

# **International Labour Organisation: Future of Work Initiative**

## **Theme 3: The Organisation of Work and Production**

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## Introduction

1. The Future of Work Initiative was inspired by the awareness that ‘processes of change were taking place at such speed and on such a scale as to constitute a transformation of the world of work. Therefore, the ILO needed to understand and to respond effectively to them in order to be able to advance its mandate for social justice’.<sup>1</sup> The final purpose of the Initiative is ‘to articulate and promote policy alternatives, innovative partnerships and good practices that can be replicated by governments, employers and workers and other key partners’.<sup>2</sup>
2. At a national level, ‘effective’ responses and ‘policy alternatives’ place the focus on labour market regulation and, in South Africa, on the social dialogue that precedes regulatory initiatives. Building on the discussion in Papers 1 and 2 of the transformations in the world of work at societal and labour market levels, this paper sets out to engage with processes of change at workplace and sectoral level with a view to informing the debate about policy and regulatory change aimed at advancing social justice in South Africa.
3. The paper starts with an overview of the **context** in which changes to the organisation of work and production are likely to take place over the next two decades. It then looks at some basic aspects of this process at a global level, including the need for **flexible skills development** as a common denominator, **greening of the economy** as a generic driver of change and changes in **business models** driven by the processes outlined above. Specific attention is given to **self-employment** rather than employment as a means of delivering goods and services. From here the discussion moves to examples of **continuity and change drivers** in some key sectors of the South African economy with a view to understanding the extent to which these processes may replicate developments in the global economy. Potential changes in the model of **legal regulation** under the cumulative impact of these changes are then considered, followed by changes in the model of **social protection** to the extent that it impacts on the workplace. Finally, it is attempted to summarise the main trends and likely features of the workplace of the future.

## The context

4. Globally, we have seen the advent of an information age, a shift in production from goods to services, a ‘virtual environment’ crossing national frontiers, the ‘internet of things’ and free movement of capital not matched by free movement of labour.<sup>3</sup> Boundaries of

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<sup>1</sup> Report of the Director-General *The future of work centenary initiative* International Labour Office, Geneva, 2015 para 2.

<sup>2</sup> ‘Terms of Reference: Future of Work Initiative: National Dialogues Around the ILO Centenary Initiative’ 1.

<sup>3</sup> But, despite legal barriers, the movement of labour through necessity – including the flow of refugees and migrants from developing to more developed countries – has reached significant levels.

thinking have shifted and will continue to shift.<sup>4</sup> This is true also at the more capital-intensive, technologically advanced and highly-skilled end of the South African economy.<sup>5</sup>

5. 'Work', as a term referring to an open-ended range of economic activities performed by individuals, is superseding 'employment' as a conceptual basis for labour regulation<sup>6</sup> This reflects a growing diversity in work relationships beyond employment, which already finds expression in the South African Bill of Rights, the ILO's Decent Work Agenda and various national statutes.<sup>7</sup> The term 'work' will be used in this paper except when 'employment' in a narrow sense is intended.
6. Similarly, value chains (global, regional and national) and productive networks (or networked business models) are emerging as a more logical framework for understanding the organisation of production, in contrast to the historical notion of the workplace or 'firm' as an autonomous unit controlled by an employer. In this context, 'workplace' refers to the physical environment where specific work is performed, which may include one or more operations in one or more sites owned or controlled by different actors in a value chain.
7. These processes will be uneven, both at the level of production and of policy and law-making. Global competition has driven innovation most intensively in the private sector, resulting in the erosion of standard employment and collective bargaining and worker rights, while the centre of gravity of trade unionism has shifted from the private to the public sector.<sup>8</sup> Traditional labour law will find application more readily in the public sector, while there will be a growing need for regulatory innovation in the private sector to ensure the effective protection of non-standard workers.<sup>9</sup>
8. But the most fundamental contrast is the widening gap between the developed sector (capital-intensive industries, where investment focuses on maximum efficiencies,

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<sup>4</sup> See, for example, World Economic Forum *The Future of Jobs: Employment, Skills and Workforce Strategy for the Fourth Industrial Revolution* (January 2016).

<sup>5</sup> Referred to from here on as the 'more developed' part of the economy in contrast to the 'less developed' part, in line with global usage.

<sup>6</sup> The International Conference of Labour Statisticians has defined 'employment' as denoting all work 'performed in the context of transactions for remuneration', whether 'in the form of pay for work done or for hours worked, or in the form of profits derived from goods or services that are sold or bartered': ILO *Report II: Statistics of work, employment and labour underutilization*: 19th International Conference of Labour Statisticians Geneva, 2–11 October 2013 para 128. As such it includes (for example) independent contracting or 'own-account' work done for payment. For the sake of consistency, 'employment' is used in this paper in its usual legal meaning of work done by an employee in the service of an employer.

<sup>7</sup> For example, the UK Employment Rights Act of 1996 extends basic rights to 'employees' as well as to 'workers' other than employees.

<sup>8</sup> In South Africa, the proportion of total trade union membership located in the private sector has declined from an estimated 36% in 1997 to 24% in 2013, while the proportion in the public sector rose from 55% to 69% over the same period: H Bhorat, K Naidoo & D Yu *Trade Unions in an Emerging Economy: The Case of South Africa* (Development Policy Research Unit, University of Cape Town, July 2014) 8 Table 1.

<sup>9</sup> As attempted, for example, by the Basic Conditions of Employment Amendment Act of 2013 and Labour Relations Amendment Act of 2014.

advanced technology and labour replacement), and less developed sector (less capital-intensive industries continuing to rely on semi-skilled labour that have become uncompetitive on a global scale). In South Africa the contrast is deepened by mass unemployment, which tends to be concentrated among unskilled and semi-skilled workers while, at the developed end of the market, there are shortages of skills. Job losses and job creation, as well as the creation of work opportunities outside formal employment, are therefore important criteria in assessing the implications of change in the workplace.

9. In South Africa, contrary to conventional economic wisdom and by default, the public sector has emerged as the primary area of job creation. However, these jobs tend to be temporary and insecure, often in the form of public works programmes which replicate the traditional reliance on semi-skilled or unskilled labour. As a result, workers are not prepared for employment in more developed industries and, unless there is a policy change, a foundation is being laid for deepening inequalities in the labour market.
10. To a large extent the divergence between developed and less developed industries coincides with that between the ‘formal’ (more regulated) and ‘informal’ (less regulated) parts of the economy.<sup>10</sup> In so far as regulation denotes worker protection, the dichotomy replicates that between areas of vulnerable, precarious work and those where the norms of decent work apply to a significant degree. However, the division is by no means absolute. The era of neo-liberalism has seen an erosion of worker protection in many countries and legal toleration of precarious employment.
11. The terms ‘formal’ and ‘informal’ economy do not denote separate economies; there is a single economy of which all parts are integrated to a greater or lesser extent but are unevenly developed and regulated. ‘Informality’ reflects, in many cases, lack of capacity to comply with legal requirements. As such it is a product of a regulatory system premised on the model of a developed economy, characterised by formal employment, and is not geared to addressing the conditions of work beyond that framework.
12. If this is so, the future of the informal economy depends on whether the regulatory system retains its traditional character or is reimagined to embrace all forms of work in a functional manner. This question is revisited in the **Conclusion**.

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<sup>10</sup> The ILO’s Transition from the Informal to the Formal Economy Recommendation (204 of 2015) defines ‘informal economy’ as ‘all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements’ [par 2]. This refers particularly to –

- (a) those in the informal economy who own and operate economic units, including:
  - (i) own-account workers;
  - (ii) employers; and
  - (iii) members of cooperatives and of social and solidarity economy units;
- (b) contributing family workers, irrespective of whether they work in economic units in the formal or informal economy;
- (c) employees holding informal jobs in or for formal enterprises, or in or for economic units in the informal economy, including but not limited to those in subcontracting and in supply chains, or as paid domestic workers employed by households; and
- (d) workers in unrecognized or unregulated employment relationships [par 4].

13. In a further paradigm shift, the traditional focus of labour law on worker protection has become increasingly contextualised in the bigger socio-economic picture. Social dialogue and collective bargaining have for generations balanced workers' rights and interests with those of others (principally employers). The era of globalisation and neo-liberalism has seen the balance tilted significantly in favour of employers. In legal terms, the shift is accommodated by constitutional frameworks where – as in South Africa – workers' rights are not prioritised over those of employers or other social actors but must be interpreted subject to any competing rights. This opens the possibility of new limitations on existing forms of worker protection; for example, against dismissal.
14. However, this does not imply the subordination of workers' rights to employers' interests; both sides of the equation must carry weight if the constitutional and legal model is to be sustainable. What it does imply is the reconceptualisation of labour law as part of a broader process of labour market regulation and workplace governance, based on the promotion of social justice and human rights (including the right to engage in economic activity and the right to fair labour practices), rather than on worker protection as an overriding purpose.
15. In workplaces and sectors where traditional collective bargaining remains the norm, this may be a long and arduous process. However, the coming decades will see the emergence of new generations of leaders increasingly able to engage with new challenges. This offers a window of opportunity for shaping a new approach to workplace governance and labour law in line with the primary purpose of the LRA: 'to advance economic development, social justice, labour peace and the democratisation of the workplace'.<sup>11</sup> If in 1995 these words were visionary, by 2030 the conditions for giving them content will be more mature.

### **Continuities and changes: Sectoral illustrations**

16. Technological and knowledge development determines the potential for change in the organisation of work and production. Against the background of far-reaching changes on a global scale, the question is to what extent these changes are likely to be replicated in South Africa. Answering this question concretely will require in-depth study of different industries and types of economic activity. Here the aim is only to identify broad prospects, drawing on examples in a number of sectors, in order to gain some sense of developments that business, labour and government should be prepared for and to give some indication of potential regulatory needs.
17. In South Africa, as in other countries, the impact of technological and knowledge development at enterprise level has varied across different sectors and workplaces according to a range of variables. This makes it difficult to generalise. At the same time,

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<sup>11</sup> Section 1.

it is evident that significant technological changes are taking place, creating a potential for fundamental transformation of the workplace. Left to market forces, this may result in incoherence, undermine social justice and add to social instability. Alternatively, social dialogue can lay a basis for harmonising sectoral and workplace responses within a rights-based regulatory context.

- *Financial services*

18. Financial services are part of the sector that contributes the largest share to South Africa's GDP, at just over 20%.<sup>12</sup> The World Economic Forum Global Competitiveness Report rankings show that South Africa's financial services sector is very highly regarded internationally.
19. The insurance subsector is lauded as being 'among the most innovative, agile and progressive risk markets in the world',<sup>13</sup> tending to reduce costs through automation of systems, streamlining of business processes and branch closures. The resultant job losses have been (partly) offset by expanding access and service offerings.
20. Global megatrends, stakeholder pressures and subdued economic growth are seen as factors that will drive the evolution of banks. In South Africa, expansion into the rest of Africa is also expected to drive change. This expansion tends to be in the form of collaborative partnerships with existing companies, reducing risks and barriers to entry as well as leveraging local knowledge.
21. For some sub-sectors, increasing penetration of low-income markets is not expected to result in significant profits. Instead, competition is focused on product innovation and enhancing client value propositions. Major banks, however, are also looking to inclusive banking as a way of addressing increasing competition in the sector. Strategies include:
  - changing the focus to a range of products to better serve entry level markets;
  - creation of alternatives to branches to reduce capital costs;
  - extending operating hours; and
  - adopting below-the-line marketing strategies.
22. A holistic range of skills is called for in implementing these changes, including financial services experience, information technology (IT), ability to translate business needs into IT solutions, and knowledge of the regulatory environment. Skills needs tend to be more 'hybrid' than narrowly focused.

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<sup>12</sup> Calculated from data in Statistics South Africa *Gross Domestic Product (GDP) 2<sup>nd</sup> Quarter 2016* (September 2016).

<sup>13</sup> Faculty of Commerce, University of Cape Town and Western Cape Department of Economic Development and Tourism. *Financial Services Sector Assessment Report* (March 2014) Page 49.

23. South Africa has the possibility of positioning itself as a hub for financial services multinationals, but is hampered by the fact that it is more expensive than alternative sites. However, given the availability of highly skilled individuals, trained to provide services for a sophisticated financial environment, there is potential to attract investment in more specialised services.

- *Mining*

24. Different dynamics operate in different parts of the sector. A major driver of change affecting the large-scale end of the sector is technological advances, reinforced by foreign direct investment. While the sector as a whole has shed many jobs, new technologies have the potential to produce better mining infrastructure and create new jobs (for example, in operating mines that were previously uneconomical). This also creates a challenge in terms of the type, mix and level of skills that are needed.

25. Labour displacement in mining is further limited by geological factors which necessitate continued reliance on labour-intensive methods. To this extent technological change tends to be focused on increasing productivity through, for example, allowing access to previously inaccessible shafts, making continuous mining a possibility, improved safety measures,<sup>14</sup> maximising output and reducing waste. Other drivers of change include employment equity, HIV/AIDs, the mining charter, mineral beneficiation<sup>15</sup> and environmental sustainability.

26. Alongside large-scale mining there is the dynamic of small enterprise development. Small enterprises in the mining sector tend to be characterised by poor working conditions and casualisation. Institutional support will be needed to build a more sustainable business model, based on decent work, as a critical component of promoting social justice.

27. In addition, there are ‘parallel’ or informal gold mining activities, carried on mainly by cross-border migrant workers in formal mines as well as abandoned mines, often under extremely poor and dangerous conditions. Although illegal, this provides a livelihood to many and accounts for production worth between \$2bn and \$5bn annually.<sup>16</sup> There is every indication that it will continue for the foreseeable future and, though it poses a major challenge for regulation, it will not be sufficient to meet it with a police response.

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<sup>14</sup> While mining fatalities have declined, 77 deaths in 2015 are reflective of the continuing dangers.<sup>14</sup> Many of the technological innovations referred to above would serve to mitigate some of the dangers. See for example Paul Stewart ‘Accelerated mechanisation and the demise of a mass-based labour force? Platinum mines in South Africa’ *Review of African Political Economy* Vol 42, No 146 (2015). See also Martin Creamer’s ‘Revolutionary gold-mining machine making progress – AngloGold’ (15 August 2016) (accessible from <http://www.polity.org.za>).

<sup>15</sup> Currently, the subsectors which reflect beneficiation have very low employment figures, suggesting that there is considerable room for growth. The Mining Qualifications Authority highlights diamond processing and jewellery manufacturing as beneficiation sectors for which data is collected and, according to the 2015-2016 update of the *Sector Skills Plan for the Mining and Minerals Sector* (3 August 2015), these two subsectors accounted for less than 0.5% of total employment in the sector.

<sup>16</sup> Janet Munakamwe ‘The interface between the legal and illegal mining processes: unpacking the value chain of illegally mined gold’ (Paper presented to X Global Labour University Conference, Washington D.C., 2015).



28. Skills development and/or reskilling across an extremely broad spectrum emerge as the greatest common denominator of the above-mentioned developments in the large-scale sector. At present the skills profile of the sector is heavily skewed towards semi- and unskilled workers, indicating that there is much room for skills acquisition. Yet, in terms of skills supply, training and certification by the Chamber of Mines and Department of Mineral Resources, as well as industry-funded bursaries, all declined significantly in 2014. This includes certification for scarce skills. The state of basic education is a concern, especially with regard to quality maths and science matriculants, while Technical Vocational Education and Training (TVET) colleges are criticised for not producing work-ready graduates.

- *Clothing manufacturing*

29. The clothing sector is currently a prime example of a relatively low-tech, labour intensive manufacturing sector. Although there have been technological advances in the pre-assembly stages of clothing production, including specialist machines for different tasks, the sewing machine and semi-skilled machinist remain at the core of the production process. The assembly stage of production continues to be organised along classic Fordist lines. On this basis it has the potential to create a large number of semi-skilled jobs.

30. Given the relatively low-tech nature of production, mobility has been a major driver of change in the sector. It has allowed a 'stretching' of the production process to create global and regional value chains from low-wage regions where production takes place to developed regions with big markets, facilitated by advances in information and communications technology.

31. In South Africa this has meant a declining market share for domestic clothing manufacturers. The option of adopting a low-wage strategy was to a significant extent closed off by the Southern African Clothing and Textile Workers' Union (SACTWU), which bargained aggressively for higher wages and narrowing wage gaps between rural and major urban areas.

32. The result has been a complex restructuring process in the clothing value chain. Many full-package manufacturers downsized, with some transforming themselves into design houses. The traditional cut, make and trim (CMT) sector grew rapidly and increasingly assembled clothing for design houses rather than taking excess orders from manufacturers. Retailers increasingly began to source clothing via design houses, which in turn work with networks of CMTs.

33. Current trends include a sharp drop in formal employment, an increase in the number of unregistered clothing firms (often home-based) and rising non-compliance with the bargaining council standards. Although centralised bargaining still exists, its foundations are rapidly eroding and job retention of jobs in the sector has been on the basis of non-compliance with labour regulation; i.e. there has been a process of informalisation rather than an absolute decline in jobs.

34. Another consequence has been the increasing relocation of manufacturers to neighbouring states that are also members of the South Africa Customs Union (SACU), in particular Lesotho and Swaziland. This has generally taken the form of relocating some of their operations, while other operations and the head office remain in South Africa. The main benefits are very low labour costs and weak unionisation as well as the ability to 'export' their products back to the South African market duty-free.
  35. This process will leave a much smaller clothing industry in South Africa, comprising only those manufacturers that have managed to implement world-class manufacturing strategies and quick-response arrangements with retailers. Even so, almost all the fabric and a proportion of accessories will be imported from East Asia because there are only a few textile manufacturers left in South Africa and very few others in the region.
  36. For the future, much depends on what China does. Current indications are that China is moving out of clothing manufacture and into higher value-added activities. As China does so, manufacturing is moving to low-wage neighbouring countries like Vietnam and Cambodia as well as Sri Lanka and Bangladesh.
  37. While the shift by China into higher value-added activities will open up some space in the market for clothing manufacturers in Sub-Saharan Africa (SSA), the challenge is to avoid countries in SSA competing with each other by pushing down labour costs. One option would be for SSA to develop a cotton to yarn to textile to clothing value chain, which would mean the creation of thousands of jobs as well as engagement in the higher value-adding sectors such as spinning and weaving.
  38. The challenge is that such a value chain will have to be competitive, ideally in terms of efficiency rather than low wages. It would also call for agreement among countries in the region with regard to specialisation in cotton production, spinning, weaving and knitting, and assembling clothing.
- *Retail*
39. The South African retail sector displays a stark divide between highly concentrated retail giants, such as Shoprite, Massmart and Woolworths, and thousands of informal retail outlets. It is an artificial divide because the major retailers are the main source of products sold by informal retailers. For example, it was estimated that in 2010 approximately half of the Massmart Group's sales was to spaza shops.<sup>17</sup>
  40. Formal retail contribution to GDP is currently 13.8%.<sup>18</sup> According to the Wholesale and Retail SETA Sector Skills Plan, the sector employed 751,848 employees, with 69%

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<sup>17</sup> C Skinner and G Haysom 2016 The informal sector's role in food security: A missing link in policy debates? Working Paper 44. Cape Town: PLAAS, UWC, and Centre of Excellence on Food Security 4.

<sup>18</sup> Calculated from data available in Statistics South Africa *Gross Domestic Product (GDP) 2<sup>nd</sup> Quarter 2016* (September 2016).

formally employed and the remaining 31% working informally. The formally employed segment has seen an increase relative to the informally employed.

41. Apart from short-term economic fluctuations, challenges and drivers of change include increasing competition from foreign retailers entering the market, rising operating costs, growth into the rest of Africa, the need for greater speed to market and responsiveness to changing consumer preferences as well as growing legislative requirements. These challenges have resulted in more investment in generating operating efficiencies, such as more efficient supply chains with centralised distribution and improved IT systems.
42. Further change drivers are the growth of e-retailing,<sup>19</sup> the push to adopt multi-channel retailing and the emergence of responsible or socially and/or environmentally conscious buying. The rise of social media has also meant that companies are more easily taken to task for perceived failures, with pressure placed on companies to demonstrate – for example – commitment to sustainable business practices. This also creates space for more innovative marketing strategies aimed at younger people.
43. In the medium to longer term, every retailer will be increasingly challenged to expand operations in the virtual economy, ranging from local markets in the case of certain products to global markets in the case of others. Traditional outlets may come to comprise a small part of the overall operation. This will profoundly transform the workplace as the emphasis shifts to creating the jobs and organisational structure required to maintain the retailer's presence in the rapidly-changing 'global shopping mall'.
44. Taken together, these changes have led to skills gaps. Low pay,<sup>20</sup> poor working conditions, high staff turnover, lack of qualified applicants and lack of work experience are reasons cited for difficulties in bridging these gaps. In addition, casualisation is widespread in the sector.<sup>21</sup>
45. At the less developed end of the market, the trading sector is the biggest section of the informal or unregulated economy<sup>22</sup> although its predominance is declining.<sup>23</sup> A large proportion of those engaged in informal trade sell food.<sup>24</sup> It has been argued that the

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<sup>19</sup> According to World Wide Worx *Online Retail in South Africa 2016* report, online retailing has grown consistently by over 20% since 2000, with a 26% growth rate in 2015. It is expected that continued growth (projected at 20% in 2016) will result in online retail accounting for 1% of overall retail in 2016.

<sup>20</sup> R3 033.73 is the statutory minimum wage for wholesale and retail in urban areas until February 2017.

<sup>21</sup> For example, at Shoprite only 35% of employees are considered full-time, and an additional 5% being termed 40-hour full-timers or flexi-timers. The rest are externalised, mostly hired from labour brokers and, according to COSATU, only paid R1 800 per month.

<sup>22</sup> In 2016 there were a reported 2 565 000 people working informally, with 40.5% engaged in informal trade. C Skinner and G Haysom 3

<sup>23</sup> The proportion of informal workers engaged in trade is declining quite steeply: in 2000 the proportion stood at 53% and in 2008 it was 46%. The reasons for the decline are not known. One possibility is the expansion of formal retail: in 2003 it was estimated that there were 920 supermarkets in South Africa, rising to 3 167 in 2013. Ibid 3.

<sup>24</sup> Ibid 3-4.

informal food trade is a significant route for accessing food by the poor and is therefore critical to their food security.<sup>25</sup>

46. Surveys suggest that at least 20% of international migrants are engaged in informal trade, with nationalities such as Somalis probably having much higher levels of participation. Allegations are made that they are part of global networks that allow them to undercut local informal traders. This has been highlighted in periodic outbreaks of xenophobic violence, which has often targeted foreign traders operating in townships.

- *Transport and logistics*

47. As in other sectors, there are sharp contrasts between the developed and undeveloped ends of the sector. At the upper end, technological development has led to far-reaching innovation – for example, driverless trains, driverless trucks and automated cars. In the USA it has been estimated that 3.5 million truck drivers will become dispensable and that driverless trucks will save the freight industry \$168 billion per year, partly due to staff reductions.<sup>26</sup>

46 ‘Team driving’ or ‘owner-driver’ schemes exemplify structural innovation. In essence, workers employed as drivers are transformed into independent contractors to whom their previous work is outsourced by their former employer-turned-‘client’. The incentive for employers is the replacement of labour costs and labour rights with the management of services on a purely commercial basis. The incentive for workers is the prospect of succeeding as entrepreneurs.

47 The best-known example in South Africa is the owner-driver scheme launched by Amalgamated Beverages Industries (ABI) as a black empowerment initiative in 2004. This scheme, and similar ones, have shown mixed results. While some owner-drivers have prospered, others have been ruined.<sup>27</sup>

48 An obvious question is whether the relationship between client and contractor is actually a disguised employment relationship. While independent contracting relationships have been found to be spurious in some cases, in at least one case the Labour Appeal Court has dismissed the claim of owner-drivers that they were still employees and found that they were independent contractors.<sup>28</sup>

49 Technological and structural change are combined in the ‘sharing economy’ business model pioneered by Uber in the passenger transport sector and replicated by numerous

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<sup>25</sup> Ibid 5-9.

<sup>26</sup> Olivia Solon ‘Self-driving trucks: what's the future for America's 3.5 million truckers?’ *The Guardian* 17 June 2016, citing Morgan Stanley estimates that it would reduce operating costs by 34% and save \$70 billion per year in staff reductions.

<sup>27</sup> This is discussed more fully under **Is independent work an alternative to employment?** (below).

<sup>28</sup> *Phaka & others v Bracks NO & others* (2015) 36 ILJ 1541 (LAC). The judgment is open to question to the extent that the circumstances of the owner-drivers differed considerably, involving differing degrees of dependency on the former employer.

other organisations (also in other sectors). ‘Partners’ or ‘independent contractors’ market their services via an online platform owned by a third party, in terms of legal arrangements whereby the platform owner receives a fee and may determine conditions on which the services are provided.

- 50 This model has proved to be extremely lucrative, with its impact being compared to that of the supermarket in the retail sector.<sup>29</sup> In South Africa the number of Uber drivers is projected to increase from 4 000 to 15 000.
- 51 Internationally, legal controversy surrounds the status of Uber ‘driver-partners’, which may also extend to similar workers in other sectors.<sup>30</sup> A challenge in coming years will be to resolve these questions and develop a legal model that can harness the potential of the ‘sharing economy’ to deliver services more effectively as well as providing decent work.

### **Towards a green economy**

- 52 Socio-economic pressures for change in the workplace are supplemented by environmental imperatives. Legislation has put in place much-needed requirements to limit the damage to the environment caused by industrialisation over many decades, internationally and in South Africa. With economic development and growing populations, it is inevitable that these requirements will intensify.<sup>31</sup>
54. ‘Greening the economy’ calls for significant changes in technology and methods of production through the replacement of unsustainable techniques with cleaner techniques. It entails the loss of unsustainable jobs but also calls for the creation of new jobs which, supported by an appropriate framework, can translate into a net gain in work opportunities. This is emphasised in the National Development Plan and New Growth Path, which envisages the creation of 300 000 additional direct jobs by 2020 on the basis of green technology.<sup>32</sup> Agriculture, forestry, energy, resource-intensive manufacturing,

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<sup>29</sup> In the case of Uber, the company’s value has risen from zero to an estimated \$28bn-\$66bn in six years.

<sup>30</sup> In a number of countries Uber has been banned because drivers did not comply with passenger transport regulations. In South Africa Uber drivers are required to be licensed as transport operators by provincial governments.

<sup>31</sup> See, in general, Kechician et al *A Greener Path to Competitiveness: Policies for Climate Action in Industries and Products* (World Bank Group, 2016). At a continental level, the Sustainable Development Investment Partnership (SDIP) has announced the establishment of an Africa hub with 16 initial projects valued at more than \$20bn, while the Grow Africa initiative (involving NEPAD and the African Union) has so far brought about \$2.3bn of private-sector investment, reportedly benefiting 10 million small farmers and creating 88,000 jobs: World Economic Forum *2015-02016 Annual Report* 44.

<sup>32</sup> Department of Economic Development *The New Growth Path: Framework* (2011) 31. A study by the International Labour Organisation reflects net job increases of 0.5 to 2 percent: ILO *Working towards sustainable development: Opportunities for decent work and social inclusion in a green economy* (2012) viii; and see 175-179 for discussion of green job creation in a number of countries, including South Africa.

recycling, building and transportation are highlighted by the ILO as sectors in which job creation on this basis could potentially be achieved.<sup>33</sup>

55. At the developed end of the market, this will increase the demand for new skills. However, part of the challenge is to generate work for the poorest of the poor. Recycling by waste pickers is a well-known example, with local government and NGOs in some cases playing an active role in supporting recycling initiatives. Cooperatives have been proposed as a means to represent workers seeking a livelihood in projects of this nature and promote sustainability, which may also provide a model for self-organisation of workers in other sectors where the conditions for trade union organisation are absent.

### **A shift from career paths to flexible reskilling**

56. One of the issues consistently highlighted so far is the critical importance of flexible skills development; or, more precisely, changes in technology and work requirements, combined with the demands of flexibility, reducing the scope for traditional career paths and confronting enterprises with the need to access a changing range of skills, sometimes at short notice. But in practice, as one study concludes, “[t]here is overwhelming consensus that the skills system is not meeting the needs of the economy”:<sup>34</sup>
57. What has also emerged across sectors is a lack of basic numeracy and literacy skills among workers and workseekers, pointing to inadequacies in basic education. Also lacking are ‘soft skills’ or generic workplace skills<sup>35</sup> on the part of new labour market entrants. These shortcomings make it necessary to focus not simply on the functioning of the existing system but, more importantly, how it can change to meet the country’s skills needs in the future.
58. Four institutions currently responsible for the bulk of skills development, at least in theory, are looked at below. Though none is likely to survive in its present form, they cover the key areas and levels where skills development needs to take place, both on an ongoing and ad hoc basis, and where functional institutions need to be established.
59. At a national level, the Technical and Vocational Education and Training (TVET) colleges system could have a major impact in providing accredited qualifications on an ongoing basis. However, current implementation of the model shows serious deficiencies. Numerous changes are required, such as enhancing teaching and management capabilities, ensuring access to cutting-edge technologies and improving perceptions of

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<sup>33</sup> *Working towards sustainable development* chapters 2, 3, 5, 6, 7, 8 and 9. See also chapter 10 Part D.

<sup>34</sup> Mzabalazo Advisory Services *The South African skills development system: A critique and proposal to build a new, flexible and responsive skills development system* (Centre for Researching Education & Labour, University of the Witwatersrand, April 2015) 7.

<sup>35</sup> These include skill sets associated with effective communication, teamwork, and workplace etiquette. In the case of one service provider, Harambee, provision of a work readiness programme like this has been tied to an intermediary role, where they identify and recruit potential candidates, assess their competencies and match them to jobs where they would have the greatest likelihood of success.

the colleges by learners and employers. Key to this will be buy-in and commitment from trade unions and employers.<sup>36</sup>

60. At a sectoral level, Sectoral Education and Training Authorities (SETAs) are intended to meet the skills development needs of enterprises.<sup>37</sup> While the performance of SETAs varies, criticisms of their effectiveness are legion and fundamental.<sup>38</sup> On balance, it can safely be said that SETAs have not demonstrated the capacity to meet South Africa's present and future skills needs and that national policy will have to be revised.
61. A central challenge is to develop a model that will be accessible not only to larger enterprises with the resources (including personnel) to participate in planning and determining outcomes, but also to smaller enterprises lacking those resources. It remains to be seen to what extent the centralisation of functions and other changes proposed for the National Skills Development Strategy IV will bring about the necessary transformation.<sup>39</sup>
62. From a company perspective, the development of much-needed skills will depend to a significant degree on effective engagement with SETAs or any national and sectoral training institutions which may supplement or replace them in due course. This is because training can only be effective if it is driven by the needs of a broad cross-section of enterprises in each sector. Scope for participation also by smaller enterprises should be seen as a priority if skills bottlenecks are to be removed.
63. Further possible precedents are provided by the Social Plan Initiative (SPI)<sup>40</sup> and the Training Layoff Scheme (TLS). Though neither has achieved their desired results, lessons can be learned from their shortcoming in designing models for assisting in the reskilling of dismissed workers at company level.
64. The SPI was adopted in 1998 in response to the spate of retrenchments following South Africa's re-entry into global markets. The plan intended to manage retrenchments with the primary goal of avoiding them as far as possible and ameliorating the effect of unavoidable job losses through reintegrating retrenched workers into the economy.

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<sup>36</sup> This is, arguably, a large reason for the success of the German model, where 6000 companies take in trainees, who are paid by the company at a lower rate than qualified workers but well enough to cover cost of living expenses. These placements ensure that they gain practical experience while attending vocational schools. See Maree, J 'Vocational schools can slay youth unemployment' *Business Day* 18 January 2016: 12.

<sup>37</sup> According to the National Skills Development Strategy, their role is "to facilitate the delivery of sector-specific skills interventions that help achieve the goals of the NSDS III, address employer demand and deliver results. The core responsibility of SETAs is to develop sector skills plans...": *National Skills Development Strategy III* (2011-2016)

<sup>38</sup> See, e.g., *Ministerial Task Team on SETA Performance: Report for the Minister of Higher Education and Training, Hon B Nzimande (MP)* (Government Gazette No 36747, 16 August 2013); Sean Archer *Key Issues in the Assessment of Seta Performance in South Africa's National Skills Development Strategy* (Southern Africa Labour and Development Research Unit, University of Cape Town, 2010).

<sup>39</sup> Department of Higher Education and Training *SETA Landscape: NSDS & SETAs Beyond 2016 within the Context of an Integrated, Differentiated Post School Education and Training System Final Draft (July 2015)* [http://www.agriseta.co.za/downloads/Draft\\_SETA\\_Landscape\\_Recommendation\\_2015\\_4\\_docx\\_latest.pdf](http://www.agriseta.co.za/downloads/Draft_SETA_Landscape_Recommendation_2015_4_docx_latest.pdf)

<sup>40</sup> See NEDLAC Report on Social Plan Review (2011).

Failure to implement it has been attributed to (among other things) its voluntary nature, lack of focus and lack of coordination by the various parties involved. In addition, its design was modelled on the mining sector, which affected its applicability in other sectors.

65. The tripartite TLS was implemented in 2009 as an alternative to dismissal resulting from operational requirements due to economic distress.<sup>41</sup> It allows for a temporary suspension of work for a worker or group of workers in order to receive training to better meet the future needs of the company, based on an agreement between employer and union or the workers themselves. The training should be linked to the skills needs of the employer and should result in skills acquisition that will help sustain the business and enable it to benefit from improved economic conditions.
66. The scheme is highly inclusive in that incorporates multiple organs of state as well as employers, trade unions and bargaining councils to implement and coordinate it. But this also leads to a very cluttered implementation framework and administrative requirements which render the scheme too difficult for smaller companies to navigate.<sup>42</sup>
67. To the extent that restructuring and labour-shedding can be expected to continue and possibly accelerate in a rapidly changing economic environment, the need for institutions similar to the SPI and TLS is likely to continue, in particular to provide necessary skills to workers who may otherwise be lost to the economy.
68. To sum up: the study quoted above concludes that it is necessary

“to design a new system, not ‘reform’ the old one. However, the new system will not be built from a zero base. It will be built on what is working effectively currently, including what is in the process of being built or supported to be more effective”.<sup>43</sup>

### **Independent work or self-employment as an alternative to employment?**

69. To the extent that restructuring of businesses and automation results in job losses which cannot be matched by the creation of alternative jobs, the scope for independent work will increase. Research suggests that there has been an increase in self-employment since the 1990s<sup>44</sup> and, for growing numbers of workers, self-employment may be the only prospect of gainful work in future. However, it is not a feasible option for those who lack the capacity or desire to conduct their own businesses. It is also not an option for those who lack marketable skills.

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<sup>41</sup> See Department of Labour *A Guide to the Training Layoff Scheme* (12 August 2009).

<sup>42</sup> A national jobs fund with an initial allocation of R2.4bn was set up to finance the scheme. However, by 2014 little more than R20m had been disbursed.

<sup>43</sup> Mzabalazo Advisory Services (n 9) p 19.

<sup>44</sup> Paul Benjamin ‘Beyond ‘lean’ social democracy: labour law and the challenge of social protection’ (2006) 60 *Transformation: Critical Perspectives on Southern Africa* 32 at 37.



70. At the developed end of the market, the emergence of the ‘crowdwork’, ‘gig work’ or ‘human cloud’ models across a range of sectors (exemplified by the Uber model, launched in 2009) has lent new impetus to the phenomenon of independent work.<sup>45</sup> The extent to which this is capable of serving as an economic alternative to employment in different sectors is open to question. However, it is obvious that ‘the human cloud’ is here to stay and is likely to expand across different sectors.<sup>46</sup>
71. From the perspective of decent work, the central question is the form(s) of regulation appropriate for protecting independent workers’ basic rights. In essence, this implies regulation of freedom of contract.<sup>47</sup> Legislation will need to determine the scope of permissible commercial transactions in line with public policy,<sup>48</sup> a task that has thus far been left to the courts.<sup>49</sup>
72. The starting point will be to identify the specific risks associated with different forms of independent work, such as the inequality in bargaining power that may exist between independent contractors and large corporate clients, or online platforms inviting freelancers to auction their services in a legal vacuum, encouraging a race to the bottom. Legislation will need to provide measures designed to combat each risk.
73. This also implies the development of a dedicated legal model (or models) identifying workers who qualify for such protection, separate and distinct from the employment model. This would limit labour litigation by removing the need for workers to prove that they are ‘employees’, rather than ‘independent contractors’, in order to claim protection of labour rights.
74. Organisation among self-employed workers for the purpose of collectively representing their interests and negotiating terms of service or product delivery will be an increasingly important part of the equation. In the case of online platforms for organising service delivery to clients, for example, this could be achieved by workers collectively owning the technology and stipulating or negotiating terms of service delivery with clients, without the need for third-party intervention.<sup>50</sup>
75. However, the bulk of independent work in South Africa is not at the developed end of the market but consists of operations started through necessity, for the most part on an

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<sup>45</sup> See, for example, Paul Mason *PostCapitalism: A Guide to our Future* (Penguin 2015).

<sup>46</sup> For example, two internet platforms in South Africa access to the services of domestic workers: see [www.sweepsouth.com](http://www.sweepsouth.com) and [www.domestly.com/](http://www.domestly.com/).

<sup>47</sup> Section 9 of the Constitution.

<sup>48</sup> See, for example, the Australian Independent Contractors Act of 2006, which allows a court on application to vary or set aside a services contract to the extent that it is ‘unfair’ or ‘harsh’. This includes contracts that are ‘harsh or unconscionable’, ‘unjust’, ‘against the public interest’ or which ‘[provide] for remuneration at a rate that is, or is likely to be, less than the rate of remuneration for an employee performing similar work’.

<sup>49</sup> See *Brisley v. Drotzky* 2002 (12) BCLR 1229 (SCA); *Napier v. Barkhuizen* 2006 (9) BCLR 1011 (SCA).

<sup>50</sup> The Cooperatives Act of 2005 and the Cooperatives Development Strategy offer a flexible framework within which this could happen, though much input will be needed to develop the necessary skills base among workers as well as revisiting the regulatory framework to remove unintended barriers to small worker cooperatives. See NEDLAC & ILO *Republic of South Africa: Decent Work Country Programme 2010 to 2014* (2010) 14-15.

informal basis.<sup>51</sup> The vast social inequalities giving rise to this phenomenon will not be eliminated in the foreseeable future, though it can be reduced and the regulatory framework can be brought more closely in line with reality. This is discussed more fully under **Legal regulation** below.

## The impact on business models

76. The impact of the trends and developments reviewed above on production, work processes and systems in different sectors calls for detailed studies. At a general level, however, it is clear that these developments spell major if not fundamental change to traditional business models (i.e., the way that a business sells products or services to its customers, or how it is run). For present purposes the focus is on the latter aspect.
77. Historically, the dominant model in industrialised economies has been the ‘firm’; that is, an autonomous unit controlled by the entrepreneur using employment (as opposed to independent contracting) for the performance of work.<sup>52</sup> Technological and structural change has already led to far-reaching change in this model through the introduction of non-standard forms of work, outsourcing and subcontracting. Ongoing change will further transform the organisation of work and work relationships, further reducing the autonomy of the enterprise while creating new priorities – for example, negotiating entry into value chains while minimising the risks this may involve.
78. South African entrepreneurs may be insufficiently prepared for these challenges. According to the World Economic Forum, 60% of respondent companies in South Africa believe that ‘future workforce planning is a leadership priority’.<sup>53</sup> The following barriers are identified:

Insufficient understanding of disruptive changes.....	68%
Resource constraints.....	52%
Workforce strategy not aligned to innovation strategy.....	44%
Pressure from shareholders, short-term profitability.....	36%
Insufficient priority by line management.....	28%

79. These findings underline the fact that, in a more complex and integrated economic setting, greater focus on knowledge (research) and planning is vital, driven by the need to respond to structural as well as technological change in the productive environment.

<sup>51</sup> 69% in 2013: see *Statistics SA Survey of Employment and Self-Employment 2013*.

<sup>52</sup> See R. H. Coase ‘The Nature of the Firm’ *Economica*, New Series, Vol. 4, No. 16. (Nov., 1937) 386.

<sup>53</sup> WEF *The Future of Jobs* (fn 1) 115.

80. Automation, including the introduction of artificial intelligence or robots, has already affected a wide range of industries, from automobile manufacturing to building, including highly skilled work.<sup>54</sup> While certain jobs are phased out, different and more highly-skilled jobs have been created together with possibilities of diversifying production. These processes are set to continue. Greater emphasis on strategic planning is required, drawing on all the resources of the organisation, including the knowledge of the workforce.
81. Introducing new technology brings with it the need not only for new skills but also for different management structures. In general, the rise of the 'knowledge economy' promotes a shift from the hierarchical 'corporate ladder' to a 'corporate lattice' with flatter management structures, more horizontal communication and greater scope for creative employee involvement.<sup>55</sup> This will offer significant potential for achieving greater effectiveness and productivity.
82. Flexibility will become increasingly important, but should not be equated with precarious employment. Studies have shown, for example, that reliance on temporary work may translate into less motivation of workers and lower productivity.<sup>56</sup> New thinking on human resource management, combining flexibility with inclusivity and worker protection,<sup>57</sup> will be an important feature of successful business models.
83. Externalisation of operations by firms may prompt new models of diversification rather than specialisation. Bidvest, for example, has created business entities offering a range of services that many firms seek to outsource, such as logistics, security and cleaning. The restructuring of firms and the scope it offers for new forms of service provision requires more research.
84. Some of the above trends are well-established, and much can be learned from experience. However, change can be expected to become more pervasive and rapid with ongoing technological development, making greater demands than have thus far been experienced. As with legal regulation, this calls for ongoing assessment of existing policies and the need for new strategies at sectoral and enterprise level.
85. The above discussion has focused on restructuring and innovation by larger established firms. It is very difficult to predict what structural and technological advances in the economic environment will mean for small and micro firms that do not have the capital or the managerial capacity to engage with strategic planning, innovative human resource management, the potential of new technology, the knowledge economy or other

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<sup>54</sup> For example, IBM's Watson computer is used to diagnose cancer patients in the USA.

<sup>55</sup> Cathy Benko, Molly Anderson, Suzanne Vickberg 'The Corporate Lattice A strategic response to the changing world of work' (Deloitte University Press, 1 January 2011).

<sup>56</sup> Cf Marloes de Graaf-Zijl 'The economic and social consequences of temporary employment: a review of the literature'; Roca- Puig & Beltrán- Martín 'Combined effect of human capital, temporary employment and organisational size on firm performance.'

<sup>57</sup> See sections 198 (as amended) to 198D of the LRA, which provide a platform of basic rights for the protection of non-standard workers in line with international standards but do not purport to address all the challenges involved.

challenges described in business literature. One danger is that new technology and all it entails will see a chasm developing between those firms that can utilise it and advance and those that are left behind (as well as their workforce). The effect would be to exacerbate existing divisions between firms and enterprises at the more developed and less developed ends of the spectrum and the regulatory problems bound up with designing measures applicable to both. While employers, trade unions and workers should be alive to these processes and seek to respond appropriately, the challenges they present must ultimately be addressed at government level.

## **Legal regulation**

86. Unlike developed countries, the greatest regulatory deficit in South Africa is manifested in the existence of an informal economy.<sup>58</sup> The notion of resolving it by enforcing the existing regulatory system across the board, or absorbing 'informal' work into the existing 'formal' economy, is unrealistic. Rather, the challenge is to develop a more functional regulatory system capable of covering the entire workforce and accommodating divergences from the patterns of formal employment.
87. In this regard ILO Recommendation 204 calls for 'transition from the informal to the formal economy' to be facilitated by an 'integrated policy framework' that will address, among other things, 'the promotion of strategies for sustainable development, poverty eradication and inclusive growth', and 'the establishment of an appropriate legislative and regulatory framework'.<sup>59</sup> To this end the Recommendation envisages a 'comprehensive employment policy framework, based on tripartite consultations'.<sup>60</sup> While calling for a wide range of measures relating to the formal as well as the informal components of the economy, the combined effect is to hold out the prospect of a thoroughly transformed regulatory system.
88. While the goal is social justice and decent work, the starting point has to be the actual needs of employers and workers across the economic spectrum, from multinational corporations to self-employed individuals, and what the law should deliver in regulating their conditions effectively.
89. Social dialogue at every level is necessary to identify those needs and design appropriate regulatory mechanisms, including structures for securing compliance, capable of

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<sup>58</sup> Although the informal economy in South is smaller than in most African countries, it encompasses up to a third of the workforce and may expand further. In general, see Richard Devey et al 'Second Best? Trends and Linkages in the Informal Economy in South Africa' DPRU Working Paper No. 06/102 (2006).

<sup>59</sup> Pars 10, 11. Also included is 'the promotion of entrepreneurship, micro, small and medium-sized enterprises, and other forms of business models and economic units, such as cooperatives and other social and solidarity economy units' (par 11(g)).

<sup>60</sup> Para 15.

extending the reach of labour law to the working population as a whole.<sup>61</sup> These structures may include non-governmental structures at different levels.

90. Such an approach is consistent with the ILO's Labour Administration Convention 150 of 1978, which defines 'labour administration' as 'public administration activities in the field of national labour policy' and provides that member states 'may, in accordance with national laws or regulations, or national practice, delegate or entrust certain activities of labour administration to nongovernmental organisations, particularly employers' and workers' organisations, or – where appropriate – to employers' and workers' representatives'.<sup>62</sup>
91. The Convention also envisages social dialogue in the form of 'arrangements appropriate to national conditions to secure, within the system of labour administration, consultation, co-operation and negotiation between the public authorities and the most representative organisations<sup>63</sup> of employers and workers, or--where appropriate--employers' and workers' representatives ... at the national, regional and local levels as well as at the level of the different sectors of economic activity'.<sup>64</sup>
92. The need for an inclusive regulatory system is also implicit in the ILO's Employment Relationship Recommendation 198 of 2006, which urges member states to ensure that 'standards applicable to *all forms of contractual arrangements* establish who is responsible for the protection contained therein' as well as ensuring 'effective protection to workers especially affected by the *uncertainty as to the existence of an employment relationship*, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities'.<sup>65</sup>
93. On this basis, the future regulatory model will address the situations of all workers equally, including those who are currently beyond the reach of labour law, thus ending the distinction between 'formal' and 'informal', 'standard' and 'non-standard' (referred to below as an 'integrated regulatory system'). Informed by the principle of substantive equality, it will give effect to the basic constitutional rights of all workers by means of appropriately differentiated mechanisms. In practice it will respond to business and worker interests across the spectrum by creating dedicated regulatory, enforcement and dispute-resolution mechanisms designed for different contexts.
94. The CCMA and bargaining councils have created a strong foundation for dispute resolution in the future, from which much can be learned. Bargaining councils also represent an attempt at creating dedicated regulation and enforcement processes, and have

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<sup>61</sup> Cf 'Towards a model framework for a local level collective bargaining system for street traders' Streetnet International 2013.

<sup>62</sup> Articles 1, 2. South Africa has not ratified this Convention.

<sup>63</sup> Given that the Convention sets minimum standards, this should not be interpreted as excluding broader consultation and negotiation where appropriate to achieving the objectives of the Convention.

<sup>64</sup> Article 5.

<sup>65</sup> Articles 4.4(d) and 4.5; emphasis added.

the capacity to serve as forums of social dialogue on any issue of ‘policy and legislation that may affect the sector and area’.<sup>66</sup> However, bargaining councils have significant limitations which need to be eliminated, in particular the fact that they are limited to representing members of registered trade unions in sectors where these form a majority of the workforce. Bargaining councils are therefore excluded in sectors where registered union do not organise a majority and, in many cases, are practically unable to do so. Also in sectors where bargaining councils exist, own-account workers and others not classified as ‘employees’ are excluded. From the perspective of decent work, maximum representivity of all workers and employers by all regulatory structures must be a central aim and institutions should be structured in ways to promote this objective.

95. Similarly, the jurisdiction of regulatory structures should be determined not only by geographical boundaries or physical workplaces but by the actual performance of work within their scope, whether in single workplaces or in value chains.
96. Legislation enacted on this basis will primarily consist of enabling statutes laying down basic rights and principles, not confined to fair labour practices and non-discrimination but extending to other aspects of decent work, such as health and environmental protection. Such rights and principles are then worked out in detail and implemented by appropriate structures at subsidiary levels as envisaged by Convention 150 and outlined above.
97. In line with the Convention, consultation and negotiation as a means of fine-tuning workplace rights and duties in the most appropriate forms will ideally happen between employers’ and workers’ representatives on the ground. While this has always been possible, an integrated regulatory system will provide for supportive measures as well as the delegation of the necessary rights and powers to relevant structures. Statutory and non-statutory forms of worker participation have traditionally served as mechanisms for regulating rights and reconciling employers’ and workers’ interests at this level.<sup>67</sup> The intended revision of Chapter V of the LRA to provide for effective participatory structures in the workplace can be seen as a starting point for arriving at plant-level regulatory structures not limited to trade union members or ‘employees’.
98. The protection of workers’ rights is not the only regulatory issue arising from the reorganisation of work. Corporate law allows great flexibility in structuring businesses, allowing new business models to remain beyond the reach of environmental, safety and health, fiscal and other legislative frameworks. Yet it has little or no relevance for small and informal businesses. A thorough re-examination of corporate law is likely to provide

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<sup>66</sup> Section 28(1)h), LRA.

<sup>67</sup> German works councils can be looked at as a comparative example, taking note of the conditions for their operation which are absent in South Africa.

points of entry for economic activities that are excluded at present, allowing space for new business models to develop.<sup>68</sup>

99. Other potential regulatory mechanisms are codes of corporate governance, corporate social responsibility, Broad-Based Black Economic Empowerment and trade agreements. Through more effective social dialogue, these mechanisms can become more inclusive of the interests of all parties, particularly of marginalised workers, and articulate more systematically with legislation at different levels in protecting workers who fall through the cracks of legal protection.

### **Social protection<sup>69</sup>**

100. The right to social protection extends to all persons regardless of employment status and, as such, must remain a responsibility of the state.<sup>70</sup> But implementation of certain forms of social protection is at the sectoral and workplace level. This includes the challenge of extending of social protection to those currently excluded as envisaged by ILO Recommendation 204.<sup>71</sup>
101. Health and safety is one example. Health and safety committees in larger workplaces set a legislative precedent for extending, monitoring or regulating other forms of job-related social protection; for example, the management of retirement funds. Bargaining councils' health, retirement, education and other benefit schemes demonstrate the extension of social protection at a sectoral level.<sup>72</sup> These institutions deserve to be studied, both to identify weaknesses and to consider ways of replicating them, as mechanisms for delivering social protection to all workers.
102. A further principle for defining certain forms of social protection at workplace level is that of 'enterprise liability'.<sup>73</sup> In essence, it means that an enterprise is held responsible for all risks emanating from the conduct of its business, not only for wrongful acts by its employees. The same principle could apply to risks of unemployment or other gaps in

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<sup>68</sup> The Law Reform Commission has never investigated company law or any law administered by the Department of Trade and Industry. Similarly, the investigation by the Department of Trade and Industry prior to the Companies Act of 2008<sup>68</sup> did not focus on the issues raised above.

<sup>69</sup> In general, see MP Olivier *et al* (eds) *The extension of social protection in South Africa* (SiberInk, 2001); U Becker & M Olivier (eds) *Access to Social Security for Non-citizens and Informal Sector Workers* (SUN Press, 2008); M Olivier & S Kuhnle (eds) *Norms and Institutional Design: Social Security in Norway and South Africa* (SUN Press, 2008).

<sup>70</sup> See the ILO Social Security (Minimum Standards) Convention, 1952 (No. 102) and Social Protection Floors Recommendation, 2012 (No. 202).

<sup>71</sup> Para 20 of the Recommendation calls on member states to 'progressively extend the coverage of social insurance to those in the informal economy and, if necessary, adapt administrative procedures, benefits and contributions, taking into account their contributory capacity'.

<sup>72</sup> At present the future of bargaining council health and retirement schemes is uncertain, given the development of national health and pensions schemes.

<sup>73</sup> As applied by the High Court in relation to sexual harassment: see *Grobler v Naspers* [2004] 5 BLLR 455 (C).

work security created by the operation of the enterprise; for example, as a result of restructuring, insolvency or non-compliance with labour legislation.<sup>74</sup> Based on an extended definition of ‘workplace’, such liability could also apply to suppliers that are part of value chains.

103. The forms and levels of social protection that are appropriate at national and workplace levels will be clarified by means of social dialogue between government, employers and labour through which workers’ needs can be identified as well as the capacity of government and/or employers to respond. Based on the principles outlined above, it will extend to all those performing work for the enterprise, not only employees, and to all forms of work-related risk rather than to fixed categories only.

### **Trends and challenges**

104. A number of inter-related trends and challenges have emerged from this overview. Their implications are critical to future planning. Some of the key aspects can be recapitulated as follows:

- 104.1. The geographical workplace has been superseded by the chain or network as the essential productive entity.
- 104.2. The South African labour market and economy are deeply polarised between a modern segment in line with developed economies at one extreme, a precarious, informal segment in line with developing economies at the other, and various transitional levels in between. No uniform set of measures can be appropriate to workplaces across the spectrum; appropriate regulation must contain the necessary differentiation.<sup>75</sup> However, it must also be geared to a policy of progressively raising standards in line with the criteria of decent work, including measures to enable developing firms to achieve the necessary capacity.
- 104.3. Global trends exert specific pressures in different sectors, most directly at the modern segment competing in global markets, which must be understood and responded to.
- 104.4. Continuing reliance on low-wage, unskilled/semi-skilled labour is not a sustainable option. Existing concentration by government on the creation of semi-skilled or unskilled jobs in public works programmes is feeding this unsustainability. A decisive policy change is needed to focus on relevant skills development instead. Also at sectoral and workplace level there must be greater emphasis on disseminating

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<sup>74</sup> Limited precedents of mechanisms for protection in the event of insolvency can be found in section 197B of the LRA and s 36 of the Insolvency Act.

<sup>75</sup> This approach is consistent with the substantive meaning given to ‘equality’ in terms of the Bill of Rights, and needs to be worked out on this basis.



technological advances more widely (for example, within value chains). Civil society organisations can play a supportive role, and progressive enterprises can form partnerships for this purpose.

104.5. New technology can deliver not only greater efficiency but improved conditions of work. Rather than destroying jobs, it can create different jobs. This is true especially at the developed end of the economy and at intermediate levels, but even precarious work can become uneconomic through reliance on antiquated methods. It is therefore imperative that new technologies are disseminated to all levels. It is unlikely that this will happen if left to the market; active state involvement is necessary and non-governmental organisations can also make an important contribution.

104.6. Restructuring and externalisation of work (or the emergence of more networked or fluid business models) have become inherent for reasons concerned with cost, efficiency and technological advance. Regardless of the desirability of this trend in contrast to the presumed stability of standard employment, it is a reality and its impact should be central to employment policy and planning at all levels.

104.7. Different technology calls for different skills; however, inadequate basic education provided to a large part of the workforce presents a serious barrier to the development of necessary skills. Addressing this must be a central part of any strategy for future growth.

104.8. Migration from other African countries is a reality which cannot be prevented or wished away but needs to be part of forward planning. Amongst other things, it can add new skills to the local labour market which are more likely to create jobs than destroy them.

## **The workplace of the future**

105. There is a plethora of studies and literature on the subject, some of it speculative. The purpose here is to address a number of key features of the emergent workplace of the future which may have a bearing on present-day planning.

106. Automation and digitalisation, ranging from intelligent robots to an exponentially developing internet of things, e-retailing as the norm and expanding use of 3D printing in manufacture, will be ongoing drivers of technological innovation in the workplace. Market pressures will be reinforced by regulatory and environmental requirements.

107. More advanced technology brings with it (the need for) a more highly-skilled and educated workforce, better able to work independently and without high levels of line management. This translates into flatter management structures and a 'corporate lattice'

rather than a hierarchical ‘corporate ladder’, enabling workers to operate more independently and contribute more freely to decision-making.<sup>76</sup>

108. Workers are not necessarily employees; many are independent workers providing services on a contractual basis, subject to legislative protection of their basic rights which, among other things, regulate minimum terms and conditions for the provision of services.
109. A workforce of this nature has more to contribute to managerial decision-making and structures for incorporating its input are not only advantageous but may be essential. Labour law responds to this need with provision for participatory structures based on international best practice, representing all workers and not only employees.
110. ‘Managerial prerogative’ becomes more circumscribed to the extent that its basic function (instructing workers in the performance of their duties) is superseded. Strategic planning based on in-depth research, informed by consultation with staff, and securing investment acquire critical importance, superseding control as central management functions.
111. This trend is reinforced by the evolution of human rights law, reinforcing the right to equality and placing functional limits on the inequality between employer and employee. It also creates a basis for promoting substantive equality among participants in the value chain, obliging enterprises based in South Africa to conform to, and require observance of, basic human rights in its dealings with partner enterprises. Monitoring this process becomes part of the regulatory framework. Where appropriate, collective agreements can stipulate what is required but, in the absence of collective agreements, it is incumbent on companies to do so.
112. Skills development is crucial to the survival, let alone growth of the enterprise. This forms another focal area of managerial responsibility, requiring detailed planning and meaningful involvement in less bureaucratic, more streamlined sectoral and/or national training systems.<sup>77</sup> Again, consultation with staff on training needs helps to promote optimal articulation between enterprise needs and workers’ capacity to meet those needs.
113. Regional migration is an area of importance as a source of skills which may be in short supply locally. Alternatively, educated migrants are capable of being trained to perform more highly-skilled work. This, however, depends on a more rational immigration policy aimed not so much at limiting entry into South Africa as at promoting the effective operation of a Southern African labour market. This topic, and the implications for the Southern African Development Community (SADC) is dealt with more fully in **Paper 4**.
114. Strategic planning includes taking cognisance of the changing economic environment. Management, and the workforce, are aware of their place in the value chain and changes

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<sup>76</sup> See para 81 above.

<sup>77</sup> See paras 50-62 above.

in that context. Having participated in formulating regulation applicable to the value chain, management understands the importance of compliance with those rules in the functioning of the value chain as a condition for its sustainability, particularly where the value chain bridges the formal/informal divide.

115. But, in a highly dynamic setting, it is necessary to make constant adjustments in relations with suppliers or clients, renegotiate terms or identify new partners. The most advanced information technology is essential not only for production but also for planning.
116. No distinction is drawn between engagement with ‘formal’ (large) or ‘informal’ (small) partners. The only relevant difference is that different rules may apply to different categories of enterprise. The most successful value chains are those that achieve the closest integration.
117. Finally, planning extends to the regional and global level. This involves, among other things, monitoring technological and structural developments internationally and anticipating their impact on the business. It also involves identifying new potential partners globally which, through new forms of digital technology, could be directly involved in the value chain or offer new markets. The objective must be to maximise the positive effects of innovation while minimising its damaging effects, particularly on employment.
118. Greater equivalence in employment standards and product standards, combined with a relaxation of barriers to trade, is the intended outcome of ongoing inter-government engagement in Sub-Saharan Africa. Possibilities such as a regional value chain in the clothing sector are dependent on regional agreement.<sup>78</sup> This topic is considered more fully in **Paper 4**.
119. The polarisation of the economy and society between increasingly modern and increasingly precarious extremes will remain an abiding concern. Left to its own dynamics, much of the informal and poorly-skilled segments of the labour market may go on a race to the bottom, serving to destabilise society as a whole. As noted already, this trend may be reinforced by government emphasis on creating semi-skilled and unskilled jobs through public works programmes which do not enable workers to move beyond precarious work.
120. Creative policy initiatives, based on an integrated regulatory system which is supportive rather than restrictive of small-scale economic activity, must be seen as a priority to counteract a downward spiral in the labour market. For example: underpinned by the necessary legislative reforms, value chains can become an important mechanism for providing small producers with access to new skills, investment and opportunities for development. Training or retraining workers in every part of the value chain, including

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<sup>78</sup> See paras 39-40 above.

those with redundant skills, is part of the same process.<sup>79</sup> Importantly, technological advances assist regulation in becoming more comprehensive as well as more nuanced and pliable.

121. To sum up: the workplace of the future will not simply reflect a continuation of past and present trends. New technologies will be the main determinant of the changes that will take place, accompanied by structural change in the organisation of work. But at least two sets of variables will have a crucial impact on the evolution of the workplace of the future. On the one hand it will be affected by social and economic developments which cannot be controlled or anticipated with any degree of accuracy; for example, renewed global economic recession or important political shifts that cut across existing trends. On the other hand, government may be persuaded to introduce legislative and policy changes, while regulatory structures in the public and private sectors as well as enterprises may similarly respond creatively to challenges. Every discussion of future perspectives must be conditional on these and other variables.

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<sup>79</sup> See also para 67 above.