of 'directed devolution' is aimed at capturing the benefits of flexibility to respond to the uncertain effects of disruption, and to learn from the many policy experiments that inevitably occur.

Finally, directed devolution is appropriate where devolution of matters of detail can be achieved without losing enforceability, and where some method can be found to do so without shifting power away from those with less power.

Revisiting the application of minimum standards in the 'platform' or 'gig' economy

Let us now revisit and elaborate on how this principle of directed devolution can be applied in the platform economy. There would be (national) level minimum standards in minimum pay established, that is employment standards for workers not employees, and then it would be left to tribunals or agencies ('agencies of detail') to determine how this standard applies in particular sectors (outside conventional employment). Framework legislation would set out a legally-binding requirement, for example that all workers are entitled to a minimum income of a certain amount, to certain conditions of employment and to rights to collectively bargain ('standards'). It would establish agencies or tribunals to deal with the application of this prescriptive principle in various contexts. Personnel between the higher and lower levels might partly overlap. The implementation of those minimum conditions in each relevant context would be suspended until that agency or tribunal makes a decision in that context.

A subsidiary body — an 'agency of detail' — would make a decision, based on evidence presented to it. Those minimum standards set by the higher level would (to the extent that they related to matters outside the conventional employment relationship) not come into effect until a decision was made by an agency of detail. By setting at a higher level the obligations that apply, the power relationship is, to an extent, reset. Working out at a lower level the detailed obligations on capital and labour enables the detailed nuances to be taken into account. There would be no need for the agency to determine the standard itself. That will have already been set at higher level. The agency is there to work out the how to make it work.

It could deal with a general case for implementation of the relevant standards, following an application by one or more parties (eg a union or other worker association), or in response to a case prosecuted by an aggrieved individual. The agency would hear the evidence from all sides on the practical aspects of how to implement the standards in that particular context. If it was a specific case run on behalf of an individual—asserting that their rights to the higher-level standards have not been upheld—the mechanics may be slightly different to the general case. In the end, though, this would still end up with both sides presenting evidence on the general practicality of various solutions and the best means of achieving it. In sequencing cases, priority should be given to situations where the workers involved are in a potentially vulnerable situation, taking account of news stories, reports, investigations, or initial submitted evidence.

Directed devolution is not a substitute for specific regulatory interventions in the platform economy, for example to enable proper classification of workers as employees vis-à-vis contractors. There is nothing in the directed devolution model that would undermine the rationale for reforms like the AB5 legislation in California. It is a complement, not a substitute, for such reforms, recognising that they have limits and trying to address those. To the extent, however, that a directed devolution approach could render the employee-contractor distinction less important, it would move us closer to a 'universal work relation' framework advocated by Countouris (2019) (and canvassed by Stewart and Stanford 2017).

Conclusion

Disruption caused by the logic or modern capitalism and the processes of technological development has torn apart the 'web of rules' that protected workers in the past. In its place has risen a 'patchwork of rules' as actors have engaged in institutional experimentation to try to recover lost ground. But coverage of this patchwork is, by definition, uneven and it is problematic for actors to learn from the successes and failures of their various experiments, even those policy makers who wish to protect workers from the potential for exploitation.

Sympathetic policy-makers need institutional forms that can respond to the innovation that created the disruption, protecting the interests of the vulnerable who are their putative concern, and enabling innovative policy responses to be tried and their lessons learnt and generalised. Directed devolution is one such form. It means legal entitlements or obligations are set and a higher level, and then a lower level is required to determine the detailed application of that standard and in doing so to protect the interests of the workers concerned. There may be constitutional issues to deal with in specific national contexts but they would be manageable (in Australia, for example, by use of the 'corporations power' in the constitution). It is a model that has potential applications elsewhere into sectors subjected to digital disruption, such as the intrusion of decision-making algorithms into human resource management and consultation on digital technological change, but these are matters for other investigations. In the meantime, the methods by which the interests of the workers concerned are protected through this process boil down to the factors that have always been important is assessing and addressing power: building collective organisation; coordinating knowledge transfer; anticipating the mobilisation of counter interests; dividing opposing interests where possible; constructing viable alliances; ensuring that workers have the resources needed to participate (for example, to present evidence to lower level agencies); and developing thoughtful strategy in response. But traditional power-building tools must be supplemented with institutional arrangements that can take account of nuanced and complex circumstances and the need for actors and organisations to learn.

APPENDIX B

DEALING WITH ALGORITHMS

Cathy (O'Neill 2016) has written of modern algorithms as 'weapons of math destruction'. The problem is of unfair, discriminatory outcomes from the use of mathematical algorithms in decision making, often hidden in computer source code or even the created memory for the machine's 'brain', and often reflecting prior bias (in e.g. recruitment, promotions, lending decisions, sentencing, welfare benefits) and associated with secrecy and lack of accountability. Yet data scientists insist these algorithms are neutral, firms and administrators love the cost savings and simplicity of decision-making, and the algorithms are notoriously difficult to make sense of even if you can read code. It would be near impossible for workers to be universally protected by a legislative prescription on AI used in HRM, as each firm's AI systems would differ — some bought 'off the shelf', some developed in house — and the details would be impenetrably opaque.

A 'directed devolution' approach would be to require that organisations using algorithms in decision making must set up independent ethics committees (IECs) to oversight them. These IECs would be required to determine processes for auditing algorithms, and resolve any dispute. Failure to establish an IEC would be a *prima facie* indication that organisational processes are unfair, but establishing an IEC would not obviate an organisation's liability for unfair practices.

In this example, the organisation becomes the 'agency of detail' described in the previous example. Crucially, it is not able to avoid its responsibilities. The organisation would not be able to circumvent its obligations in the manner of 'self regulation' because it remains liable for anything that goes wrong. Organisations use mathematical algorithms to reduce costs and reduce risk, and hope that accountability can also be avoided. 'Sorry, but it's a decision driven by the numbers and the facts, not by the discretion of any individual or committee in the organisation.' (Or, in the words on *Little Britain*, 'computer says no!'). In the end, though, how 'numbers' and 'facts' drive decisions is determined by recent or long-passed decisions of people employed or contracted by the organisation. The proposal here would force organisations to internalise the risk and make their own assessments as to how best to manage that risk, rather than transferring it onto the people affected by decisions.

How would this work in practice? An organisation might decide to automate parts of its recruitment and selection process, by using an artificial intelligence (AI) capability. A common way AI is deployed here is to 'train' it by feeding it CVs of successful and unsuccessful applicants from previous selection rounds. Rather than removing subjectivity, this often leads to previous biases being systematically reproduced but much harder to overcome because of the aura of objectivity and the opaqueness of code (O'Neill 2016). Computer-driven decisions have the appearance of being unable to be overturned—one worker was sacked by a computer and, even though the firm knew it was an error, it chose to unsatisfactorily work around rather than overturn the sacking (Ross and Carrick 2018). It is logistically impossible for an outside body to audit the mountains of code countless

organisations would use to make such decisions, but an internal ethics committee, set up in each firm using AI for recruitment, could be required to ensure that all code was auditable or at least able to be assessed on a risk-management basis. An aggrieved worker could still take court action for discrimination if it could be shown, but the absence of an ethics committee, or a demonstrable failure of its processes, would provide *prima facie* evidence that the corporation was indeed engaging in discrimination. Corporations would have to make decisions as to how much risk they were willing to tolerate, not how best they could transfer risk onto others. Workers would have more realistic protections against arbitrary adverse actions.

IECs may be important not only in relation to recruitment, selection and promotion but also in relation to corporate surveillance of employees—potentially a more serious issue adversely affecting a larger number of workers. Moreover, while IECs provide a policy solution in relation to HR practices, they could also be applicable to outward-facing aspects of corporate behaviour as well, such as consumer loans.

APPENDIX C

RESPONDING TO DIGITAL JOB DISPLACEMENT

One of the major concerns regarding the application of digital technology is that many workers' jobs will be lost. Estimates of the proportion of jobs susceptible to automation through the digital 'revolution' range from under 10 per cent to nearly 50 per cent (Frey and Osborne 2013; Arntz, Gregory, and Zierahn 2016). While job losses may be much less than this, due to the inability of such approaches to take account of either the cost of automation or the likely new areas of consumer expenditure, it is likely that many workers will be displaced within firms. This potential is a source of much public angst about the future.

Broad-brush approaches in this area, from general prohibitions to 'robot taxes', may do more harm than good (M. James 2017), and often the people best qualified to regulate specific technologies are the people directly affected. There are benefits from establishing local firm-based bodies for consultation on the introduction of technology at work. This approach would not, however, prevent technological advances or gains in productivity. Employees in firms contemplating new technology acknowledge that this often assists in enhance their own job security. This is evidenced by the way that, in Germany, manufacturing employees' influence in the introduction of technological change is institutionalised through works councils, yet it appears that 'exposure' to robots is associated with an *increased* probability that an employee will keep their job (Dauth et al. 2017).

This could not be the only means of overcoming adverse employment effects of new digital technology — much depends on opportunities for retraining and redeployment, including through public agencies, which in turn is shaped by government actions, especially when the geographic dimensions of technological change are recalled. But such directed devolutionary responses would be an important part of an overall strategy of ensuring the gains of technological advance are generalised and not used to disadvantage particular workers.

APPENDIX D

THE REALITIES AND FUTURES OF WORK