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

Organisation: SafeWork NSW

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The Hon. Daniel Mookhey MLC
Chair
Select Committee on the Impact of Technological and Other Change on the Future of Work and
Workers in New South Wales
Parliament of NSW
By email: futureofwork@parliament.nsw.gov.au

Dear Mr Mookhey

Thank you for the invitation to make a submission to the inquiry by the Select Committee on the
Impact of Technological and Other Change on the Future of Work and Workers in New South
Wales.

SafeWork NSW is the state's work health and safety (WHS) regulator. We work with the NSW
community to reduce work related fatalities, serious injuries and illnesses and make it easier to do
business safely.

We:

- provide advice on improving work health and safety
- provide licences and registration for potentially dangerous work

- investigate workplace incidents and enforce work health and safety laws in NSW

With more than a third of Australia's entire economic output coming from NSW, the work we do to
make workplaces safe is very important.

In response to Term of Reference **(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, business using online
platforms*

The term on-demand or gig-economy includes the more traditional terms such as
freelancers, consultants, independent contractors and temporary contract workers. This
submission will focus on workers who are in a business relationship, as described by the
Federal Select Committee on the Future of Work and Workers,[1] where 'a company makes
money directly as a result of workers' labour, and workers are dependent on the company
for work and income, these workers are employees of that company.'

SafeWork NSW submits that persons working for, or with, businesses using online
platforms are adequately captured within the definition provide by the WHS Act 2011. The
NSW Legislation adopts in its entirety the definition provided in the Model WHS Act.

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[1] Hope is not a strategy – Final Report Select Committee on the Future of Work and Workers
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers/Futureo
fWork/Report

The Model Work Health and Safety Laws provide that a 'A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as, an employee, a contractor or subcontractor, an employee of a contractor or subcontractor, an employee of a labour hire company who has been assigned to work in the person's business or undertaking, an outworker, an apprentice or trainee, a student gaining work experience, volunteer or a person of a prescribed class.'[2] In the recent review of the Model WHS Legislation Ms. Boland, the reviewer, stated that the introduction of the Model WHS Act in 2011 'significantly broadened the reach of the laws' and that 'the laws were crafted to deal with work being performed in any place and not necessarily at a single, fixed workplace.'[i3]

Marie Boland further states that 'it is important that the model WHS laws keep pace with the changing nature of work so that regulators can continue to work effectively to reduce harm as industries evolve. The model WHS laws anticipated that the capacity to develop model WHS Regulations and model Codes would enable them to respond to emerging hazards (such as those mentioned by stakeholders during this Review), industries or changing work arrangements.'

ii. the application of Commonwealth and New South Wales workplace laws and instruments to those persons, including superannuation and health and safety laws

This submission will not speak to the application of superannuation laws but will instead focus on the application of the health and safety laws in NSW.

In 2011, Safe Work Australia developed a single set of *WHS* laws to be implemented across Australia. These are known as 'model' laws. New South Wales adopted these laws in 2011 and they came into effect on 1 January 2012.

The three-tiered model WHS laws are based on the Robens model.[4] This model recommends that duty holders be required to comply with general duties of care set out in a broad-based WHS statute, together with more detailed standards laid down in regulations, with codes of practice forming a 'third tier' of the WHS regulatory architecture. This has been the fundamental structure for regulating WHS for decades. The three-tiered framework was widely supported across stakeholder groups.[5]

SafeWork notes the recommendation from the Federal Select Committee which states 'Australia's future workplace laws and legislators will need to more rapidly adapt to and anticipate the evolving nature of work and employment relationships, so as to ensure that workers, however classified, are afforded fundamental workplace rights and entitlements,' and does not see this as incongruent with the findings of the Boland review.

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[2] WHS Act https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws/review-model-whs-laws
[3] Boland Review, https://www.safeworkaustralia.gov.au/doc/review-model-whs-laws-final-report pg.39
[4] A common term used to describe an approach to regulating WHS established under Lord Robens' Report of the Committee on Safety and Health at Work (UK) in 1972. Key features of the Robens model include a unified and integrated system of general duties and self-regulation through greater consultation between workers and PCBUs.
[5] Exceptions were the Chamber of Minerals and Energy and the Minerals Council of Australia, which both called for a two-tiered approach comprising only the model WHS Act and the model WHS Regulations: Chamber of Minerals and Energy Submission, p 9; and Minerals Council of Australia Submission, p 5.

iii. *whether contracting or other arrangements are being used to avoid the application of workplace laws and other statutory obligations,*

SafeWork NSW will only speak to the application of work health and safety laws and would direct the Committees attention to the Boland review and Ms. Boland's statement that 'the introduction of the Model WHS Act in 2011 'significantly broadened the reach of the laws' and that 'the laws were crafted to deal with work being performed in any place and not necessarily at a single, fixed workplace.'[6]

iv. *the effectiveness of the enforcement of those laws and regulations*

SafeWork NSW considers that the WHS Laws in NSW are effective and enforceable in the management of worker safety in the emerging non-traditional working arrangements. This is supported in the Boland Review where it states that 'WHS regulators generally considered that the current model WHS laws are broad enough to deal with emerging business models.'[7] SafeWork NSW acknowledges however, that as pointed to by Ms. Boland 'this view has not been comprehensively tested to date.' It is further noted 'that in this context that a Senate select committee reporting on the future of work and workers in Australia recently recommended, among other things, that the Australian Government ensure legislated WHS rights for workers who perform non-standard work.'[8]

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*

WHS regulators in the Commonwealth and in each state and territory are responsible for regulating and enforcing the laws in their jurisdictions. The *model WHS laws* have been implemented in the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, South Australia, Tasmania and the Commonwealth. Some jurisdictions have made minor variations to make sure the legislation is consistent with their relevant drafting protocols and other laws and processes.[9]

vi. *Australia's obligations under international law, including International Labour Organisations conventions*

SafeWork NSW is a Member of Safe Work Australia and as such one of its key functions under the Safe Work Australia Act 2008 is to liaise with other countries or international organisations on *WHS* and workers' compensation matters.[10]

Australia is a founding member State of the ILO and a key partner of the ILO in promoting the Decent Work Agenda. Australia has ratified a number of Conventions, including seven Fundamental and three Governance Conventions and is part of the Asia-Pacific Government Group of ILO members.[11]

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[6] Boland Review, https://www.safeworkaustralia.gov.au/doc/review-model-whs-laws-final-report pg. 39
[7] Boland Review, https://www.safeworkaustralia.gov.au/doc/review-model-whs-laws-final-report pg. 40
[8] Senate Select Committee on the Future of Work and Workers, *Hope is not a strategy—our shared responsibility for the future of work and workers*, Commonwealth of Australia, Canberra, 2018, Recommendation 8, p viii.
[9] Safe Work Australia https://www.safeworkaustralia.gov.au/law-and-regulation
[10] https://www.safeworkaustralia.gov.au/about-us/careers/who-we-work/international-collaboration#international-organisations
[11] https://www.ilo.org/pardev/donors/australia/lang--en/index.htm

Summary

In general terms, the three-tiered WHS Legislative framework in place in NSW, being the WHS Act 2011, WHS Regulation 2017 and the various Codes of Practice deal effectively with the challenges that arise from the changing nature of work through the emergence of the Gig and On-Demand economies. SafeWork NSW acknowledges however that the Boland review of the Model WHS Legislation contains a number of recommendations and that body of work will need to remain cognisant of the issues presented by these emerging and future changes to the nature of work.

On the question of whether existing WHS laws are sufficient to respond to such change, the 2018 Review of the model Work Health and Safety laws (Boland review) found that the ability to make regulations and/or codes gives the model WHS law framework the flexibility to respond to new hazards and working arrangements as they arise.

The Boland review specifically recommended that Safe Work Australia develop criteria to continuously assess new and emerging business models, industries and hazards to identify whether there is a need for legislative change, new model WHS regulations or model codes.

Accordingly, SafeWork NSW is open to investigating where our WHS laws might better accommodate the issues associated with new and emerging ways of working.

Future of Work

More generally in response to the Committee's Term of Reference, the following work is underway to aid the prevention of workplace harm in the future work environment.

In December 2017 SafeWork NSW established the Centre for WHS (Centre) as its research arm. The Centre aims to create an evidence-based approach for the prevention of WHS harm, and promotes a new perspective and collaboration practice for smarter, tangible research outcomes.

In January 2020, SafeWork's Centre sought creative research proposals through an expression of interest process to aid the prevention of workplace harm in the future. In line with the Centre's Research Blueprint, this intended to seek to better understand the impact of technological and other change on the future of work and workers to inform the prevention of harm in the workplace. To stimulate ideas for further exploration within, and outside of this program, the Centre published a horizon scan which analyses some of the factors that might shape the future workforce, and impact the way that society is structured and organised from an occupational perspective.

In response to this campaign, four projects were selected with work underway as follows:

1. **Trusting Artificial Intelligence at work:** This project aims to identify and mitigate the psychological barriers to accepting advice from advanced technology concepts (e.g., artificial intelligence, machine learning and robots) in the workplace. This will enable us to establish a set of design principles that will guide developers in the construction of systems that will be most conducive to safe and effective human-machine interactions.

2. **Flexible work and psychological safety**: This research will examine the psychosocial risks associated with flexible work arrangements. Flexible work is becoming more common and the demographics of the Australian workforce is shifting. More businesses are providing flexible work arrangements leading to a pressing need for a new and more inclusive WHS framework. This project seeks to understand the psychosocial risks that employees may face when working from locations different to their usual place of work, and to develop new strategies to prevent psychosocial harm amongst these employees.

3. **Ethical deployment of Artificial Intelligence in the workplace**: The researchers will seek to determine which principles are at the forefront of decision-makers' minds and

which tend to be overlooked. This knowledge will allow us to construct a scorecard that companies can use to track the degree to which their use of Artificial Intelligence (AI) technology aligns with the wellbeing of their workers. The study aims to assist businesses adopting AI technology while safeguarding workplace health and safety by developing a practical guidance on ethical approaches that champion wellbeing throughout the planning, implementation and continued use of AI technology.

4. **Preventing psychological harm in first responder organisations:** This research will investigate the harm that arises from traumatic experiences by looking at the fourth dimension of mental health, spirituality, in addition to psychological, biological and social factors. The research will work with emergency services to identify the symptoms of psychological harm arising from real and perceived traumatic experiences of first responders and explore what organisations can do to prevent and treat it.

The Centre has also undertaken the following research:

1. **Gig economy roles and responsibilities in WHS:** The research will establish a better understanding of the WHS perceptions and behaviours in the Australian gig economy context by focusing on food delivery services. Such knowledge will be used to enable the development of proactive prevention activities.

2. **Emerging work health and safety impacts on farmers:** The researchers will work with farming communities in Australia to explore how sustainable farming practices may offer co-benefits when it comes to the prevention of WHS harm amongst farmers. This will include developing a suite of sustainable and scalable solutions that will simultaneously deliver benefits to farmer health and safety, business productivity and the environment.

3. **Building Information Modelling for WHS management**: The current approach to managing work health and safety on major construction projects is using a WHS Management System. However, technological improvements have seen the rise of "digital engineering" and the use of BIM, a 3D model-based process that maps the physical and functional characteristics of a structure, to facilitate project design, planning and management. The benefits of BIM being expanded to cover WHS have been recognised world-wide. This project aims to advance this cause in Australia.

Work is planned for the second half of 2020 that includes:

1. **The impact of robotics on WHS**: With the expanding use of both collaborative and industrial robots in the work environment, this research seeks to understand the barriers and measures for safe WHS when people and robots share the same physical environment.

2. **The ageing demographic of the Australian workforce and prevention of WHS harm:** In 2017, 15 per cent of the Australian population were aged over 65 (n≈3.8 million), a proportion expected to increase to 20 per cent by 2037 (Australian Institute of Health and Welfare, 2018). The ageing population has been accompanied by a larger participation of older Australians in the workforce. More recently, older working Australians may be facing the real prospect of delaying retirement and working for longer having been impacted by the COVID-19 pandemic (Ormsby, 2020). The Centre for WHS aims to seek novel research that will provide greater understanding of how to prevent psychological and physical harm among older workers.

Summary

SafeWork NSW's Centre for WHS is undertaking a program of work to support the understanding of the future of work. This work is looking at technology, changing practices and people. This work will continue to evolve, as new understanding emerges, to aid the prevention of harm in our future workplaces.

Thank you again for the invitation to make a submission to the Committee.

Yours sincerely

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Better Regulation Division

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