Compensating work injuries for precarious workers: an historical perspective

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Abstract

Media attention to serious accidents affecting on-demand food delivery workers has prompted debate about whether (and if so how) such workers should be provided with insurance coverage for work-related injury. This article reviews current workers' compensation laws in the Australian states, and interrogates the historical rationale for the introduction of special provisions deeming certain kinds of workers as 'employees' for the purpose of coverage notwithstanding that they were not engaged under employment contracts. We discover that arguments which convinced parliaments in the 1900s, 1920s and 1950s to include the likes of 'tributers' and 'pick up' workers in the past, are equally persuasive today.

Key words

Workers' compensation, on-demand platform work, gig work, precarious work, work-related injury, labour history

Introduction

In recent years, the rise of platform-enabled forms of worker engagement has revealed a gap in Australia's state-based workers' compensation schemes. Although many of these workers undertake particularly dangerous forms of work, it is not clear that they are entitled to workers' compensation coverage. The platforms who engage them have argued that they are not employees, so they bear no responsibility for insuring them against the risk of injury at work (Taliadoros, Tisdale and Kotzmann 2021: 451-460). They argue instead that these workers are contractors, working in their own micro businesses, and responsible for taking out their own insurance policies.

For some time, Uber argued that its contract with drivers was one for the provision of telecommunication services by Uber to the driver, and not a contract for the provision of work by the

drivers to Uber. (See the argument that succeeded, for the purposes of the *Fair Work Act 2009* (Cth) unfair dismissal laws, in *Kaseris v Rasier Pacific VOF* [2017] FWC 6610: [15].[i]) For example, ride share and food delivery cyclists working for Uber and UberEats have been denied workers' compensation coverage under the *Workers Compensation Act 1988* (NSW). In *Hassan v Uber Australia Pty Ltd* [2018] NSWWCC 21, [81], an Uber driver's claim for workers' compensation after a car accident was denied because although he was clearly working for Uber Australia Pty Ltd, the contract he had signed named an unlimited partnership registered in the Netherlands as the counterparty to his agreement.

Similarly, in *Kahin v Uber Australia Pty Ltd* [2020] NSWWCC 118: [81]) an UberEats rider was hindered in her attempt to bring a workers' compensation claim after being assaulted during a delivery. The arbitrator refused her application for access to documents, on the basis that the Fair Work Ombudsman had already published a media release confirming its opinion that Uber drivers were not employees (Fair Work Ombudsman 2019).

In one more recent and particularly high profile case that attracted much media attention (see Bonyhady and Rabe 2020; Malone 2021), the employer (Hungry Panda) and icare's insurance agent, Employers Mutual Limited, eventually conceded that the worker was an employee for the purpose of paying a death benefit to his widow (see *Wei v Hungry Panda Au Pty Ltd & Ors* [2022] NSWPIC 264). This concession relieved the assessor of any obligation to determine the question of whether the worker was an employee, or the kind of contractor who is deemed to be an employee for the purposes of coverage by the *Workplace Injury Management and Workers Compensation Act 1988* (NSW) Schedule 1, section 2. So a final determination of whether these workers are covered by workers' compensation has yet to be made.

The platforms (with the exception of Menulog) have resisted characterisation of their workers as employees, because employment status carries with it a great many other entitlements (such as modern

award coverage and access to unfair dismissal protection) that the platforms wish to avoid. We argue that even if these workers do not fall within the definition of employment for the purposes of other laws, there are good reasons to ensure that they are covered by deeming provisions in workers' compensation legislation, so that they are at least afforded appropriate protection in case of work-related injury.

A proposal by the New South Wales government has canvassed the introduction of a special insurance scheme for these kinds of workers (Cormack and Bonyhady 2020), but to date these proposals fall short of including these workers in established workers' compensation schemes. The advantage of workers' compensation coverage is that workers who are injured or made ill by work enjoy benefits beyond mere compensation for injuries. Workers' compensation legislation generally includes income maintenance for periods away from work, and rights to return to work after rehabilitation. These entitlements are important for maintaining workers' attachment to their jobs, and to the labour market more generally.

A better solution than a new minimalist insurance scheme for these workers would be extension of existing workers' compensation schemes to cover on demand work when it is performed by workers who are not running their own independent businesses. Workers' compensation statutes in all states and territories in Australia already include provisions 'deeming' or 'presuming' certain kinds of non-employed workers as workers for the purpose of coverage. (A list of these provisions is provided below.) These provisions were necessary because the definition of employment under the common law in Australia has been (and continues to be) confined to contracts whereby the worker agrees to personally serve the hirer's business, under the control and direction of the hirer.

Much ink has been spilled in legal texts attempting to clarify the definition of employment (see Sappideen et al 2016: pp 13-68; Irving 2012: pp 36-65; Bomball 2019: pp 377-385; Riley 2016). A burgeoning literature is critical of limitations of the definition, and the ease with which hirers can avoid it (see Stewart 2002; Roles and Stewart 2012; Stewart and McCrystal 2019). We will not engage with

these arguments here. Indeed we would not wish to foreclose the argument that on demand workers in the gig economy are properly characterised as employees, for the purposes of all labour protections.

There has been no appellate level decision on the characterisation of on demand workers since the High Court of Australia ruled that a back packer hired as a contractor was in fact an employee in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1. While the outcome of that case is promising, the court's reasoning is of concern, because the majority asserted that characterisation was purely a matter of assessing the terms of the contract between hirer and worker, and the vulnerability of a worker was irrelevant. While this broader question of whether on demand workers are employees or not remains unresolved, we argue that it would be useful to ensure that today's on demand workers are at least deemed to be employees for the purposes of workers' compensation coverage.

In times past, deeming provisions were included in the statutes to ensure that certain kinds of vulnerable workers who were not in a position to take out their own insurance against the risks of workplace injury would be covered under the policies of the enterprises engaging them and profiting from their labour. In this article, we review some of the decisions made in earlier times, to demonstrate that today's on demand workers are in very similar circumstances and so warrant the same consideration as on demand workers of the past. Rather than leave the question of coverage to individual concessions by employers and insurers, legislation should clarify, explicitly, that these kinds of workers are covered by workers' compensation, and the platforms engaging them should bear the primary obligation of insuring them.

Our analysis commences with a brief survey of the deeming provisions in some of the state schemes, to illustrate the extent to which non-employed workers are presently covered. We then consider some particular examples of kinds of non-employed workers who have been included in the past. We focus on the position of tributers in the mining industry, and workers attending 'places of pick up'. We conclude by observing that many of today's on demand workers, particularly those undertaking

food and parcel delivery and passenger transport work in the transport sector, are in comparable positions. They face similar risks, both of injury, and of insecure incomes insufficient to meet the costs of taking out individual sickness and accident insurance policies. It would be both efficient and fair to include them in existing workers' compensation schemes rather than invent lesser protections for them.

Contemporary workers' compensation statutes and 'deemed' or 'presumed' workers

Workers' compensation is state-based law, so each state and territory's laws must be consulted to understand coverage in the relevant jurisdiction. The provisions in each state enactment are complex and include many kinds of persons in their coverage who normally fall outside of the definition of employment for various reasons, such as work experience students, volunteers, and ministers of religion. We focus on those provisions that deal with workers who contribute economically valuable work for remuneration, but do so under some kind of contractual arrangement that falls outside of the common law definition of employment. It is not difficult for legally-astute hirers to devise ways of profiting from another's labour without engaging the worker as an employee. For example, many taxi drivers are not employed, but drive their cabs as bailees. Where an owner (or lessee) of a vehicle permits another to take possession of the vehicle for the purpose of deriving an income from it, the owner is a bailor, and the driver is a bailee. The contract will provide that the bailee pay the bailor a sum – usually based on the earnings of the driver – for the privilege of using the vehicle. The bailor is certainly profiting from the bailee's labour, but the contract is not conceived as an employment contract by our legal system. Employment is a contract involving the provision of personal service for reward; a bailment is conceived of as a contract dealing with the possession and use of property.

Victoria

The *Workers Compensation Act 1958* (Vic) includes:

- Tributers are deemed to be employees of the owner or lessee of the mine or claim they are working: section 3(3). Tributers are engaged to perform mining work, in exchange for a portion of the ore they extract. In terms of the legal characterisation of the contract, a tributer is a licensee, entitled to go onto property for the purpose of extracting ore. The contract is not conceived of (from a legal perspective) as one under which the tributer provides personal service for and under the direction of the mine owner.
- Contractors who are engaged to fell trees or clear scrub and perform the work themselves: section 3(4). The *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ('WIRCA') Schedule 1, section 6 also provides that timber contractors who perform some or all of the work themselves are deemed employees of the principal.
- Drivers engaged to carry passengers under a contract of bailment: section 3(5). This includes taxi and hire car drivers who do not own their own vehicles, but take possession of them under a contract of bailment, and pay the owner for the use of the vehicle. The WIRCA Schedule 1, section 7 makes similar provision for bailees of vehicles.
- Contractors who perform work for principals, so long as the work is not 'incidental to a trade or business regularly carried on by the contractor in his own name or under a firm or business name', and so long as they provide some or all of the work themselves (without subcontracting): s 3(6). Typically, an independent contract is distinguished from an employment contract by terms which allow the contractor to determine when to work. Contractors will often also provide their own tools.
- Share farmers who are paid in cash or in kind less than one third of the income derived from the land: s 3(6A). the WIRCA Schedule 1, section 12 makes the same provision.
- Workers who attend 'places of pick up' 'at which employers select and engage persons for employment' are deemed to be employees of the last employer to give them work while they are travelling to or waiting at a place of pick up: s 3(7). The WIRCA Schedule 1, section 16 makes

the same provision (once such a worker is given a job, they will be a casual employee for the day. The deeming provisions allow them coverage between assignments, while they are travelling or waiting for work.)

The WIRCA provides that owner drivers carrying goods for reward are also deemed to be workers for the purposes of that Act, if they use their vehicles 'mainly for the purposes of providing transport services to the principal', so long as Work Safe Victoria has not determined that they are carrying on an independent trade or business: Schedule 1, section 8(2). The Authority published a 'Premium Guideline' on Owner Drivers, on 1 July 2014 which states that only unincorporated owner-drivers will be deemed workers, and they must not engage any relief drivers for more than 20 per cent of their work. They cannot earn more than 80% of their income from a single hirer, and they must work for at least 180 days a year, and no fewer than three days per week. This guideline is directed towards creating a clearer line between those owner drivers who are running their own genuinely independent businesses, and those who are effectively engaged in the businesses of the hirers.

New South Wales

The *Workplace Injury Management and Workers Compensation Act 1988* (NSW) Section 5 and Schedule 1 deems certain persons to be workers, and these include various kinds of rural workers, such as timber fellers, cane cutters, and fencers: Schedule 1 section 3. There is a specific provision for 'shearer's cooks': Schedule 1, section 12.

The NSW Act also includes tributers (Schedule 1, section 6), and others engaged in mine work: 'Any person usually employed about a mine or in connection with the operations of a mine whose remuneration is provided wholly or partly by the workers employed at the mine is … taken to be a worker employed by the person by or for whom the mine is being worked': Schedule 1 section 7. The

NSW Act also includes a provision dealing with workers at places of pick-up, in similar terms to the Victorian legislation: Schedule 1, section 14.

In addition to a range of specific kinds of work, Schedule 1, section 2 includes a general category of 'Other contractors', who perform work worth more than $10, but not as part of any trade or of their own, and without subcontracting any of the work to employees of their own. In *Malivanek v Ring Group Pty Ltd* [2014] NSWWCCPD 4 (at [235]-[243]) the characteristics of such a contractor were explained:

(1) The contractor must employ no workers;

(2) If they use an Australian Business Number (ABN), it must because the principal hiring them required it;

(3) They must provide no significant capital equipment;

(4) They must not advertise for work;

(5) They must not be permitted to delegate or subcontract work to others;

(6) They must have no identifiable goodwill in any business of their own;

(7) They must not systematically and regularly accept work from other principals.

On its face, this set of characteristics may seem to include many on-demand workers who accept gigs through platforms, however some features of gig work defeat classification under this category. They often provide their own vehicles and communication technology. Cleaners and home care workers engaged through platforms may provide other tools and equipment. *McLean v Shoalhaven City Council* [2015] NSWWCC 186 made it clear that a contract driver who provided his own truck to perform deliveries for a local council was not a deemed worker because his contract was described as one for the hire of a truck with a driver, not a driver with a truck. Uber drivers also fall outside the category of bailees, because they provide their own vehicles.

Similar provisions in other states and territories

Provisions treating tributers as deemed workers can also be found in The *Workers' Compensation and Injury Management Act 1981* (WA) section 7. Provisions dealing with self-employed contractors who do not operate their own businesses and employ some or all of the work themselves can be found in the *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 11(2) and Schedule 2 section 3, the *Workers Rehabilitation and Compensation Act 1988* (Tas) section 4B; and the *Workers Compensation Act 1951* (ACT) s 11.

The *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 11(2) and Schedule 2 Part 1 of that act, deems sharefarmers to be workers if they are entitled to no more than one third of the proceeds of the share farming operations under their agreement with the owner of the farm, and do not provide their own farm machinery (see Schedule 2 (1)).

As this review of contemporary workers' compensation provisions illustrates, there is a history in Australia of extending workers' compensation coverage to a range of workers who fall outside of the common law definition of employment, but are not – in any meaningful sense – entrepreneurial business people who can be expected to manage their own risks of work-related injury. Presently, it is not clear that the newest manifestations of 'on demand' work, whereby workers are engaged through platforms to undertake tasks, are covered by these provisions, but should they be? We interrogated the reasons that Parliaments enacted provisions covering earlier kinds of self-employed work, with a view to assessing whether the same reasons might be engaged to justify amendment of workers' compensation legislation now, to benefit today's 'tributers' and 'pick up' workers.

Tributers

The 'tribute' system of work in the mining industry has a long history and may have its origins in Cornwall and brought to Australia by the many Cornish copper miners who migrated to Australia

(Masao Yamanaka, 1985). Under the tribute system, workers were not engaged as employees but bid to work a portion of a mine in return for a share of the profits earned. As Yamanaka writes (1985, 10):

> …in tribute work he [the miner] received a certain percentage on the value of the ore at the rate of so many shillings in the pound upon that value… The tributer may best be compared to a small farmer who rents his land from a big owner and makes a living from such produce of the land as remains over after he has paid his rent. The tributer's rent was one which varied according to the richness or poorness of his (underground) farm. Thus, if a tributer agreed to work a pitch for 12s. in the £, the remaining 8 s. may be considered as his rent paid to the adventurers (shareholders) of the mine. Tributer seldom owned any of the implements or materials he used; for these were provided by the company, who charged him for the use of them. The tributer had to pay all the expenses connected with the winning of his produce.

Tributers therefore shared in both the risks and rewards of the mining industry and were neither considered nor treated as employees. Among the many risks of the mining industry was, of course, the significant risk of injury or death in this highly dangerous pursuit.

New South Wales

The mining industry was among the earliest to be considered in need of compensation in the case of accidents, but as the ensuing description of periodic legislative amendment shows, there were regularly debates of a political nature about how best to deal with that challenge, much in the way current debates recognise the needs of gig workers, but disagree about how best to address those risks.

The *Miners Relief Act 1900* (NSW) introduced a contributory system of payments into a fund which would be used to support injured workers and provide payments to dependents in the case of death. This was introduced by agreement with employers, unions and workers in the NSW mining industry. The Act applied to all work, no matter how it was structured. No distinction was made in the Act between employees or other types of workers; rather deductions from ‘wages’ of all kinds were to

be paid into the fund. Section 2 of the Act provided that 'Wages' included 'all earnings by persons arising from any description of piece or other work, either above or below ground in or about the mine'.

When introducing this Bill, the Secretary for Mines and Agriculture justified the inclusion of tributers on the basis of 'the dangerous nature of the avocation and the numerous accidents that take place, and the poverty and distress caused by these accidents' (Hansard, NSW Legislative Assembly, 12 September 1900: pp 2871-2). He said that while large scale accidents sometimes attracted 'public generosity' to alleviate distress, individual accidents did not, and there had been as many as 23 deaths in Broken Hill alone in the first eight months of 1900.

This special arrangement for compensating for injuries in the mining industry was replaced by a more general system of workers' compensation by the *Workmen's Compensation Act 1916* (NSW) (Act No 71 of 1916). This Act, however, was specifically designed to cover only 'workmen' who were 'employed', with certain exclusions, unless its provisions were extended to other categories of workers. In the Committee stages of the consideration of this Bill, the Minister moved the inclusion of a new subclause 5:

> Every tributer working in connection with any mine as ·defined by the *Mining Act 1906,* and also any wages men employed by any such tributer shall, for the purposes of this Act, be deemed to be workmen employed by the person with whom the tribute agreement was made by the tributer.

In introducing this amendment, the Minister noted that it was required because when the *Miners' Accident Relief Act* was repealed, many miners would have no rights to claim compensation in case of accidents.

> Instead of receiving wages they will possibly enter into a bogus agreement. They will take a tribute, and although they are following a dangerous occupation, they will possess no right to compensation for accident. Though the owner of the mine will be getting from the tributer his portion of the profit, no liability will rest

> with him so long as the men are working as tributers. I consider that men engaged in dangerous work of this character should be protected under this Act just the same as if they were working for wages (Hansard, NSW Legislative Assembly 9 August 1916: p 667.).

The amendment was opposed, although an opposition spokesperson (Mr Wade) conceded that contractors ought to be covered to prevent bogus sub-contracting to avoid the obligation to pay compensation in the case of injury. He said:

> The underlying principle of the Clause is that a man who. contracts with another person to carry out certain work, and sublets his contract, is still to be held responsible for the injury sustained by the worker employed by the subcontractor. To that extent the provision is logical and fair, because it is possible that contractor might otherwise seek to avoid his responsibility by subletting to a sub-contractor who might be a man of straw. Under those circumstances the contractor would be the person who ·would have to bear all the responsibility for those who were working for him, directly or indirectly (Hansard, NSW legislative Assembly Hansard, 9 August 1916: p 667).

The Minister's amendment was carried and tributers were covered by the new Compensation Act. However, in 1929, a conservative government (under Premier Bavin) briefly occupied the Treasury benches in the NSW parliament and the Act was amended to exclude certain categories of workers, including share farmers and tributers. Speaking against the amendments, one Opposition member noted:

> Everybody knows that a lot of work in mines is done on tribute, a man agreeing to pay the lessee of the mine a percentage of the values won. If the mine owner or lessee desires to evade the provisions of the Workers' Compensation Act, all he will have to do is to let a man work on tribute instead of engaging him on contract or by the day. The tributer may employ other men, and he also will evade liability. What was in the mind of the person who moved this amendment it is beyond my ability to understand. If there is anybody to whom compensation should be applicable, it is the man who works in a dangerous occupation, and mining is one of the most dangerous occupations.' (Hansard, NSW Legislative Assembly, 26 November 1929: p 1696.)

In 1942, the new McKell Labor government sought successfully to restore the rights taken away in 1929 through new *Workers' Compensation Act and Workmen's' Compensation (Broken Hill) Act*

(Amendment) Bills 1942 (NSW). In his second reading speech, the Minister for Labour and Industry and Social Services explained that this legislation restored the 1926 law which deemed any worker who undertook a contract for work of more than £5 in value, which was not undertaken in the course of any trade or business regularly carried on by him in his own name or under a firm name, to be employed by the person who hired him, provided that the worker did not employ others to do the work. The new legislation also restored workers' compensation rights for tributers, timber-getters, rural workers undertaking land clearing work, and to sugar-cane cutters, provided that they undertook the work themselves. Salesmen, canvassers and collectors who were paid wholly or partly by commission were also included. (Hansard, NSW Parliamentary Legislative Assembly, 14 May 1942: p. 3569.) The Minister noted that a number of these deemed employment provisions were based on English workers' compensation laws. He concluded his speech with an impassioned plea:

> I bring to this debate personal knowledge and experience of the industrial life of the Commonwealth extending over twenty years. I can say without exaggeration that I have helped to dig out entombed men, to carry them for three miles underground to the surface, to carry out the mangled bodies of men who have been killed instantly, and those who have died on the way up. I have also helped to carry out men who have become permanent human wrecks. It has also been my unfortunate experience to have to convey the sad news of the injury or death of loved ones to their wives and families. I am speaking of the time when there was no compensation for injured workers, or for the dependants of men who were killed. The only payments that were made came from levies and from contributions by fellow workers. My own brother was entombed in a mine. It took some dozens of workmen digging desperately for an hour to get him out, and he was not given a million to one chance. As a result of a wonderful constitution and first-class medical and nursing attention, he pulled through, but he received no compensation…' (Hansard, NSW Parliamentary Legislative Assembly 14 May 1942: p 3570).

During the debate on the Second reading of the Bills, Ted Horsington, the long-serving Labor member for Sturt, who had worked as a miner and was a union secretary based in Broken Hill, remarked on the exclusion of a number of categories of workers – described as contractors – by the 1929

amendments and why they should be brought back into the workers' compensation fold. He noted the deliberate strategy of mine owners to avoid workers' compensation obligations by engaging miners as tributers rather than employees, and expecting them to make their own arrangements (if any) for insurance (Hansard, NSW Legislative Assembly, 15 May 1942: p 3599). Deliberate employment avoidance is a common strategy in the gig economy today (Rawling and Riley Munton 2022: pp13-16).

Victoria

In Victoria, compensation for injury or death in the mining industry has been available to certain workers since the enactment of the *Mines Act 1890* (Vic). Section 366 of that Act provides that

> if any person employed in or about any mine suffer any injury in person or be killed owing to the non-observance in any such mine of any of the provisions of this Division of this Part of this Act, … or owing in any way to the negligence of the owner of such mine his agents or servants, the person so injured or his personal representatives or the personal representatives of the person so killed may recover from the owner compensation by way of damages as for a tort committed by any such owner…

While the 1890 Act defined a tributer and a sub-tributer (in section 299), it does not appear to have specifically dealt with whether these categories of worker were covered by the compensation provisions or not.

The Victorian Parliament enacted its first general workers' compensation legislation in 1914 as Act No. 2496*, An Act to provide for Compensation to Workers for Injuries occurring in the course of their Employment.* In addition to the general provisions, section 5 of this Act also provided that

> ...when the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible or was such as to give a right to recover compensation under section one hundred and forty-eight of the *Mines Act 1897* [which had the same injury and accident provisions as the 1890 Act] nothing in this Act shall affect the civil liability of the employer, but in any such case the

> worker may at his option either claim compensation under this Act or take proceedings independently of this Act…

At some juncture, it evidently became a matter of some doubt as to whether tributers and sub-tributers were covered by the new legislation. Accordingly, in 1922, an amendment was passed to include section 3(1) which provided that tributers and sub-tributers should be deemed to be working under contracts of service (i.e. employment) of the lessee or owner to the mine: *Act No 3217 of 1922: An Act to amend the* Workers Compensation Act 1915, Clause 3 (1). In the first reading speech with respect to the amending Bill, the Chief Secretary (Major Baird of the Lawson Nationalist Government) explained that the amendments were intended to make clear that tributers, and also sub-contractors engaged in cutting sleepers for the railways, clearing land, and other such work, came under the Act (Hansard, Victorian Legislative Assembly, 16 November 1922: pp 2800-2801). The Chief Secretary then tabled the equivalent of today's Explanatory Memorandum, to explain the new provisions:

> Clause 3(1): Tributers the reason of this amendment is that legal opinions being divided as to whether tributers do or do not come under the provisions of the Act, it was decided to make it clear the interest of tributers will be protected…
>
> Section 7: In various mines the butty-gang system is in operation, and it was held that under the original Act, although the members of the gang might be regarded as workers, the principal of the gang would not come within the scope of the Act. As these are purely co-operative parties it would be unfair to deprive the supposed principal of the benefits of the Act. (Hansard, Victorian legislative Assembly, 16 November 1922: p 2801.)

A 'butty gang' was another form of engagement in the mining industry, whereby a group of workers formed a co-operative to perform work. As members of a co-operative, they were not considered to be employees, but were clearly treated as such for the purpose of workers' compensation, and the 1922 Act specifically extended this provision to the principal of the gang. The intention was to ensure that all persons who effectively provided only their labour in any type of work were covered by the relevant workers' compensation legislation.

While the 1922 Bill was debated in the parliament, and certain other clauses criticised by the then Opposition, which included the Country Party, no objection was raised by any member to including these mining workers within the scope of the workers' compensation system. The Bill was carried unamended in the Assembly. As noted above, tributers and sub-tributers remain covered by the current Victorian workers' compensation legislation, thus retaining rights they first specifically acquired one hundred years ago.

Western Australia

Tributers have also been covered by workers' compensation legislation in Western Australia for over one hundred years, being specifically included in the *Workers' Compensation Act Amendment Act 1920* (WA) (No 43 of 1920). As in Victoria, such workers had been recognised under the earlier *Mining Act 1904* (WA) section 4, which provided that tributers whose earnings did not exceed 300 pounds a year (subsequently amended to 400 pounds) were deemed workers of the lessee or owner of the mine. The inclusion of tributers within the scope of the West Australian workers' compensation legislation was extensively debated in the parliament. There was no objection in principle to this provision, although a number of practicalities were raised, especially with regard to calculating the earnings of tributers, who did not, of course, work for wages. In introducing the provision in the second reading speech, the Minister simply noted:

> One amendment which this measure will make affects the workers who are entitled to apply for relief under the Act. At present the definition of the term "worker" does not include tributers. A tributer, so long as his remuneration as defined by this Bill, does not exceed the amount which would disentitle a worker to claim under the Act, will be treated in the same way as a worker.' (Hansard, WA Assembly, 25 November 1920: pp 1895-6).

After this brief introduction, a long debate about tribute agreements continued in the Assembly on 30 November 1920. One of the principal objects of the proposed changes to the workers'

compensation laws were to include tributers. MPs who spoke in this debate specifically supported the inclusion of this class of worker, but a number of them noted that similar workers were not included in the legislation:

> Hon P Collier: It is proposed to enlarge the definition of "worker"' under the Workers' Compensation Act to include the tributer. The Bill in that respect is a good one. But there are other classes of labour which might well be brought within the scope of this measure. There are, for instance, the men engaged in our agricultural areas, in clearing the farmer's land, who do not come under the present Act. It may rightly be claimed that this is a class of worker somewhat analogous to the tributer…'

In expressing his agreement with what he described as overdue measures to include tributers, the Hon T. Walker opined that the inclusion of other workers should also be considered:

> Whilst we are legislating we do not want to think of one body alone, but all bodies who in like manner should be brought under the measure. I have known in my limited experiences men who have been permanently injured and have been, barred because they were working nominally as contractors, but actually working for some farmer… [Land] Clearers and all others working for employers under contract should be included in the Act. … Piece workers, whether employed as coal miners or as farm hands or in other capacities, employed as men practically contracting to do work as workmen for employers or owners, and only paid by contract as a matter of convenience, should not be regarded as outside the relation of worker to master in the slightest degree…' (Hansard, WA Assembly, 30 November 1920: pp 1963 ff).

Workers attending 'places of pick up' and other workers

One feature of today's gig work is that, in some sectors (notably passenger transport and food delivery), workers' contracts allow them to work for multiple platforms. This is described as 'multi-apping' (Rawling and Riley Munton 2022: p 19), and it has been argued to justify the view that the worker is no one employer's responsibility in the time between their tasks. This phenomenon is not entirely new. It has a parallel in the practice of a century ago, in the 'pick up' system.

One of the most precarious forms of employment in Australia in the past has been that of the casual day labourer offering to do stevedoring work on the waterfront. Synonymous with the 1930s 'hungry mile' on Sydney's Darling Harbour wharves (now redeveloped as Barangaroo), but equally prevalent in other ports, dock workers seeking employment were required to attend a morning 'pick up' in the hope that they would be engaged for the day. Sometimes, they were successful and often they were not, returning home without work or income. Work in some other industries was also organised in this manner.

As in the mining industry, work on the waterfront was dangerous in the first half of the 20th century. In 1950, it was estimated that 22 per cent of Australia's wharfies were listed as 'disability men'; that is, unable to perform the more arduous work. In 1956, the Federal Minister for Labour revealed that the proportion of stevedoring employees suffering compensable injuries had reached 58 per cent (Sheridan 1994: 265). If work was obtained at the 'pick up', an employment contract was formed, but if no work was to be had no employer/employee relationship existed for that day. Casual workers were considered to be employed by the hour and any employment relationship ended with the end of each period of engagement. As casual employees, the workers were covered by workers' compensation while undertaking tasks, but they were not covered for 'journey claims' on the way to or from or while waiting on the docks. Generally speaking, workers' compensation protection also includes 'journey' accidents resulting in injury or death.

A number of State parliaments acted to ensure that all day labourers operating in the 'pick up' system of casual employment – as well as those who did not obtain employment – were covered for workers' compensation – even where no employment contract had been formed and, indeed, where no work actually took place. Victoria and NSW both passed amendments to their workers' compensation Acts in 1950 and 1951. The *Workers' Compensation (Amendment) Act 1951* (NSW) (Act No 20 of 1951) section 14B provided:

> Where any person is ordinarily engaged in any employment in connection with which persons customarily attend certain prearranged places (in this Act called "places of pick-up") at which employers select and engage persons for employment, any such person shall be deemed, while in attendance at any such place of pick-up before being so selected, or while travelling thereto from his place of abode, to be a worker employed by the employer who last employed him in his customary employment.

In the second reading speech, Mr Finnan, Minister for Labour and Industry and Social Welfare, noted the inclusion of contractors who performed some or all of the work themselves, including timber industry and rural workers, and also explained the rationale for the inclusion of boxers, wrestlers and others in similar public entertainments, on the basis that 'serious accidents sometimes befall such persons in the course of their performances and, owing to the peculiar nature of their calling under contracts associated with their engagement, such persons are generally outside the provisions of the existing legislation'. He went on to justify the inclusion of workers who

> by the nature of their calling are required to attend pick-up centres in order to secure employment', including wharf labourers, sugar and coal workers…
>
> 'Hon. members will appreciate that at present these persons are not considered to be in employment when their day's work has finished. Therefore, if they are injured while proceeding to or from the pick-up centre no compensation is payable to them. But the wharf labourer must, if he finishes a job, say, to-night, proceed to a pick-up place to-morrow morning. On the way to or from the Pick-up place· he may suffer a severe accident. This amendment will protect. such people, who will henceforth be deemed to be employed by he who last employed them in their customary work.

The Bill was extensively debated. One member interjected, querying whether a worker who would receive appearance money from one employer would nevertheless be covered by the insurance of the person who previously employed him on the way to the job. Mr Finnan replied:

> The unionist must attend the pick-up place. He does not go there simply to draw attendance money of, say, 15s. or 16s. We believe that he should be protected against financial loss as a result of an accident when he is on his

> way to the pick-up place. He is instructed to travel to the pick-up place and should be treated as one who is in employment.

Another member (Richardson) noted:

> The effect of the proposed amendment of the Act· will be that the last employer will continue to be responsible, through his insurance company, of course, for a wharf labourer until he is taken into employment by another employer. I must concede that, under the terms of employment relating to that class of work, it is essential for a. man to go to the pick-up place. before he can be reemployed, and from that point of view it might be reasonable that such workers· should be included in the provisions of the bill. Nevertheless, I point out that the last employer remains responsible (Hansard, NSW Legislative Assembly,18 June 1951: pp 2774 ff)

The Victorian Parliament had previously passed amending legislation in identical terms: *Workers Compensation Amendment Act 1950* (Vic) (Act No. 5522 of 1950). In introducing that Bill, the Chief Secretary, Mr Dodghsun, advised the Parliament that any person in travelling to or from, or in attendance at a pre-arranged 'pick up' place, 'shall be deemed to be working under a contract of employment and the employer who last employed him shall be deemed to be his employer. The purpose is to extend to wharf labourers travelling to a pick-up point, or whilst there awaiting engagement, the benefits of the Act in the same way as is enjoyed by other workers.'

An extensive debate took place, clearly indicating some concern about the practicalities of the proposal, but ultimately deciding that it was the only way of achieving the desired coverage of these itinerant workers, who moved from job to job, if not from place to place:

> Mr Dawany-Mould: If a man is not picked up on that day, will he still be covered?
>
> M. Dodgshun: Yes, he goes to the pick-up point with the intention of being picked up and has offered himself for work.
>
> Lieut-Colonel Leggatt: A man may attend every day of a month and not be picked up, and in such a case the employer who last employed him will be regarded as the employer.

> Mr Dodgshun: That is so. Difficulty was experienced in trying to draft the clause equitably, and that is the only way in which it could be done (Hansard, Victorian legislative Assembly, 28 November 1950: pp 2618 ff).

Conclusions

As the above review of some of the historical debate demonstrates, there has long been a commitment in Australian state parliaments to ensure that all workers who undertake dangerous work for the benefit of the businesses of others, should be covered by workers' compensation legislation. A common theme is that a hirer of labour should not escape the obligation of providing such insurance for workers by entering into 'bogus' (we might today call them 'sham') contracting arrangements. A common theme is that in order to be deemed an employee or worker for the purpose of the legislation, the worker must be performing most, or all of the work themselves, and must not be running any business of their own. We saw that in Western Australia, an annual income threshold was provided, to exclude workers operating lucrative businesses of their own, who could afford to take out their own policies.

We see, in the way in which parliaments address 'pick up' systems, that they were mindful of the considerable gap in workers' compensation coverage for those itinerant workers who needed to travel between potential engagements, generally without any guarantee of work on arrival. Perhaps, most notable is that, in many of these debates, there was bipartisan support for the general proposition that non-employed work should be covered by the schemes, to avoid incentives for hirers to avoid their liabilities. Notwithstanding common assertions that today's gig economy is a brand-new phenomenon, we see many parallels with these forms of work in the past. Gig workers are typically treated as self-employed workers, and their contracts often explicitly permit them to work for other platforms. When they log on to the app, much like attending at a place of pick up, they have no guarantee that any task will be assigned to them, so they can be cycling around waiting for an assignment, not paid for their time and, presently, not covered by workers' compensation in case of injury.

Workers' compensation coverage provides more than merely compensation for the medical expenses incurred by an injured worker. It also provides income support, and a right to return to work after recovery. These benefits are as important for gig workers as they are for employees in permanent jobs. If parliaments in the 1900s, 1920s and 1950s could solve the problem of workers' compensation coverage for itinerant 'pick up' workers, and workers such as tributers and sharefarmers, there is no reason why state parliaments in the 2020s cannot do the same.

Our discussion has largely focused on the need for workers' compensation for workers in the transport industry, because that industry is presently front-of-mind in discussions of the Uberisation of work (Rawling and Riley Munton 2022). Several fatal road accidents have drawn attention to the risks faced by these workers (see Bonyhady and Chung 2021; Johnson 2019; First Interim Report 2021: p 121). Nevertheless, other kinds of worker are also increasingly being engaged through platforms, and the platform operators typically characterise the workers as self-employed contractors, and count themselves as merely introduction agencies. For example, platforms such as Mable are emerging in the area of home care services (Job Insecurity Report 2022). There are risks in this kind of work as well. Social workers, nurses and cleaners can suffer assaults and other injury while attending to the physical needs of patients. Even where the nature of work is not so inherently dangerous as the mining work of tributers, there is ample research establishing that precarious work is inherently unsafe because of the pressures that precarity creates for workers who must work in haste and in poor conditions to earn what is often a meagre income (Quinlan and Wright 2008; Takahiko Kudo and Belzer 2019; Faulkiner, and Belzer 2019; Gregson and Quinlan 2020: p 548).

Just as the mine owners of the past profited from the labour of tributers, notwithstanding the absence of any direct employment relationship between them, today's digital platforms profit from the labour of those who sign up as workers on their platforms. The likes of Uber and others derive their revenue by taking a substantial commission from the earnings of the workers. There is every reason to

enact deeming provisions in workers' compensation legislation to ensure that these kinds of workers, like the tributers, timber getters and pick up workers of the past, are able to access the workers' compensation protections enjoyed by regular employees. It may be, with the change in federal government, that some of the recommendations of the *Job Insecurity Report* (2022) will be implemented, and we will see a broader definition of 'employee' in the *Fair Work Act 2009* (Cth), so that workers accepting gigs through digital platforms are able to access some of the entitlements afforded to employees. In the meantime, however, it is clearly within the remit of state governments to make minor amendments to their workers' compensation laws to ensure that these kinds of workers are covered for work-related injuries. On demand workers in the past have been afforded this protection. The arguments mounted by former generations for ensuring that these kinds of vulnerable workers enjoy workers' compensation coverage are equally pertinent today.

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Declaration of interests

Keith Harvey and Joellen Riley Munton are members of the executive board of the Australian Institute of Employment Rights. Joellen Riley Munton is a Professor of Law at the University of Technology

Sydney, and Professor Emerita of the University of Sydney. As they are both editors of this journal, this article was edited independently.

References

1. Bomball, P (2019) 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (2019) 42(2) *Melbourne University Law Review* 42(2), p 370.Bonyhady, N and Rabe, T (2020) 'Rider deaths reveal risky safety practices' *Sydney Morning Herald*, 3-4 October 2020, p 24.
2. Bonyhady, N and Laura Chung, L(2021) 'Fifth Food Delivery Driver Dies Following Truck Crash in Central Sydney', *Sydney Morning Herald* (online, 23 November 2020) <www.smh.com.au/national/nsw/fifth-food-delivery-rider-dies-following-truck-crash-in-central-sydney-20201123-p56h9y.html>.
3. Cormack, L and Bonyhady, N (2020) 'Food delivery levy proposed to pay for workers' comp for the gig economy' *Sydney Morning Herald*, (Sydney, 17 December 2020).
4. Fair Work Ombudsman (2019) 'Uber Australia Investigation finalized' (Media Release, 7 June 2019), https://www.fairwork.gov.au/newsroom/media-releases/2019-media-releases/june-2019/20190607-uber-media-release.
5. Faulkiner, M R and Belzer, MH (2019) 'Returns to Compensation in Trucking: Does Safety Pay?' (2019) *The Economic and Labour Relations Review* 30(2): p 262.
6. First Interim Report (2021), Senate Select Committee on Job Security, Parliament of Australia, *On-Demand Platform Work in Australia* (First Interim Report, June 2021).

7. Gregson, S and Quinlan, M (2020) 'Subcontracting and Low Pay Kill: Lessons from the Health and Safety Consequences of Sweated Labour in the Garment Industry, 1880-1920' (2020) 61 *Labour History* 61, p 534.

8. Irving, M (2012) *The Contract of Employment* (LexisNexis Butterworths).

9. Job Insecurity Report (2022) Commonwealth of Australia, Senate Select Committee on Job Security, *The job insecurity report*, ISBN 978-1-76093-350-0.

10. Johnson, S 'Deliveroo Tackles Rider Safety – as Thousands of Workers Complain about Being Injured on the Job – Following the Death of Four Uber Eats Deliverers', *Daily Mail Australia* (online, 16 October 2019) <www.dailymail.co.uk/news/article-7573137/Uber-Eats-delivery-drivers-killed-forces-Deliveroo-set-safety-panel.html>.

11. Malone, U (2021) 'Hungry Panda Food Delivery Company under Scrutiny over Riders' Insurance, Failure to Report Death to SafeWork NSW', *ABC News* (online, 23 February 2021) <https://www.abc.net.au/news/2021-02-23/hungry-panda-scrutiny-over-delivery-riders-safety-gig-economy/13182772>.

12. Quinlan, M and Wright, L (2008) *Remuneration and Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission* (Report, October 2008).

13. Rawling, M and Riley Munton, J (2022) 'Constraining the Uber-Powerful Digital Platforms: A Proposal for a New Form of Regulation of On-Demand Road Transport Work' *University of New South Wales Law Journal* 45(1) p 7.

14. Sheridan, T (1994) 'Australian Wharfies 1943-1967: Casual Attitudes, Militant leadership and Workplace Change*', Journal of Industrial Relations*, June 1994, pp 258.

15. Riley, J (2016) 'The Definition of the Contract of Employment and its Differentiation for Other Contracts and Other Work Relations' in Mark Freedland et al (eds) *The Contract of Employment* (Oxford University Press, UK) p 321.

16. Sappideen, C, O'Grady, P and Riley J (2016) *Macken's Law of Employment*, 8th Ed, (Lawbook Co, Sydney).

17. Stewart, A (2002) 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15(3) *Australian Journal of Labour Law* 15(3): p 235.

18. Stewart, A and McCrystal, S (2019) 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' *Australian Journal of Labour Law* 32(1), p 4.

19. Roles, C and Stewart, A (2012) 'The Reach of Labour Regulation: Tackling Sham Contracting' *Australian Journal of Labour Law* 25(3), p 58.

20. Takahiko Kudo and Belzer, M H (2019), 'The Association between Truck Driver Compensation and Safety Performance' Safety Science, 120: p 447.

21. Taliadoros, J, Tisdale, R and Kotzmann, J (2021) 'Application of Work Health and Safety and Workers' Compensation Laws to On-Demand Workers in the Gig Economy: The Need for Legal Clarity' *Adelaide Law Review* 42(2) pp. 431-466.

22. Masao Yamanaka (1985) *Tribute System and Cost Book Principle - South Australian Copper Mining Business in Mid-Nineteen Century* Otemon Economic Studies, 18.

[i] Most of the cases considering whether the on demand platforms (such as Uber, Deliveroo and Foodora) employ their workers have arisen in the unfair dismissal jurisdiction of the *Fair Work Act 2009* (Cth) Part 3-2. Most, including the Fair Work Commission Full Bench decision in *Gupta v Portier Pacific Pty Ltd; Uber Australia trading as Uber Eats* [2020] FWCFB 1698, have found that the workers are independent contractors. Two notable cases, which turned on the terms of the workers' own particular contracts and working arrangements, found that the workers were employees. See *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 and *Franco v Deliveroo Pty Ltd* [2021] FWC 2818 For a discussion of these cases see Rawling and Riley Munton 2022.