THE McKELL INSTITUTE

‘Gig’ work

and reform of workers’ compensation and rehabilitation in Queensland

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OCTOBER 2024

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ACKNOWLEDGEMENT OF COUNTRY

This report was written on the lands of the Darug and the Eora Nations. The McKell Institute acknowledges Aboriginal and Torres Strait Islander peoples as the Traditional Owners of Country throughout Australia and their continuing connection to both their land and seas.

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FOREWARD

The gig economy has transformed the way people work, offering flexibility and autonomy.

This shift has raised critical questions about the conditions and protections for those workers in the gig economy.

In 2023, following one of the largest ever surveys of transport workers in the gig economy in Australia, the McKell Institute released the ***Tough Gig: Worker Perspectives on the Gig Economy report.***

The report found that 95% of gig workers wanted reform, with half reporting they receive under the minimum wage and most had to finance their own equipment, further reducing their take home pay.

Workers also reported issues associated with injury at work with over a third having been physically injured while working and over 65% reporting not earning money while sick or injured as a major concern.

In 2024 the Closing the Loopholes Bill came into effect and aims to extend labor protections to gig workers by ensuring they receive the same rights as traditional employees.

Gig workers can now make applications to the Fair Work Commission to set minimum rates of pay and other workplace conditions.

With the passing of the Closing the Loopholes legislation, attention must now turn to ensuring that gig workers receive support when injuries or accidents occur.

When accidents happen, the lack of coverage can have devastating consequences.

The need for WorkCover for gig workers aligns with community expectations, recognising the importance of mental and physical health in the workplace.

Establishing WorkCover for gig workers in Queensland is not just a regulatory change, it's a vital step towards ensuring economic fairness, worker safety, and long-term sustainability in a rapidly changing job landscape.

Sarah Mawhinney
Executive Director of The McKell Institute Queensland

EXECUTIVE SUMMARY

This report investigates issues facing Queensland's workers' compensation laws in relation to gig workers.

Unlike most other aspects of employment law, workers' compensation and rehabilitation is primarily a state responsibility. Workers' compensation and rehabilitation systems differ between states, causing confusion among participants. The rehabilitation and return-to-work dimensions are crucial to the effectiveness of these schemes, and in minimising the cost to the community of workplace injury.

Many 'gig' workers are vulnerable workers as they have low bargaining power and lack access to many of the rights afforded to employees under conventional labour law including access to workers' compensation and rehabilitation. When injured or killed at work, the consequences are serious but compensation may be totally lacking.

Earlier attempts at resolving these problems have mostly centred on finding ways of converting 'gig' workers to employees. Such attempts have had mixed results overseas but have not progressed much in Australia.

Many 'gig' workers (at least in some occupations) do not wish to become employees and prefer to retain contractor status. Yet they often wish to be 'protected' from larger corporations. Policy makers should consider ensuring 'gig' workers are covered by workers' compensation and rehabilitation systems without changing their status from contractors to employees.

The Queensland 2018 Review of workers compensation made recommendations that worked in this direction, as did the 2023 Review. The Queensland government in 2024 amended legislation to enable certain 'gig' workers to eventually be covered by the workers' compensation and rehabilitation system.

The passage in 2024 of the federal 'Closing Loopholes' amendments to the *Fair Work Act 2009* (Cth) may have given the impression of pre-empting the issue of gig worker coverage for workers' compensation and rehabilitation, by enabling the Fair Work Commission to make minimum standard orders for a range of 'gig' workers. However, the Fair Work Act does not cover workers' compensation and rehabilitation and the Fair Work Commission does not have the power to issue minimum standards orders in relation to Workers' Compensation and Rehabilitation.

Private insurance cannot adequately address the issues. 'Gig' workers are unlikely to adopt any voluntary methods of injury compensation coverage. Yet mandated private insurance would not be cost-effective, would leave these workers outside the workers' compensation and rehabilitation system and without suitable rehabilitation and return- to-work programs. Mandated private insurance is particularly inappropriate in the context of 'multi-apping', engaged in by a majority of platform users. Resources would be wasted by firms (or insurers) arguing over who is liable for the injury, possibly without resolution. If a general workers' compensation and rehabilitation scheme were in place, the payment to the injured worker would be made by an insurer that covers all workers.

Given the close relationship of workers' compensation and rehabilitation and workplace

health and safety (WHS), one approach to reforming gig worker coverage would be to replicate the approach in WHS law, of assigning responsibility to a ‘person conducting a business or undertaking’ (PCBU), the term used in WHS law. This would have much in common with the ‘contractor deeming’ provisions that already apply in most Workers’ Compensation and Rehabilitation jurisdictions, but would have superior coverage by removing the requirement, existing in most jurisdictions, that a contractor not be undertaking their own business. However, the definition of ‘worker’ to whom a PCBU has responsibility would need to be amended. Focusing on PCBUs with more broadly defined responsibilities would also enable the simple identification of who was responsible for paying premiums.

Queensland permits new groups of workers to be added to a list of ‘deemed’ workers if the FWC has made a minimum standards order regarding them, and the Queensland Minister deems them to be added. This procedure has the advantage of using an external reference point but has the disadvantage of being potentially quite slow and with incomplete coverage. The first disadvantage could be dealt with by amending the threshold point in the FWC’s ‘regulated worker’ process. Alternatively, or additionally, the Minister could be relieved of some additional discretionary responsibilities (which does not apply in relation to other occupations), but some could not be relieved unless the PCBU approach were taken.

Workers’ compensation arrangements for the gig economy should be nationally consistent in terms of (a) which ‘gig’ workers are covered by workers’ compensation systems, and (b) how the premiums for them are to be collected from the platforms that deploy them. This will provide clarity and equity for ‘gig’ workers and digital labour platforms. To achieve this, a national summit of interested parties, including Ministers, is necessary.

Recommendations from this report focus on:

- ensuring access to rehabilitation and return-to-work services, and clarity in situations of multi-apping;
- greater alignment of workers’ compensation and rehabilitation and workplace health and safety laws, with a focus on the roles of persons conducting a business or undertaking, and clarifying the workers for whom they should be responsible;
- the relationship to state to federal processes under the Closing Loopholes amendments to the Fair Work Act, and associated research implications; and
- the achievement of national consistency in the coverage of ‘gig’ workers and the way that premiums are paid

PART 1: THE QUEENSLAND CONTEXT

‘Gig’ work and reform of workers’ compensation and rehabilitation in the Queensland context

This report investigates issues facing Queensland’s workers’ compensation laws in relation to gig workers. Workers’ compensation (‘accident compensation’ in some countries) and rehabilitation are amongst the most important legal issues facing the ‘gig’ economy. This reflects the potential vulnerability of these workers and their families, co-workers, and community to harsh and long-term consequences from injuries, sometimes fatal. In these schemes, eligible injured workers are entitled to statutory compensation, no matter who is at fault, and importantly to access to rehabilitation and return to work programs. The rehabilitation and return-to-work dimensions are crucial to the effectiveness of these schemes, and in minimising the cost to the community of workplace injury. Recent amendments to both Queensland and federal legislation, and developments in technology and labour markets, invite important questions about the treatment of ‘gig’ workers by workers compensation and rehabilitation.

WORKERS’ COMPENSATION (‘ACCIDENT COMPENSATION’ IN SOME COUNTRIES) AND REHABILITATION ARE AMONGST THE MOST IMPORTANT LEGAL ISSUES FACING THE ‘GIG’ ECONOMY.

Current regulation of workers' compensation and rehabilitation[1]

Workers' compensation and rehabilitation is primarily a State responsibility. State parliaments pass the laws that determine eligibility for it. These mostly rely on common law conceptions of employment. The definition of 'worker' in each jurisdiction is generally intended to capture individuals employed under a 'contract of service'. A 'worker' is defined in Queensland's *Workers' Compensation and Rehabilitation Act 2003* as someone who 'works under a contract' and 'is an employee for the purpose of assessment for PAYG withholding'.[2] Thus the definition of worker refers back to federal law, but not to the *Fair Work Act 2009* (Cth) — instead to the *Taxation Administration Act 1953* (Cth). This definition restricts 'workers' to 'employees' — except where deeming provisions apply.

All workers' compensation and rehabilitation systems in Australia also deem some other workers, other than employees, eligible. These deeming lists vary between states, with only a few common threads.[3] Most workers are in a State or Territory system.[4] The laws governing those systems all differ. So, workers' compensation and rehabilitation coverage is fragmented and inconsistent, causing confusion among participants, and reform is complex.

While workplace health and safety (WHS) legislation, too, is formally a State responsibility, greater consistency of laws across jurisdictions was produced through a process of 'harmonisation' (the passage of identical statutes in each jurisdiction, except Victoria) in the 2010s. Harmonisation enabled coverage of WHS laws to extend beyond employees to many contractors who were under the jurisdiction of a 'person conducting a business undertaking' (PCBU). It found support from governments of all political persuasions.

The meaning and vulnerability of 'gig' workers

Gig work is characterised by the engagement of workers in a series of predominantly short-term paid tasks, as opposed to regular or long term, on-going traditional work arrangements. The digital platform work that is discussed in this paper is mainly 'location- based work'[5] or 'work on-demand via apps', described by De Stefano as:

> a form of work in which the execution of traditional working activities such as transport, cleaning and running errands, but also forms of clerical work, is channelled through apps managed by firms that also intervene in setting minimum quality standards of service and in the selection and management of the workforce.[6]

Many 'gig' workers are vulnerable workers as they have low bargaining power and lack access to many of the rights afforded to employees (they are usually contractors) under conventional labour law, including access to workers' compensation and rehabilitation.[7] When injured or killed at work, the consequences are serious, but compensation may be lacking. The hourly incomes of many platform workers, after expenses are taken into account, are low by comparison with modern award rates in Australia[8] or minimum wages in Australia and overseas.[9]

The *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (the 'Loopholes amendments' to the Fair Work Act 2009) focus on two types of 'gig' workers: heavy vehicle owner-drivers and digital platform workers. Together, these are what the Act calls 'regulated workers'. The amendments establish procedures for the two groups that are distinct and separately described, but often very similar to, sometimes the same as, those applying to each other. The groups overlap, as illustrated by the fact that some road transport drivers now also work for digital platforms themselves, delivering smaller parcels over shorter distances determined through digital apps.[10] The Loopholes amendments refer to many digital platform workers as 'employee-like' workers.

In this report, then, 'gig workers' is a broad-brushed term that refers to many types of workers who perform short-term 'gigs', including digital 'platform' workers (who use an app to identify 'gigs') and road transport owner-drivers (who might use other forms of communication to also find 'gigs'). Thus all 'regulated workers' in the Closing Loopholes amendments are 'gig' workers.

Gig work is often associated with poor workplace health and safety. This is most obvious in heavy vehicle transport, for which statistics are relatively accessible. Between 2016 and 2020, the road transport industry had the highest fatality rate per 100,000 workers of any Australian industry — greater than even agriculture, construction or mining.[11] The industry features low incomes for owner-drivers, long working hours, many near-misses, poor general health and psychological distress.[12] At the other end of road transport are bike couriers, who are more commonly digital platform workers. There are numerous reports of bike couriers dying at work in recent years.[13] Often, even dependents relying on the deceased's earnings cannot access any workers' compensation benefits,[14] unless the platform consents.[15] Platform workers' vulnerability warrants their coverage by workers' compensation and rehabilitation systems.

Attempts to reform coverage through changing the definition of employee

To date, there has been confusion and uncertainty over whether and in what ways 'gig' workers are covered by workers' compensation and rehabilitation arrangements. In Queensland, in 2018 it was reported that some 'gig' workers' claims, when processed, were accepted and some were denied,[16] reflecting their unclear status and the uncertainty of injury coverage.[17]

Earlier attempts at resolving the problems discussed above have often centred, either consciously or unconsciously, on finding ways of converting 'gig' workers to employees. Attempts to convert 'gig' workers to employees have been motivated by much more than workers' compensation and rehabilitation rights, of course, being driven by a general view that employees have greater protections at law than contractors. These attempts have had mixed results overseas with some successes,[18] but have progressed little in Australia.

Courts had developed key 'indicia' of how best to determine whether a worker was engaged under a 'contract of service' (as an employee), or a 'contract for services' (as a contractor). The resultant common law tests have not easily adapted to account for rapidly changing technology.[19]

This led to FWC Deputy President Gostencnik commenting that existing notions may be ‘outmoded’ and ‘no longer reflective of our current economic circumstances’, but warning that traditional tests of employment would continue to apply until ‘the law of employment… evolve[d] to catch pace with the evolving nature of the digital economy’. [20] If there were expectations that the common law would evolve in this way, they were set aside when the High Court took a narrower, not a broader, approach to defining employees in two 2022 decisions, Personnel Contracting[21] and Jamsek.[22] These overturned the application of a ‘multi-factorial test’ based on these indicia that had been previously used to determine employment status. Instead, they prioritised what the original contract of employment stated, not what happened afterwards.[23]

On workers’ compensation and rehabilitation matters, there is little point in pontificating over whether or not particular ‘gig’ workers are ‘genuine independent contractors’. For one thing, to do so would miss the point that the rationale for providing protection through workers’ compensation and rehabilitation coverage is that they are vulnerable and lack the resources to cover themselves, not that they are really employees. Some could be independent contractors regardless of the operation of the multifactorial test.

ON WORKERS’ COMPENSATION AND REHABILITATION MATTERS, THERE IS LITTLE POINT IN PONTIFICATING OVER WHETHER OR NOT PARTICULAR ‘GIG’ WORKERS ARE ‘GENUINE INDEPENDENT CONTRACTORS’.

For another thing, some contractors who might, by some more liberal test, be redefined as employees may already be considered ‘workers’ by virtue of what Taliadoros, Tisdale and Kotzmann refer to as ‘contractor deeming provisions’ which, in Queensland, operate through Schedule 2 of the Workers’ Compensation and Rehabilitation Act.[24] Under section 3 (Part 1) of that schedule, a contractor is, in effect, a ‘worker’ if the contract involves work that is not ‘incident’ to the contractor’s regular trade or business, unless they do not do the work themselves. Most other states have provisions something like this.[25] These contractor deeming provisions, necessary to respond to the vulnerability of many contractors, nonetheless create complications. They mean that much turns on the facts in each case,[26] generating uncertainty about general application and undue expense for all concerned.

Furthermore, Taliadoros, Tisdale and Kotzmann consider that the ‘contractor deeming provisions’ could only capture some, not all, ‘gig’ workers. If Courts accepted Uber’s claims that its drivers were just partners, not contractors, of Uber, then the ‘contractor deeming provisions’ would have no effect. This would very likely also be the case with Airtasker[27] and several other platforms.

It might be thought that the Closing Loopholes amendments allowed a wider definition of employees to be captured by workers’ compensation and rehabilitation systems.

As shall be seen below, this is not actually the case. Before we expand on this, however, we turn to the question of what ‘gig’ workers themselves want.

The preferences of ‘gig’ workers regarding self-employment and protection[28]

One consideration, in regulating workers’ compensation for gig workers, is whether they would prefer to remain self-employed, or be reclassified as employees, as this might influence whether their interests would be best served by redefining them as employees or by enabling them to be covered by workers’ compensation through other means. Information on their preferences is limited, though the available sources tend to point in a consistent direction.

Amongst platform workers, it seems likely that there is some interest in becoming employees, but it is doubtful that this view constitutes a majority, as many like the apparent flexibility and independence. In a UK survey of platform workers, half agreed that ‘People working in the gig economy make a decision to sacrifice job security and workers’ benefits for greater flexibility and independence’, and less than one in five disagreed.[29] Yet clear majorities agreed that the ‘Government should regulate the gig economy so that all working in it are entitled to receive a basic level of rights and benefits’ and that ‘gig economy firms are exploiting a lack of regulation for immediate growth’.[30] It appeared that many ‘gig’ workers wanted benefits equivalent to those available to employees, and large numbers supported specific entitlements to which employees had access. [31] The desire of ‘gig’ workers for protection is also evidenced by their behaviour, with many workers in many countries taking public actions to protect their incomes or conditions and advance their interests,[32] leading to the development of a global online ‘Index of Platform Labour Protest’.[33] The frequency

of collective action strongly suggests these workers are seeking avenues to win better pay, conditions, and security – including through protective regulation.

In combination with contestable data from other sources, the overall impression is that many, probably a majority, of ‘gig’ workers would prefer to remain independent contractors, though some clearly want employee status — but most want access to employee-like protections.[34] Still, it is doubtful that any preference for contractor status operates across all forms of gig work. For example, the ABS observed major gender differences in the desire for wage-based employment[35] and this could reflect the different sectors in which men and women ‘gig’ workers are deployed.

Ultimately, public policy takes account of more than just the views of affected workers. The most vulnerable may be a minority. Standards may protect not only the workers directly involved, but also other workers in the relevant sector. There may be other public policy considerations as well (for example, the desire for adequate standards or to discourage dangerous behaviour). However, the attitudes of those involved can legitimately shape the form that regulation takes, as they can influence the implementation and politics of regulation. Policy makers can ensure ‘gig’ workers are covered by workers’ compensation and rehabilitation systems without needing to change their status from contractors to employees.

The ability to achieve protection outside the employment relationship is probably one reason for the longevity of what is now the Chapter 6 provisions in New South Wales’ Industrial Relations Act 1996, that allow the regulation of payments to and conditions for owner-drivers. These provisions, originating in 1979, have been supported by governments from both sides of politics, business and worker representatives.[36] They are seen as protecting small business owners from a power imbalance while not threatening their status as non-employees. The accident compensation system in New Zealand, which provides compensation and rehabilitation coverage, regardless of whether people are employees and regardless of where and how injuries occurred, has likewise persisted through several major changes of government, as universal provision by a monopoly insurer has led to major efficiencies and, according to a departmental Regulatory Impact Statement, changing it by introducing competition ‘would require claims cost savings in the order of 20% to 26% to offset the higher expenses of private insurers’.[37]

PART 2: THE REFORM PROCESS

Recent Reviews and legislative amendments in Queensland

The 2018 Queensland Review of workers’ compensation and rehabilitation made several recommendations regarding gig workers. Most important was to redefine the coverage of workers’ compensation and rehabilitation laws and responsibilities to encompass those who work under agency arrangements, and require payment of premiums by the intermediaries or agencies.[38] A subsidiary recommendation regarding return to work protocols was also made. Following this, the Queensland Government went through a Regulation Impact Statement (RIS) process. This involved stakeholder consultation and publication of a Consultation RIS,[39] and then a submission period in which stakeholders were given an opportunity to respond to the RIS.

After the RIS process, the issuing of a final decision was put on hold pending decisions made at the federal level concerning reforms in that jurisdiction. It was apparent to many observers that significant reforms would occur at the federal level. These developments culminated in the 2024 ‘Closing Loopholes’ amendments to the Fair Work Act. In anticipation, the 2023 Review recommended the Queensland Government proceed with amending the Act to extend workers’ compensation and rehabilitation coverage to ‘gig’ workers and require intermediary businesses to pay premiums, as the forthcoming federal changes would not fundamentally change the position of ‘gig’ workers on workers’ compensation.

Subsequent to the 2023 Review, the Queensland government introduced amendments to the Act to enable the Minister to deem certain ‘regulated workers’ that are subject to a FWC minimum standards order or related instrument to also be ‘workers’ under the Queensland Workers’ Compensation and Rehabilitation Act.[40] These ‘regulated workers’ would not be treated as employees by the FWC (the Closing Loopholes amendments preclude that possibility) and they would retain their contractor status. The extension of workers’ compensation and rehabilitation coverage would be limited by the speed and scope of the processes in the federal jurisdiction to be followed by the FWC, and subsequently by Queensland officials responsible for devising and managing regulations.

The illusion of the impact of federal reform on workers’ compensation and rehabilitation

The passage in 2024 of the federal ‘Closing Loopholes’ amendments to the Fair Work Act may have given the impression of pre-empting the issue by either expanding the definition of employee or by enabling the Fair Work Commission to make minimum standard orders for a range of ‘gig’ workers. However, this is not the case, for two reasons.

First, the amendments to the definition of employee in the Fair Work Act,[41] while purportedly

meaning a 'return to the 'multi-factorial' assessment previously applied by courts and tribunals,[42] had no impact on workers' compensation and rehabilitation coverage of gig workers. This is because the Closing Loopholes amendments only affect the definition of employee for the purposes of the *Fair Work Act 2009*ˆ, that is for matters such as unfair dismissal, award entitlements and enterprise bargaining. They do not affect the definition for common law purposes (which are ultimately more relevant for workers' compensation and rehabilitation). For the latter, it is still the High Court's rulings (most recently in *Jamsek and Personnel Contracting*) that matter.

Second, the Fair Work Act does not cover workers' compensation and rehabilitation and the Fair Work Commission does not have the power to issue minimum standards orders in relation to workers compensation. Decisions of the courts or FWC under the Loopholes No 2 Act cannot assign 'gig' workers into a workers' compensation and rehabilitation scheme. The Fair Work Commission does not and cannot have the ability to deal with the state matter of 'workers' compensation and rehabilitation', it can only deal only with workers' 'insurance'.[43] The limitations of private 'insurance' are discussed later. The key point here, though, is that while the FWC could cause a constitutional corporation, such as a platform business, to comply with an insurance order, it could not force State parliaments to legislate the inclusion of 'gig' workers in their own schemes.

PART 3: CHALLENGES IN QUEENSLAND

Issues in advancing the matter in Queensland

Some issues for Queensland to consider when dealing with workers compensation for 'gig' workers are explored below.

Mandated private insurance cover

One issue is the role of private injury insurance. For example, the Federal Productivity Commission, in its 2023 five-yearly report on productivity, had advocated that governments should 'evaluate insurance arrangements of classes of platform work'.[44] It identified three options for responding to inadequate insurance arrangements: extending workers' compensation; implementing an insurance scheme that did not involve extending workers' compensation; or requiring platforms to provide a baseline level of personal injury insurance.[45] At the federal level, as mentioned, the Closing Loopholes amendments enable the FWC to include 'insurance' in a minimum standards order.

At the start it should be pointed out that 'gig' workers are unlikely to adopt any voluntary methods of injury compensation coverage, because of ignorance (they often have 'limited awareness of their legal and regulatory rights'[46]), confusion, or a lack of resources to do so. Consequently, the costs of gig work are externalised from gig businesses to wider society. The poor conditions of platform workers have a much wider flow-on, part of a race to the bottom

in cost-based competition amongst lead businesses.[47] So the only options worth considering involve a form of mandatory coverage.

However, mandated private insurance would not be cost-effective, as it would leave these workers outside the workers' compensation and rehabilitation system and, in particular, without suitable rehabilitation and return-to-work programs, which is central to workers compensation and rehabilitation schemes.

As noted in the RIS, enhancing and mandating private personal accident insurance 'would not include all benefits available under the workers' compensation and rehabilitation scheme such as Medicare-related medical costs, hospital stay costs, common law damages, lifetime care and support needs for seriously injured workers, or ongoing benefits to dependent children of deceased workers.'[48] In the words of the RIS, 'The level of coverage and benefits available under the workers' compensation scheme is of a much higher standard than insurance policies currently available in the private market.'[49] In the private insurance offered to workers for Mable (home care), for example, the duration of benefits declines with age and benefits are not payable to workers aged over 70, there is a seven-day waiting period, and death benefits approach a third of the level in the Queensland workers compensation and rehabilitation system.[50]

The Queensland Act is 598 pages long (not including regulations). It is hard to imagine the FWC mandating any detailed scheme, merely the existence of private insurance cover.

The inadequacies of the private insurance model become especially evident when we recognise that many 'gig' workers (especially digital platform workers) engage in 'multi-apping', that is having more than one platform's app open at a particular time, so that they can fulfil duties for more than one gig firm within a day. This practice is very common due to the low income that gig work generates. One recent Australian study found that 'more than two-thirds of current platform workers are working across multiple platforms, including 16.8% who are registered with five or more platforms'.[51] When a multi-apping worker is injured, each firm (or its insurance company) would expend resources arguing over who is liable, possibly without resolution. It should not be important to determine fault, and hence liability, when a worker is injured (workers' compensation and rehabilitation schemes are founded on the belief that such efforts are wasteful in the context of workplace injuries). Neither public nor private resources should be wasted on such an activity. If a general workers' compensation and rehabilitation scheme were in place, the payment to the injured worker would be made by the insurer, who would cover all workers. As all gig firms that someone is working for would be covered by the same insurer (presuming no platform firms decide to 'self-insure' in the Queensland system), then liability would be irrelevant to the value or source of the payout.

Persons Conducting a business or undertaking (PCBUs)

Given the close relationship of workers' compensation and rehabilitation with WHS, one approach to reforming gig worker coverage would be to replicate the approach in WHS law, of assigning responsibility to a PCBU, thereby covering some contractors, not just employees. This would mean replacement of many references in the Workers' Compensation and Rehabilitation Act to 'employer' with 'person conducting a business or undertaking', and a revision of appropriate definitions, and it would more closely align workers' compensation and

rehabilitation and WHS responsibilities. Both the 2018 and 2023 Reviews in Queensland report highlighted the close linkages between WHS and workers' compensation and rehabilitation, and how injury prevention (through improved WHS interventions) was better than the 'cure' of such injuries through the workers' compensation and rehabilitation scheme.[52]

An approach to workers' compensation and rehabilitation that focused on identifying PCBUs and their relationship to 'workers' would have much in common with the 'contractor deeming' provisions, mentioned earlier, that already apply in most jurisdictions. It would go further, though, in that it would remove the requirement that a contractor not be undertaking their own business in order to be covered for workers' compensation and rehabilitation purposes. This would overcome part of the problem with the 'contractor deeming' approach — that so much turns on the facts in each case — and thus lessen the uncertainty over whether particular individuals have coverage and the substantial expense in resolving these types of claims. It would also make it harder for firms to avoid workers compensation and rehabilitation responsibilities by use of 'sham contracting' (whereby people are hired as contractors and required to get their own ABN, when the substantive reality is that they are employees who would otherwise be covered by the protections that statutory requirements such as for workers compensation and rehabilitation provide).

It would not, however, immediately overcome the uncertainty arising from claims and counterclaims about whether particular platform firms are PCBUs and whether particular individuals are clients or contractors. Platform businesses would be expected to deny being a PCBU in many situations and would deny their 'partners' are their contractors. If this avenue were to be pursued, the definition of to whom a PCBU has responsibility[53] would need to be revisited, to pre-empt an effect from such denials. In particular, the definition of the 'worker' to whom a PCBU has responsibility would need to be revised to include people receiving a payment from a PCBU for performing work for a third party, regardless of whether or not any person was a contractor to the PCBU. These are, after all, people who are acting for the benefit of the PCBU in this case, that is for the benefit of the platform.

Focusing on PCBUs and more broadly-defined responsibilities would also enable the simple identification of who was responsible for paying premiums. While the 2018 Review also recommended that premiums by platform firms should be based normally on the gross income reported by the intermediary or agency,[54] the calculation could equally be based on the income received by the worker, instead of that received by the intermediary, though neither would require legislative change anyway (premiums would be risk-rated and determined by WorkCover).

Removing from the Queensland legislation the qualifying reference to the federal Taxation Administration Act (mentioned in paragraph 2) would in some ways have similar effects, in that it would bring within the scheme many contractors who are not employees. However, the approach discussed earlier in this section would be superior by aligning WHS and workers compensation and rehabilitation legislation, and avoiding doubt as to who was responsible for the WHS and compensation premiums for 'gig' workers.

Deeming by reference to 'regulated worker' matters

Workers' Compensation and Rehabilitation legislation adds non-employees to the list of 'workers', mostly through legislative deeming. This operates through Schedule 2 in Queensland's Workers' Compensation and Rehabilitation Act, but similar arrangements apply across all states. Queensland now also permits new groups of workers to be added to the deemed list if the FWC has made a minimum standards order regarding them, and the Queensland Minister deems them to be added. This procedure has the advantage of making use of an external reference point but the disadvantage of being potentially quite slow and with incomplete coverage. A second disadvantage is that the question of who is the 'employer' (the entity that is responsible for paying premiums) is not legislatively addressed through this approach and it is left to the making of a regulation each time a class of workers is included.

The first disadvantage could be dealt with in part by amending the threshold from whether the FWC has issued a minimum standards order for those workers, to whether an application has been made for a minimum standards order for those workers. This would enable a process of consultation, drafting and decision-making to occur more expeditiously. Ideally, this process could already have started with respect to the (road transport) 'gig' workers who are subject of the first applications for orders under the Closing Loopholes amendments,[55] though it is unlikely that overworked and under-resourced policy advisers would prioritise such preparatory work absent a legislative mandate.[56] Separately, the Minister could be relieved of the additional discretionary responsibilities (which do not apply in relation to other occupations) regarding deemed 'workers'. However, in the absence of a PCBU approach (as per paragraph 38), the regulatory discretion regarding 'employers' would still be necessary, as it is difficult to imagine how legislation could anticipate FWC decisions.

Tying coverage of the state workers' compensation and rehabilitation system to developments in the FWC could unnecessarily restrict action to a select group of workers, in particular those represented by unions who are resourced and ready to bring cases to the FWC (as these are the cases that would first be heard by the FWC). There might be other groups of workers who are at least as deserving, if not more deserving, of coverage.

One example is care and disability support workers, who often find themselves travelling from one client to the next, with accidents occurring in transit, in people's homes or elsewhere. They are highly vulnerable and deserving of workers compensation and rehabilitation coverage. For-profit service providers and labour market intermediaries, such as labour hire agencies, often deploy these workers.[57] Care and support work facilitated by digital labour platforms is precarious and contrasts with efforts to recognise this vital work as skilled, secure, and fairly compensated.[58] Additional financial burdens placed on disability support workers by digital platforms often including the requirement to obtain their own liability insurance, maintain a valid Australian Business Number, and pay for any necessary probity checks and qualifications out of pocket.[59] As mentioned, even if they are required to take out their own liability insurance, it lacks the level of personal benefits and focus on rehabilitation and return-to-work of conventional workers' compensation and rehabilitation systems. More research is needed on the workers compensation and rehabilitation needs of these and other 'gig' workers.

Thus, coverage amongst 'gig' workers should not be restricted to those who meet this FWC-

driven criterion. The issue of identifying other vulnerable gig workers would be superseded if a different approach, such as that relating to PCBUs as discussed in the preceding section, were pursued.

One other limitation of extending the deeming approach is that, unless all states undertake identical deeming, it can lead to definitional complexities, potential inconsistencies between states, and gaps in coverage. This in turn creates complexities for the platform firms and other users of 'gig' workers.

Ultimately, a PCBU approach would render deeming unnecessary. Until then, Ministerial involvement in determining at least 'employers' of gig workers will likely be necessary.

National management of the issue

Regardless of whether or not Queensland makes further changes in this area, it is clear that there will be national inconsistencies in the coverage for 'gig' workers of workers' compensation and rehabilitation systems. This goes beyond the long-standing differences between states on the levels and duration of benefits to the more fundamental issue of whether particular workers are covered and who pays the premiums that relate to the risk of those workers becoming injured, including when crossing state/territory borders. The Queensland government can act to reduce inconsistency within its jurisdiction, but inconsistencies across jurisdictions will remain, and be costly and confusing to firms and workers.

On this, a recommended approach is to advocate for, and participate in, a national summit regarding workers' compensation and rehabilitation schemes aimed at achieving a common decision about how workers' compensation and rehabilitation systems will deal with 'gig' workers. A move to a PCBU-based approach would make national consistency even more important, as the PCBU concept, while embodied in state WHS legislation, is really a national concept through WHS harmonisation. At the bureaucratic level, the board of Safe Work Australia has government' interests represented, and contemplates policy. But this summit requires Ministerial-level attendance and action.

The aim is not to develop comprehensive harmonised laws in workers' compensation and rehabilitation, much as Australian states and territories and New Zealand have in WHS. Unlike in WHS, there are too many fundamental differences between the states in the design of their workers' compensation and rehabilitation systems, including in such basic matters as whether they are 'short tailed' or 'long tailed', to make harmonisation a realistic prospect within any reasonable timeframe.

The aim would be to achieve a single set of laws, specifically about platform workers, regarding two narrow issues: whether and how they are covered by workers' compensation and rehabilitation and rehabilitation systems, and how the premiums for them are to be collected from the platforms that deploy them. The states could vary, as they do now, on every other aspect of workers' compensation and rehabilitation for those workers, provided there is core agreement on a nationally consistent approach to coverage and who pays.

Consideration of whether to cover 'gig' workers necessarily involves resolution of how to identify them: should, for example, the PCBU approach in WHS law be used or modified

as per above? If not, by what criteria should platforms become encompassed? Whatever the details, a national summit is the only way to bring injured 'gig' workers into the workers' compensation and rehabilitation reform agenda.

It is apparent that there will continue to be inconsistencies between states in workers' compensation and rehabilitation, and the amended Fair Work Act cannot overcome those problems. State-level reform prospects are piecemeal and inconclusive. As the Queensland Decision Impact Assessment Statement (the response to the RIS), emphasised (using italics) in February 2024, *'There are significant complexities in extending coverage which would benefit from a national policy response'*.[60]

PART 4: RECOMMENDATIONS

The argument in this report leads to the following recommendations:

(1) Extend Worker's Compensation to all Gig Workers

that steps in the extension of coverage of 'gig' workers by the formal workers' compensation and rehabilitation system be continued, and that these include guaranteed access to rehabilitation and return to work and the full range of benefits under the current model in Queensland. This policy should also be suited to the normal reality of 'multi-apping';

(2) Ensure accountability by redefining responsibilities of 'person conducing a business or undertaking'

that consideration be given to aligning the lines of accountability in workers' compensation and rehabilitation and workplace health and safety, by placing primary emphasis on the responsibilities of a 'person conducing a business or undertaking' (rather than an 'employer') and with a redefinition of a PCBU's responsibilities to include a person receiving a payment from a PCBU for performing work for a third party, regardless of whether or not any person was a contractor to the PCBU;

(3) Expedite coverage of workers who might be subject to federal regulation

that legislative reference to developments in the federal treatment of 'regulated workers' be redesigned to expedite coverage of workers who might be subject to federal regulation, without necessarily restricting action to those workers (while recognising that full implementation of recommendation (2) would render this deeming redundant). In anticipation of future developments, there is a need for further research into the workers' compensation and rehabilitation needs of workers in sectors beyond road transport, such as cleaning or care work

(4) Convene a summit of IR ministers to examine issues

that support be provided to a national summit to achieve consistency across jurisdictions on how 'gig' workers are to be covered by workers' compensation and rehabilitation and rehabilitation systems, and how the premiums for them are to be collected from the organisations that deploy them. .

NOTES

1. Several points made in this and later sections were also made in G Fisher & D Peetz, 2023 *Review of the Operation of the Queensland Workers' Compensation Scheme,* Queensland Government, Brisbane, 2023
2. Workers' compensation and Rehabilitation Act 2003 (Qld), s11.
3. Deemed workers in Queensland are defined in *Workers' compensation and Rehabilitation Act 2003 (Qld),* Schedule 1. A summary comparison of deeming arrangements and other eligibility criteria is in Appendix D of Fisher & Peetz, 2023 Review, above n1.
4. Safe Work Australia, *Workers' compensation Coverage in Australia*, November 2021, 5.
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7. See for example, Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd [2019] FWC 5008 & [2020] FWCFB 1698; Ms Ka on lam v Doordash Technologies Australia Pty Ltd [2023] FWC 1683; Deliveroo Australia Pty Ltd v Diego Franco [2022] FWCFB 156..
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worker of the platform or facilitator (11 accepted claims) or an independent contractor (4 denied claims), and a further 4 claims have been withdrawn after being made. Many would not have submitted claims because they believed they were not covered or it never occurred to them.’

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19. *Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610 [at 66].
20. *Rasier Pacific V.O.F.* trading as Uber.
21. *CFMEU v Personnel Contracting Pty Ltd* [2022] HCA 1.
22. *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2
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54. Recommendation 10.2.
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