Submission No 23

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

Organisation: The Australian Workers' Union

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THE AUSTRALIAN WORKERS' UNION

STRONGER TOGETHER

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

Legislative Council of New South Wales

Submission of
THE AUSTRALIAN WORKERS' UNION

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INTRODUCTION

1. The Australian Workers' Union (the **AWU**) welcomes the opportunity to make a submission to this critical inquiry into the future of work in New South Wales (**NSW**).
2. The AWU is the nation's oldest trade union, representing over 20,000 workers in NSW in a diverse array of industries, including:
    a. steel, aluminium, glass and other manufacturing
    b. tunnelling and civil construction
    c. horticulture
    d. roadmaking and asphalt
    e. quarrying and mining
    f. hairdressing
    g. field operations in the National Parks and Wildlife Service and State Forests
3. This inquiry offers a timely opportunity for the NSW Parliament to consider the adequacy of the existing legal framework for the regulation of the 'world of work' in 2020 and beyond.
4. Our submission focuses on (a) automation and (b) workplace surveillance. In relation to other aspects of the terms of reference, we support the submissions of Unions NSW and its affiliated unions.

AUTOMATION AND REDUNDANCIES

The Australian Approach

5. Rapid technological advancement brings with it a host of public policy challenges, in particular the question of how (and whether) to regulate the application of new fields of knowledge to economic and social life.
6. The default position taken by Australian government appears has been one of 'non-interference', treating technological innovation as best left to the free market.
7. While it may be tempting to think that non-interference is a neutral stance, the consequences for the organisation of society will be profound if governments allow technology companies to shape the future of our workplaces.
8. International labour standards have long recognised the need for a tripartite approach to the introduction of technological change into workplaces, in in recognition of the often dire consequences for retrenched workers of unemployment. These difficulties are particularly acute for employees in 'one-industry' towns and those with specialised skillsets for which few alternative employment opportunities are available.
9. What might be called the "Anglo-American" approach, adopted in Australia, has been to largely reject tripartism in favour of support for managerial prerogative. To that end, while our industrial awards and enterprise agreements place consultation obligations on employers who are implementing operational change:

a. those consultation obligations do not arise until after the decision has been made to implement the change; and

b. those obligations impose no substantive obligations on employers, merely procedural ones to consider the views of affected employees.

10. The weakness of these obligations is even more pronounced in the context of contingent labour (agency casuals, independent contractors and 'gig' workers), who are not even entitled to consultation due to the lack of the requisite employment relationship.

11. Rather than providing any genuine veto power to workers or trade unions, the laws merely provide heightened compensation payments in cases of retrenchment on operational or technological grounds.

12. The consequences of our limited protections for retrenched workers have been made all the more apparent as a result of COVID-19, highlighting the fact that workers and their representatives have effectively no legal means to challenge economic dismissals, even where a company is acting opportunistically rather than out of genuine financial necessity.

Alternative Approaches in the OECD

13. The Australian approach contrasts with the approach taken in many other countries within the OECD, which have imposed substantive obligations on employers who seek to retrench large numbers of workers. Australia ranks below the majority of OECD nations in strictness of employment protections for collective dismissals.[1]

14. The OECD helpfully provides a database summarising the obligations on employers seeking to implement significant operational change.[2] For instance:

a. in the Netherlands, employers dismissing 20 or more employees require the permission of the Public Employment Service before giving effect to the dismissals. Employers must engage in at least 30 days of *social plan negotiations* (e.g., employment transfers, re-training, early retirement measures, financial compensation) with the employees' works council before dismissals can take effect.[3]

b. in Japan, employers dismissing 30 or more employees must notify the Public Employment Service and submit a re-employment assistance plan, devised in consultation with unions and worker representatives. The notification must take place at least 1 month before the dismissals can take effect.[4]

NSW's Employment Protection Act

15. Section 14 of the *Employment Protection Act 1982* (NSW) formerly permitted the Industrial Relations Commission to make orders requiring employers to provide assistance to employees similar to the *social plans* referred to in the Netherlands example above

[1] *Strictness of employment protection – collective dismissals (additional restrictions)* (OECD, 2019), accessed at https://stats.oecd.org/Index.aspx?DataSetCode=EPL_CD.
[2] *OECD Indicators of Employment Protection* (2020), accessed at: http://www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm.
[3] Annexure A (*OECD Indicators of Employment Protection – The Netherlands*).
[4] Annexure B (*OECD Indicators of Employment Protection – Japan*).

(retraining, preference in re-employment, compensation).[5] That provision no longer applies to private sector employees due to the transfer of industrial relations powers to the Commonwealth.

16. Such a provision would encourage employers to genuinely negotiate with unions and workers, rather than unilaterally impose top-down change with the shortest possible consultation period.

Effect on Injured Workers

17. The effect of redundancies on injured workers can be especially negative. Injured workers are far less likely to be able to find new employment, in particular where their skills are predominantly manual and their injury has caused ongoing incapacity.

18. While NSW law currently prohibits dismissing an employee on the basis of a work injury, this provision does not protect such workers from the adverse effects of economic restructuring.

19. Our workers compensation laws should be amended to require employers to provide ongoing suitable duties to injured workers, with an enforceable remedy available to injured workers in either the Industrial Relations Commission or the Workers Compensation Commission (soon be renamed the Personal Injury Commission).

20. Section 18 of the *Return to Work Act 2014* (SA) provides a far more effective right for injured workers to seek reinstatement/ongoing duties than its counterpart in Part 8 of the *Workers Compensation Act 1987*.[6] Importantly, it leaves the discretion with the tribunal as to whether to order reinstatement, even where the dismissal was for economic reasons.

21. NSW employers largely refuse to accept that they may be required to 'create' modified roles for injured workers. It is appropriate that large employers, as part of their social license to operate, be required to create modified roles for workers who have been injured in their service. Without such provisions, injured workers are disproportionately affected by technological change and left with limited support.

WORKPLACE SURVEILLANCE

Background

22. Workplace surveillance is becoming increasingly advanced and widely used across workplaces to monitor and gather information on the behaviour and activities of workers. The *Workplace Surveillance Act 2005* (NSW) (the **WS Act**), which governs surveillance of workers by employers in New South Wales, is not fit for 21st century workplaces. Workplace surveillance laws must be reformed to protect workers and remain relevant and adapted to the widespread use of advanced and comprehensive surveillance in workplaces.

AWU's Concerns with the Workplace Surveillance Act 2005

[5] See Annexure C (NSW *Employment Protection Act*, Parts 2 and 3).
[6] Compare Annexure D (SA *Return to Work Act*, s 18) and Annexure E (NSW *Workers Compensation Act*, Pt 8).

23. The WS Act gives employers broad powers in its use of surveillance of workers by only requiring that:

    a. surveillance not occur in change rooms, toilets, and shower facilities;

    b. workers be notified 14 days before installation of surveillance; and

    c. visible signs be used to notify workers of the use of surveillance.

24. The AWU has significant concerns with the WS Act as it fails to recognise the power imbalance between employers and workers.

25. Under the WS Act, employers have broad powers to monitor workers with very few protections. On the other hand, workers have no avenue to object to unreasonable surveillance and monitoring by their employers.

26. Specifically, the WS Act does not give workers any right to:

    a. be consulted on the introduction of surveillance in the workplace;

    b. refuse consent to the surveillance;

    c. question the need or purpose of surveillance;

    d. access the data/footage acquired though surveillance; and

    e. prevent unauthorised access, distribution of the information/data attained through surveillance.

27. In the AWU's experience, while employers commonly introduce heightened surveillance under the guise of safety, in practice it is inappropriately used to supervise, monitor and discipline workers for industrial issues.

28. In 2018, the Australia Institute conducted an online survey of workers' experience of workplace surveillance and found that workers felt (a) pressured and stressed as a result of constant monitoring and (b) powerless due to their lack of rights and their employer's lack of legal obligations under the WS Act.[7]

29. The survey also reached the following findings regarding workers' views and understanding of the issue:

    a. 71% stated that the surveillance technologies reduced privacy as well as trust between them and management;

    b. 73% stated that there should be legal restrictions on how employers can use surveillance technologies; and

    c. 10% of the 73% stated that their employers used the data obtained from surveillance devices to unduly discipline them.

[7] Henderson, Swann & Stanford, *Employer's Eye: Electronic Monitoring & Surveillance in Australian Workplaces* (The Australia Institute, November 2018), copy attached to this submission as Annexure F and accessible at https://www.tai.org.au/sites/default/files/GHOTD%202018%20Under%20the%20Employer%27s%20Eye.pdf.

30. The AWU can draw on numerous examples of the WS Act failing to recognise the power imbalance between employers and workers in the course of workplace surveillance.

Case Study – Blue-Collar Worksite in NSW

31. A large blue-collar worksite in NSW introduced workplace surveillance via CCTV cameras, with the stated intention that it would only be used to review significant safety incidents and that footage would be destroyed after 7 days. Workers were not consulted on the introduction of workplace surveillance, but only informed that within 14 days the surveillance would commence.

32. However, once the surveillance started, the employer reduced the number of supervisors and encouraged the remaining supervisors to fulfil their supervisory duties remotely through the surveillance. As a result, workers now receive very minimal support or access to their supervisors on the ground.

33. Additionally, the surveillance is now used to check how often workers take breaks, how much time they spend on bathroom breaks, who they interact with during shift and other similar behaviours. The surveillance has also been updated to extend to new areas of the worksite and follow and zoom-in on individual workers (to the extent that a supervisor is able to clearly read a newspaper on the site floor remotely through the surveillance).

34. The surveillance has moved far beyond the purpose for which it was first introduced. It is highly intrusive and acts as a means of excessively controlling workers' activities and movements.

35. The surveillance has also been used to target individual workers by taking, or threatening to take, disciplinary action against them, including by entrapment.

36. For example, supervisors have deliberately called workers on their mobile phone while remotely monitoring them via surveillance. If the worker answers the phone, the supervisor takes disciplinary action against the worker for answering a phone call during shift time.

37. The use of surveillance at this large blue-collar worksite has resulted in low morale amongst the workforce and high levels of mental health issues. The constant performance monitoring through surveillance has led to stress, excessive and unnecessary pressure, tension, anxiety, depression, and fatigue. In many cases, workers have not been able to take the pressure of the constant and intense surveillance conditions and have quit their jobs.

38. Three AWU members have been placed on suicide watch and one has taken his life after working for this employer. The excessive use of surveillance to supervise has also resulted in a highly dysfunctional and negative workplace, with a lack of trust and respect between workers and management

Areas for Reform

<u>Alternatives to surveillance</u>

39. The WS Act must require an employer to satisfy workers and their trade union that all alternatives have genuinely been explored prior to considering introduction of workplace surveillance/monitoring.

Consultation and agreement of workers

40. There is a clear power imbalance between workers and their employers in relation to workplace surveillance. Employers are not required to consult or seek agreement of workers before introducing workplace surveillance. To remedy the power imbalance, the WS Act must prescribe a requirement for the employer to consult and reach agreement with workers and their trade union representatives before installing surveillance at work.

41. The consultation must include agreement on a range of matters including:

    a. the purpose of surveillance;

    b. the use of the information/data attained from the surveillance;

    c. balancing the use of surveillance and its impact on workers' mental health; and

    d. how workers privacy will be protected, i.e. access and storage of information attained from the surveillance.

42. Inclusion of workers in the decision-making process will reduce the risk of unauthorised use of surveillance, increase worker satisfaction and productivity, reduce mental health issues, and create positive workplace morale.

Purpose and use

43. Employers regularly introduce surveillance under the guise of safety concerns, yet use it to monitor, supervise, manage performance and discipline workers. The WS Act should be clear that the workplace surveillance will only be used for the purposes which workers were consulted on.

Privacy

44. Due to the inadequacies of workplace surveillance laws and privacy laws, workers are powerless to prevent any misuse or unfair handling of their personal information gathered by way of surveillance.

45. Workers are not provided with any protection or privacy in relation to the collection, storage, use or disclosure of information gathered through surveillance.

46. The AWU is aware of a large manufacturing worksite in NSW where there are no policies around privacy of information attained from surveillance. As a result, workers' footage is accessible remotely by all supervisors at any time and visible to all other workers on the site.

47. Further, workers are not able to access information relating directly to themselves which the employer has attained through the surveillance. The AWU has had extreme difficulties in attaining workers' footage from numerous employers, even in circumstances where the employer is relying on the video footage to dismiss a worker.

48. Employers must ensure that any data or footage derived from workplace surveillance is free from unauthorised access and prevent the unauthorised or inappropriate use, alteration or disclosure of any personal information about workers attained through surveillance.

49. Additionally, workers must also have access to any surveillance information collected about them.

Workers/Employees

50. The current basis of the WS Act is the employment relationship. This is not appropriate at a time when more and more workers do not fit into this model. Many blue-collar workplaces may include labour-hire (agency) workers, independent contractors and 'gig' workers, alongside direct employees of the enterprise.

51. Just as the *Work Health and Safety Act 2011* (NSW) recognises that the operators of enterprises (*persons conducting a business or undertaking*) have duties towards all workers in their workplaces, not just direct employees, so should the WS Act replace the outdated reliance on the employment relationship with protections for all workers in the workplace.

Review

52. The WS Act is outdated and requires reform. It is crucial that workplace surveillance laws are revised to:

    a. ensure that there is no power imbalance between workers and their employers;

    b. safeguard workers' rights and curtail the misuse of surveillance technologies by employers;

    c. remain up to date with surveillance technologies and cover any new forms of surveillance, monitoring and testing being used, in particular for workers now having to work from home due to the COVID-19 pandemic.

RECOMMENDATIONS

Automation

Recommendation One

The NSW Government support reform at the federal level to require employers to negotiate with unions and workers, and notify employment authorities, of any proposed restructures likely to lead to significant job losses (15 or more), having regard to the existing provisions of the *Employment Protection Act 1982* (NSW) and the laws concerning collective dismissals in other OECD nations such as Japan and the Netherlands.

Recommendation Two

The NSW Government replace the existing injured worker reinstatement provisions in Part 8 of the *Workers Compensation Act 1987* (NSW) with a scheme modelled on section 18 of the *Return to Work Act 2014* (SA).

The new scheme to expressly state that provision of suitable duties may require the creation of a new or modified role for the injured worker in an appropriate case (e.g., in the case of a large or multinational employer).

Workplace Surveillance

Recommendation Three

The *Workplace Surveillance Act 2005* (NSW) be amended to:

- incorporate a binding set of workplace privacy principles to protect workers' personal information;
- provide a right to workers to access their own personal information held by their employers, including information obtained through surveillance;
- require an employer to satisfy workers and the relevant trade union that all alternatives have genuinely been explored prior to considering introduction of workplace surveillance/monitoring;
- require employers to genuinely consult with, and obtain the consent of, the workforce and the relevant trade union in seeking to implement surveillance (whether CCTV, electronic or otherwise);
- prohibit employers from using workplace surveillance for purposes other than agreed with the workforce.

Recommendation Four

The *Workplace Surveillance Act 2005* (NSW) be amended to empower the Industrial Relations Commission of New South Wales to deal with disputes over workplace surveillance and to arbitrate where agreement cannot be reached through alternative dispute resolution methods.

Recommendation Five

The *Workplace Surveillance Act 2005* (NSW) be amended to refer to 'workers' and 'persons conducting a business or undertaking' instead of 'employees' and 'employers'.

These definitions should mirror those in the *Work Health and Safety Act 2011* (NSW).

Recommendation Six

SafeWork NSW issue guidance to employers on the psychosocial risks associated with use of workplace surveillance.

Inspectors engaged by SafeWork NSW and the NSW Resources Regulator focus on workplace surveillance in monitoring employers' compliance with their duties under the *Work Health and Safety Act 2011* (NSW).

ANNEXURES

A. OECD Indicators of Employment Protection – The Netherlands
B. OECD Indicators of Employment Protection – Japan
C. *Employment Protection Act 1982* (NSW), Parts 2 and 3
D. *Return to Work Act 2014* (SA), s 18

E. *Workers Compensation Act 1987* (NSW), Part 8
F. Henderson, Swann & Stanford, *Employer's Eye: Electronic Monitoring & Surveillance in Australian Workplaces* (The Australia Institute, November 2018)