

Supplementary
Submission
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**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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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

THE AUSTRALIAN WORKERS' UNION
Response to the Discussion Paper

7 APRIL 2021

Introduction

The AWU welcomes the opportunity to respond to the Discussion Paper issued by the Committee. While our initial submission focused on the issues of (a) automation and redundancy and (b) workplace surveillance, this submission deals with questions or issues posed by the Committee in the Discussion Paper on other aspects of the terms of reference.

1. What is the 'on-demand' or 'gig' economy?

The AWU considers that the inquiry should consider the detailed report of the International Labour Organization (ILO) *Digital labour platforms and the future of work: Towards decent work in the online world* (2018). This report included the results of a survey of 3,500 workers across 75 countries and outlines 18 principles for ensuring decent work on digital platforms.

While the ILO survey focused on microtask platforms, and uses a definition of 'crowdwork', we consider many of the insights are equally applicable to other forms of 'gig work'. The ILO report helpfully addresses the question "*Is crowdwork a new form of work*" at section 1.3:

Crowdwork is sometimes treated as a "new" kind of work: a transformation of labour predicated by the development of the Internet and the online platforms that currently support it. The argument that these platforms are "new" – something not quite the same as traditional "work" – has been one way that online labour platforms have attempted to evade existing labour regulations.

Yet, as this brief history has demonstrated, the use of the "crowd" (that is to say, the public at large) to contribute small bits of information to larger projects is nothing new. What is different today is the use of a new technological medium – the Internet and websites designed for it – to coordinate these projects, replacing some aspects of the organization with a software platform. Moreover, by breaking down jobs into "tasks", platforms facilitate new ways of commodifying labour, and selling it "on demand" to

businesses and others who are looking to outsource some aspects of their workload at a lower cost.

As others have argued, crowdwork resembles many long-standing work arrangements, merely with a digital tool serving as an intermediary. The strategies of crowdwork that centre on breaking down tasks into small units assignable to unskilled workers appears as “a throwback to the de-skilled industrial processes associated with Taylor, but without the loyalty and job security” (Cherry, 2016a, p. 3). The payment structure by task rather than time might also be seen to resemble pre-industrial piecework arrangements (ibid.). The contingency of crowdwork coupled with the decomposition of large tasks into piecework looks not dissimilar from the still-extant contingent labour arrangements of the garment and textile industry – whether it occurs in centralized sweatshops or the home of the worker who is trying to make up for low wages by taking on additional jobs as “homework” (Scholz and Liu, 2010). In addition, the matching services that some platforms provide for clients and workers appear, in practice, quite similar to the work of employment or temporary work agencies.

It is nonetheless clear that there are transformations of work arrangements happening today, and crowdwork might best be understood as part of a broader shift towards more precarious and contingent labour as well as towards more automated hiring and management processes. For example, in the case of Uber, arguably the most transformative innovation is the automation of the managerial role of taxi dispatch through the development of an algorithm. In the case of microtask platforms like CrowdFlower, it is instead the evaluative role of management that is automated through processes that assign each individual task to multiple workers and use a quorum system to compare and evaluate automatically which responses are “correct” in case of any disagreements. However, as this report will demonstrate, the actual labour of the workers who are still part of the system is that which is least changed from existing forms of piecework and data work. Understanding the specificities of these labour practices is fundamental for deciding how crowdwork platforms should be regulated.

This summary is a concise assessment of what is new and what is not in the ‘gig’ economy. As the ILO’s comments make clear, there is much about gig work which is similar to pre-existing work arrangements. Indeed, the novelty is as much in their ability to evade existing laws as it is their reform to the relations between employer, customer and worker.

Australia is far behind its peers when it comes to the regulation of the gig economy. The UK Supreme Court has recently confirmed that Uber drivers are ‘workers’ within the meaning of the *Employment Rights Act 1996* (UK) and entitled to a minimum hourly wage, payment for public holidays and maximum weekly hours of work.¹ The UK legislation contains a clear definition of ‘worker’ to ensure that platform or gig workers are covered by worker protections, while genuine small business operators are excluded. Similar protections are likely required under the European Union’s *Working Time Directive*.

2. How has the way we work in New South Wales changed?

As with the rest of the country, the majority of work now performed in New South Wales falls under the categories of ‘non-standard employment’. ‘Standard employment’ is understood to mean permanent, full-time employment directly by an employer who also operates the

¹ See *Uber BV and others (Appellants) v Aslam and others (Respondents)* [2021] UKSC 5. Copies of the judgment and a press summary are available at: <https://www.supremecourt.uk/cases/uksc-2019-0029.html>.

enterprise in which the worker is engaged. Standard employment contrasts with (in perhaps descending order of similarity to standard employment):

- part-time employment, in which a worker is contracted to work less than 38 hours per week but otherwise receives the benefits of a full-time worker on a pro-rata basis.
- casual engagement, in which there are no guaranteed hours of work in a particular week and no contractual obligation to provide work from week-to-week.
- labour-hire engagement, in which the worker is engaged by an agency which is in a contractual relationship with a host entity to provide labour to the host's enterprise
- gig work, platform work or crowdwork, as discussed above.
- contracting arrangements, which may be legitimate (in the case of a small business) or illegitimate (in the case of labourers on construction sites told to provide ABNs and submit invoices for work).
- contingent visa arrangements, in which the migration law context of a work relationship renders the worker unable to meaningfully resist exploitation without jeopardising their visa status or being excluded from the job market. This includes both visa holders whose resident status is tied to their job and student visa holders.

A detailed analysis of these changes has been set out in a number of studies, for instance:

- Laß and Wooden, "*Trends in the prevalence of non-standard employment in Australia*" in (2020) 62(1) *Journal of Industrial Relations* 3-32. The authors rely on both the University of Melbourne's *Household, Income and Labour Dynamics in Australia Survey (HILDA Survey)* and the Australian Bureau of Statistics's *Characteristics of Employment Survey (CoE Survey)*. The authors state:

According to both sources, less than half of the employed Australian workforce was in a standard employment relationship (i.e., had a permanent full-time job) in 2016 – 47.9% when using the CoE Survey and 45.1% when using the HILDA Survey. And both surveys indicate that the most prevalent form of non-standard employment is casual employment, accounting for almost one in every five workers (19.5% or 19.6%) when using a self-classified measure. (p 11)

[...] The country stands out in international comparisons both because of its relatively large non-standard employment share and because of the high prevalence of casual employment within this group. (p 26)
- Carney and Stanford, *The Dimensions of Insecure Work: A Factbook* (The Australia Institute's Centre for Future Work, 2018), which 11 indicators of insecure work to chart changes in the Australian labour market from 2012 to 2017 and concludes:
 - Part-time work has grown, and many part-time workers are underemployed and work very short or irregular hours.
 - Casual employment has also grown, especially quickly for men.
 - Self-employment is more common, especially part-time, unincorporated, solo entrepreneurs.
 - Earnings for workers in insecure jobs are low, and have declined in real terms.

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- Fewer workers are protected by enterprise agreements (especially in the private sector), while reliance on modern awards for minimum wages and conditions has expanded.
 - Temporary foreign migrants make up a larger share of the total potential labour force, and face especially insecure and exploitive conditions.
 - Young workers have faced the effects of labour market insecurity most forcefully. (p 19)

3. Flexible Work

The Committee has sought responses to the flexible work circumstances arising out of the COVID-19 pandemic. The AWU's members primarily work in industries where work from home (WFH) arrangements have not been possible during the pandemic. This includes, for instances, workers in the infrastructure, mining, steel and aluminium manufacturing, construction materials, road maintenance and asphalt, horticulture and pastoral industries.

We note, however, that the term 'flexibility' in the context of work has a contested meaning: it can refer to extended spans of hours and regularisation of work at unsociable times. By contrast, the Committee's meaning appears to be concerned with the ability of workers to reconcile their personal and family responsibilities with their work obligations. In this respect, Australia's high levels of overtime are worth pointing out and WFH arrangements during the pandemic may have exacerbated the issue. For instance, in Nahum, *Work and Life in a Pandemic: An Update on Hours of Work and Unpaid Overtime Under COVID-19* (The Australia Institute's Centre for Future Work, 2020), the author finds at p 33 that:

[...] despite many workers performing some or all of their work from home in the face of the COVID-19 health crisis, the problem of unpaid overtime among workers has not just persisted but worsened. This effect is amplified by the fact that the caring and domestic responsibilities of many households have increased in 2020, with that burden falling especially on women. Additionally, the polarisation of working hours—the mismatch of too many hours for some workers, and too few (paid) hours for others—remains a persistent and disappointing feature of the Australian labour market.

In addition, Australia's disjunctive labour market – in which a one group of workers have full-time jobs and work regular overtime and the other group have insecure jobs – contributes to the gender pay gap, as women are more likely to form part of the second group.²

4. Technology and the automation of work

This question is the subject of our original submission to the inquiry.

5. Workplace laws and instruments

Since the commencement of the *Fair Work Act 2009* (FW Act), successive New South Wales Governments appear to have taken the view that labour law is now a federal issue. As this inquiry shows, federal labour regulation is incomplete in two ways. First, the FW Act

² See, for example, Doan et al., "What contributes to gendered work time inequality: An Australian case study" in (2021) *Social Indicators Research*, <<https://doi.org/10.1007/s11205-020-02597-0>>.

is not fit for purpose for the modern labour market and does not protect workers in non-standard employment.³

Second, and more hopefully, there remain substantial areas of labour regulation within the control of the State Parliaments, following from the exclusions in the FW Act. Other State Parliaments have adopted an active reform agenda in some of these fields, such as:

- in Queensland, Victoria and South Australia – introduction of labour-hire licensing schemes requiring labour-hire agencies to pass fit and proper person tests and permitting the withdrawal of licenses due to of non-compliance with labour laws.
- in Victoria – consultation over a *Fair Jobs Code* to regulate government procurement policies to promote fair labour standards in business, including secure employment.
- in Victoria – expanding the portable long service leave scheme to include workers in the contract cleaning, security and community services sectors.
- in South Australia – creating a general right to be provided with suitable work for injured workers by their employer, enforceable in the State industrial tribunal. See [17]-[21] of our original submission.
- in Victoria and Queensland – legislating to make wage theft a crime and establishing dedicated agencies to investigate and prosecute such matters.

The New South Wales Parliament could legislate in all these areas and more to fill gaps created by inaction on the part of the Commonwealth. In the context of gig workers and labour-hire workers in particular, State Parliament could do the following:

- a. establish a labour-hire licensing scheme to reduce exploitation of agency casuals.
- b. amend the workers compensation scheme to impose an obligation on platform operators to enrol their workers with iCare and pay appropriate premiums.
- c. amend WHS legislation to impose specific duties on gig economy operators and direct SafeWork NSW to institute a Code of Practice for Gig Work and adequately resource the inspectorate to properly investigate and audit gig economy operators.
- d. reform the injured worker reinstatement provisions of the *Workers Compensation Act 1987* to reflect the South Australian legislation set out above and include gig workers.
- e. allow the Industrial Relations Commission to deal with workplace surveillance disputes.
- f. pass a law imposing a fair jobs policy on publicly-financed projects, including with contractor obligations to provide secure work and support collective bargaining.

6. The New South Wales skills and education system

The AWU supports the submissions of other unions on this point.

³ The *Independent Contractors Act 2006* is likewise unable to provide appropriate levels of protection.