

Safe Work Australia

Workers' Compensation Coverage in Australia

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Introduction



1. Workers' compensation schemes have historically been designed as a form of safety net for workers that are injured in a workplace where they are subject to the control or direction of an employer. The concept of 'coverage' is fundamental to the operation of all workers' compensation schemes within Australia. Coverage defines the eligibility of a worker to make a claim under a workers' compensation scheme. It also establishes employers' obligations to obtain workers' compensation insurance. Clearly defined coverage rules are essential for creating certainty for both employers and workers.
2. It's undeniable that the way we work is changing, with increasing ability to work remotely and the development of online labour markets. The engagement of workers on demand by digital platforms is transforming the way many traditional business models operate. Existing arrangements of providing and regulating workers' compensation may become less and less workable over the coming 20 years.¹ Identifying whether a worker is covered by workers' compensation schemes in Australia is becoming more complex with the disruption of traditional business models.
3. This shift in traditional work models raises the issue of whether current workers' compensation coverage arrangements are still fit for purpose. To provide certainty and confidence when performing work, workers need to know whether they are covered by workers' compensation insurance, or if they will need to take out another form of insurance such as personal injury insurance. Likewise, businesses need to know whether they are considered employers for the purposes of workers' compensation, given all employers are legally required to have workers' compensation insurance for their employees in Australia. Lack of clarity around workers' compensation coverage, can increase the cost of premiums and the administrative burden of managing those claims.
4. The aim of this paper is to discuss existing workers' compensation coverage arrangements and explore whether they are keeping pace with societal developments and expectations. The gig economy and agriculture industry are explored in more detail to demonstrate the impact of existing coverage arrangements on workers in vulnerable industries. However, we note that other types of independent contractors, sole traders and other new forms of employment may also fall outside existing workers' compensation coverage arrangements.
5. It is acknowledged that several other reviews and inquiries have, or are currently considering the issues raised in this paper,² including the Strategic Issues Group on Workers' Compensation (SIG-Workers' Compensation) definitions temporary advisory group established by Safe Work Australia to undertake work from 2010 to 2013. This paper is drafted against that background and intends to further contribute to and build upon that existing knowledge.
6. This paper uses both the term *employee* and *worker*. The term *employee* is used when referring to a common law employee while the term *worker* is used more generally to refer to people that are working for an employer (and captures those defined as employees or deemed employees under workers' compensation laws).

¹ Safe Work Australia, Data 61 and CSIRO, (2018) [Workplace Safety Futures](#), accessed 9 November 2021

² See, Productivity Commission (2004) [National Workers' Compensation and Occupational Health and Safety Frameworks](#), [Productivity Commission Inquiry Report](#) accessed 9 November 2021, Safe Work Australia, [The National Workers' Compensation Act Plan 2010-13](#) accessed 9 November 2021, Senate Education and Employment Committees (2017), [Corporate Avoidance of the Fair Work Act](#), Chapter 8, The gig economy: hyper flexibility or sham contracting?, accessed 9 November 2021, Victorian Government, (2020) [Inquiry into the On-Demand Workforce report](#), accessed 9 November 2021, Parliament of Australia (2020) [Select Committee on Job Security](#), accessed 9 November 2021

Workers' Compensation

What is workers' compensation?

7. Workers' compensation is a safety net which provides financial compensation, rehabilitation and support with return to work for injured in the course of their employment.
8. There are 11 main workers' compensation schemes operating in Australia: one for each state and territory, and three Commonwealth schemes. Each scheme is established by its own legislation which sets out coverage, eligibility criteria, entitlements and obligations.
9. Employers in each jurisdiction are required to take out workers' compensation insurance to cover themselves and their employees. This type of insurance is funded through employer contributions to cover scheme liabilities.

Historical context for workers' compensation coverage in Australia

10. Prior to the introduction of workers' compensation laws in Australia, workers injured in the course of their employment were confined to the limited remedies available under common law. Under common law, injured workers needed to prove that their employer had been negligent to obtain compensation for a work related injury.
11. The catalyst for the development of workers' compensation laws in Australia in the early 20th century was the industrial revolution. It created large scale use of machinery and increased work related injuries and death.
12. Early workers' compensation legislation in Australia provided no fault liability removing the common law obligation for employees to establish that the employer was negligent. Coverage by the early workers' compensation laws in Australia was focused on working men engaged in dangerous employment to provide monetary compensation for families in the event the main income earner had serious or fatal injuries that arose out of and in the course of employment.
13. Coverage was eventually expanded to male workers in all industries not just high risk industries. However, up until the 1970s, women were not seriously considered when developing workers' compensation policies, despite many working class women being engaged in paid and often dangerous forms of employment.
14. Workers' compensation laws continued to develop throughout the 20th century reflecting societal and political changes, such as the increase in women's participation in the workforce and the union and labour movements. The iterative reform process for workers' compensation schemes in Australia has reflected the prevailing societal and political views of the day.
15. Historically, workers' compensation laws were based around providing a safety net for workers injured in work environments in which they had limited control or autonomy. This means workers with more autonomy and control, such as independent contractors or sole traders, were not covered by workers' compensation. The origins of workers' compensation laws are still reflected in the coverage arrangements for current legislation, with the continued exclusion of most independent contractors from coverage.



What is workers' compensation coverage?

What is coverage?

16. The use of the term 'coverage' in the workers' compensation context differs to that of other forms of insurance, where coverage often refers to the monetary limits or the agreed scope of a policy. Coverage in this context is concerned with the eligibility to make a claim under a workers' compensation scheme. Generally, workers' compensation schemes in Australia will consider three core criteria to determine whether a worker is able to claim workers' compensation for a particular injury or illness:
 - a. The claimant must be covered as a worker or deemed worker, as defined by the relevant scheme (**coverage**)
 - b. They must have suffered an injury or illness (or death) which is compensable, and
 - c. There must be the requisite connection between injury or illness and the claimant's employment (work relatedness).³
17. Whether a worker is covered by workers' compensation will depend on the rules of the particular workers' compensation scheme in their jurisdiction.

Who is covered?

18. Workers' compensation schemes in Australia cover workers that meet the schemes legislative definition of *worker* or *deemed worker*. Genuine independent contractors and sole traders are generally not covered by workers' compensation and must make their own income protection insurance arrangements.

Definition of worker

19. While there is no consistent definition of *worker* in Australian workers' compensation schemes, most schemes will consider whether a person is engaged through a contract of service or is an employee for the purposes of assessment of PAYG tax to determine if they are a worker. Table 3.1a of Safe Work Australia's Comparison of workers' compensation arrangements in Australia and New Zealand 2019 summarises the definition of worker by jurisdiction, noting that some schemes use the term 'employee' and some use the term 'worker' and all schemes have slightly different definitions of those terms.⁴

Definition of deemed worker

20. Schemes also vary in relation to the categories of workers considered to be *deemed workers* under the relevant workers' compensation scheme. Table 3.2 of Safe Work Australia's Comparison of workers' compensation arrangements in Australia and New Zealand 2019 summarises the definition of deemed worker by jurisdiction, noting all

³ Productivity Commission (2004) [National Workers' Compensation and Occupational Health and Safety Frameworks, Productivity Commission Inquiry Report](#) accessed 9 November 2021

⁴ Safe Work Australia (2019) Table 3.1a, [Comparison of workers' compensation arrangements in Australia and New Zealand 2019](#), accessed 9 November 2021

schemes have slightly different definitions.⁵ Certain types of contractors are covered as a deemed worker in some jurisdictions.

Who is not covered?

21. Independent contractors and sole traders are generally not covered by workers' compensation schemes and must make their own income protection insurance arrangements. They are generally engaged under a contract for services and are considered to be as running their own business and working under commercial, not employment contracts. Plumbers, freelance workers and many other types of workers are often considered independent contractors and not covered by workers' compensation schemes.
22. Existing workers' compensation systems prevent sole traders or independent contractors from opting into workers' compensation insurance arrangements. This is due to the current definitions of worker and challenges with covering costs associated with these types of workers. Current schemes charge an employer premiums to cover costs of insuring their workers, cost recovery arrangements are not taken from an individual worker.

Definition of independent contractor

23. To determine whether a worker is an independent contractor, workers' compensation schemes generally apply the well-known multi-factor test adopted by Australian courts. The multi-factor test involves an assessment and balance of the following range of factors against each other.
 - Does the worker have control over whether to take on work?
 - Can the worker choose their own work hours?
 - Does the worker need to provide their own tools and equipment?
 - How is the worker paid income?
 - Is the worker responsible for the cost of fixing any faults or repairing damage?
 - Is the worker required to do the work personally or can you delegate the work to someone else?⁶

Although control remains a significant factor, the High Court has stated:

*'it is the totality of the relationship between the parties which must be considered'. None of the factors, apart from the requirement of personal service, is alone conclusive. Instead, in arriving at a conclusion on the character of a work contract, the court considers the factors holistically.'*⁷

24. It follows that to ascertain workers eligibility for workers' compensation coverage, the working arrangement will need to be considered holistically.
25. Historically, distinguishing between employees and independent contractors has been a relatively straight forward process. However, the evolution of modern working arrangement such as those associated with gig workers have made the application of the multi-factor test more difficult.

⁵ Safe Work Australia (2019) *Table 3.2, Comparison of workers' compensation arrangements in Australia and New Zealand 2019* accessed 9 November 2021

⁶ *Stevens v Brodribb Sawmilling Co Pty Ltd [1986] HCA 1; (1986) 160 CLR 16* ('Stevens'); *Hollis v Vabu Pty Ltd [2001] HCA 44; (2001) 207 CLR 21* ('Hollis'); *Trifunovski (Appeal) (n 16)*.

⁷ Bomball P (2019) "*Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work*" *Melbourne University Law Review*, accessed 9 November 2021

26. Coverage arrangements in each jurisdiction have been modified over time, creating inconsistencies and complexities for workplaces. The adoption of new and innovative business models mobilising the workforce through technological platforms, creates an opportunity to re-consider and establish a clearer policy basis for coverage at a national level.

Deficiencies in alternative insurance arrangements

27. If workers are not covered by workers' compensation insurance they will need to consider other forms of insurance, such as personal accident and illness insurance or income protection insurance. Some business models provide commercial personal injury insurance as part of their employment arrangements, paid for by either the worker or the business entity.
28. Personal injury insurance is a form of insurance that pays a financial benefit if a person is injured in an accident. This type of insurance may provide a lump sum payment or a monthly payment to replace income while recovering from the injury. It does not provide rehabilitation expenses or assistance with return to work. Personal injury insurance is generally for a shorter time frame than income protection, which can be up to age 65.
29. Alternative insurance arrangements for workers, involve costs that must be borne by the worker either directly or in some cases indirectly (passed on by the business entity). Personal injury insurance arrangements do not incentivise employers to ensure good work health and safety practice in the same manner as workers' compensation insurance, which involves an increase in premiums for businesses if they have an increase in workers' compensation claims.
30. Further, alternative insurance arrangements also offer limited assistance for an injured worker with rehabilitation and return to work in comparison to workers' compensation insurance. Additionally these arrangement generally have not been developed for emerging labor markets, casual workers or sole traders and are often cost prohibitive for low income earners.

Are coverage arrangements still fit for purpose?

The changing nature of work

31. Traditional models for work arrangements have changed, work is no longer geographically bounded in the way it once was as noted famously by Harvey (1989:19) 'workers are unavoidably place-based because 'labor-power has to go home every night.'⁸. New and innovative business models are able to mobilise the workforce through technology platforms, such as the emergence of the gig economy 10 years ago,⁹ Current workers' compensation schemes based on the traditional model of employee and employer are going to become increasingly difficult to apply to future work arrangements.

Lack of certainty

32. Ambiguity around coverage may result in an injured worker mistakenly having no form of safety net if they are injured, bearing the full expense of their treatment and recovery, without supplementary income. Inversely, businesses may incur a regulatory response and increase in expenses for the cost of injured workers that are found to be covered by workers' compensation schemes unexpectedly.
33. Lack of certainty, while likely to cause the most significant impact for injured workers' and employers, may also create challenges for insurers and regulators. It increases the administrative burden through more time spent determining claims on a case by case basis. It also increases the costs associated with recovery of insurance costs from employers without insurance for eligible injured workers.

Inconsistent entitlements

34. Inconsistent coverage of workers' across workers' compensation schemes in Australia creates particular difficulties for workers' undertaking work across multiple jurisdictions. Despite, cross-border coverage arrangements designed to determine coverage for a particular injury or illness, it creates added complexity and administrative burden for injured workers navigating the workers' compensation system.¹⁰
35. Comcare is currently the only workers' compensation scheme which may enable workers' compensation coverage nationwide to eligible companies through self-insurance. Eligibility is at the discretion of the Minister for Industrial Relations and to be eligible the company must be in competition with a current or former Commonwealth entity.¹¹
36. Greater consistency and clarification of coverage for workers across all workers' compensation jurisdictions, would assist those that work across multiple jurisdictions simplifying existing cross-jurisdictional arrangements.

⁸ Graham M, Hjorth I, Lehdonvirta V (2017) [Digital labour and development: impacts of global digital labour platforms and the gig economy on worker livelihoods](#), University of Oxford, accessed 28 April 2021

⁹ Senate Education and Employment Committees (2017), [Corporate Avoidance of the Fair Work Act](#), Chapter 8, The gig economy: hyper flexibility or sham contracting?, accessed 9 November 2021

¹⁰ Safe Work Australia (2019), [Table 3.15. Comparison of workers' compensation arrangements in Australia and New Zealand 2019](#) accessed 9 November 2021

¹¹ section 100, [Safety Rehabilitation and Compensation Act 1988 \(Cth\)](#), accessed 9 November 2021

Case Study 1 – The Gig Economy

37. One significant disrupter of the modern workforce is the gig economy. The *gig economy* commonly refers to a digital platform that connects individuals or businesses to undertake a short-term service or provide a product to the consumer. The mobile application or web-based application is developed and managed by an organisation, generally referred to as the platform.
38. It is estimated that there are over 100 platforms operating within Australia that include ride sharing, food delivery, odd jobs, one-off domestic tasks, care services, professional services like web design, graphic design, coding, photography, translation and clerical or administrative work.¹²
39. Uber (private transport), Deliveroo (meal delivery) and Airtasker (task-based services) are examples of prominent and widely utilised digital platforms in Australia. It is estimated that there may be as many as 250,000 gig economy workers with consumer spending in the gig economy increasing by 40% since May 2020 with meal delivery services being 70% higher than pre COVID-19 lockdown levels in June 2020.¹³
40. Workers in the gig economy are predominantly young workers, students and migrants.¹⁴ Work within the gig economy offers flexibility and convenience allowing for work to be balanced with personal commitments such as study, family responsibilities or hobbies. There are a wide variety of services which are undertaken as part of the gig economy such as ride sharing, delivery services and personal services which may include professional services like graphic design and web development.
41. There is a diverse range of reasons that workers choose to work in the gig economy, such as to supplement main sources of income, a form of short term employment inbetween jobs or careers, transition into retirement or as a primary occupation.¹⁵ As noted by Uber, independent platform work offers two key things that are unique compared to more traditional forms of work – ‘low barriers to earning income, and flexibility to fit work around one’s own schedule.’¹⁶
42. It is not currently possible to quantify the size and scope of the gig economy which presents challenges for workers’ compensation schemes in identifying potential impact of changes to existing coverage arrangements. Further data and research is required to accurately quantify the size of the gig economy workforce.
43. Safe Work Australia is working with the ABS to enhance the use of the Work-Related Injuries Survey to identify injuries to workers engaged in the gig economy. This engagement is focussed on using existing data to identify workers rather than utilising new survey questions. Safe Work Australia also collects detailed data on work related injury fatalities and in 2019 expanded its data collection to identify gig delivery drivers who were fatally injured at work.

Are gig workers covered by workers’ compensation?

44. If a gig worker is a worker or deemed worker within the meaning of a workers’ compensation scheme, they will be covered by that scheme. However, it is not always clear whether this is the case given the unique engagement arrangements that apply in the gig economy and ongoing uncertainty about the employment status of gig workers. In light of this uncertainty, coverage is usually assessed on a case by case basis.

¹² Victorian Government, (2020) [Inquiry into the On-Demand Workforce report](#), accessed 9 November 2021

¹³ Actuaries Institute (2020) [The Rise of the Gig Economy and its impact on the Australian Workforce](#), Green Paper, accessed 9 November 2021

¹⁴ Mayes R, McDonald P, Oliver D, Stewart A, Williams P (2019) [Digital Platform Work in Australia, Prevalence, Nature and Impact](#). University of Adelaide, University of Technology Sydney, QUT accessed 9 November 2021

¹⁵ Fair Work Ombudsman (n.d.) [Gig Economy](#) accessed 9 November 2021

¹⁶ Parliament of Australia (2020) [Select Committee on Job Security](#), Uber submission, accessed 9 November 2021

45. To date there has been limited case law within workers' compensation jurisdictions in Australia addressing the issue of workers' compensation coverage for gig workers. However, these limited cases have highlighted that employment arrangements such as those found in the gig economy were not contemplated when workers' compensation laws were enacted, creating challenges for schemes trying to determine whether a gig worker is covered.
46. Similarly, recent decisions within the Fair Work Commission (FWC) acknowledge the difficulties in applying accepted legal definitions of independent contractor to gig workers and consideration of whether they should be more accurately described as employees.

Case study 2 – Agriculture Industry (Farming)

47. The Agriculture industry includes dairy and grain farming along with the farming of sheep, cattle and fruit and viticulture, horticulture and forestry. The status of workers within the agriculture industry is somewhat unique with higher proportions of sole traders and unpaid family workers.¹⁷
48. Owner operators who operate as sole traders are excluded from workers' compensation coverage. Not having access to the safety net of workers' compensation reduces access to financial aid, medical assistance and rehabilitation should an injury occur whilst working on the farm. It also increases the financial burden for these workers which may disrupt production, sowing or harvest.
49. In 2018-2019, the agriculture industry accounted for 75% of serious claims, with 8.4 serious claims per million hours worked and 15.7 serious claims per 1,000 employees.¹⁸ The high rates of injury and fatality within the agriculture industry highlight the need for adequate support for workers in the industry.

Workers' compensation coverage of temporary and migrant workers

50. Due to the seasonal nature of the work on many farms, in particular horticulture farms, farmers need to rely on temporary and migrant workers to perform labour intensive operations for brief periods of time, such as peak harvesting periods. The federal Government Report of the Migrant Workers' Taskforce report published in March 2019¹⁹ addresses issues around exploitation of these workers and concerns over work health and safety. Migrant and temporary workers that are on visas which permit them to work in Australia, such as the 457 visa, are generally entitled to workers' compensation as they are lawfully employed.²⁰
51. However, there is less clarity around coverage of migrant or temporary workers injured whilst working illegally. The Queensland Supreme Court of Appeal in *Australia Meat Holdings P/L v Kazi*²¹ determined that a person who did not have a right to work under the *Migration Act 1958* (Cth) at the time they were injured could not satisfy the definition of 'worker' under Queensland's workers' compensation laws because they were not employed under a legal employment contract. However, some jurisdictions allow a person employed under an illegal contract at the time of the injury to be deemed to have been employed under a valid contract. There is limited case law around the interaction between the *Migration Act 1958* and Australian workers' compensation laws. This issue

¹⁷ Barr N, Kancan R (2020) [Trends in the Australian Agricultural Workforce – What can data from the census of population and housing tell us about changes in agricultural employment?](#), Department of Agriculture Water and the Environment accessed 9 November 2021

¹⁸ Safe Work Australia, 2018-2019 [Australian Workers' Compensation Statistics](#), accessed 9 November 2021

¹⁹ Attorney General's Department (2019) [Report of the Migrant Workers' Taskforce](#), Commonwealth Government, accessed 9 November 2021

²⁰ See *Manthe v BHP Billiton Iron Ore Pty Ltd* [2011] WADC 160; *Singh v Taj (Sydney) Pty Limited* [2006] NSWCA 330

²¹ [2004] QCA 147

is complex and beyond the scope of this paper, however the example highlights inconsistency in workers' compensation coverage for these workers.

52. The temporary closure of Australian borders, to overseas or interstate workers as a result of COVID-19 has created a labour shortage for many farmers, this may increase reliance of neighbours and family members to assist farmers manage work requirements.²² The children of farming families or neighbours often contribute to farming in an unpaid capacity and are therefore may not be formally on the payroll, preventing adequate workers' compensation coverage for this part of the agriculture workforce.²³

Options for coverage

53. Many farms in Australia are also owned via companies and trusts which enable families working on farms to be covered as employees of the corporate entity either as a director or engaged directly as an employee.²⁴ This enables farmers to be covered for workers' compensation if an injury occurs, however to reduce overall cost of premiums, some farmers may underestimate actual wages which can result in lower than adequate income replacement for the injured worker. Workers' compensation premium rates are higher in the agriculture industry due to the high rates of injury and fatality. In 2018-19 the Agriculture, forestry and fishing industry recorded the highest average premium rate at 3.52% of payroll.²⁵ The high premium rates for this cohort of workers may be adversely impacting the coverage of workers, preventing adequate workers' compensation coverage.
54. The continual high rates of injury and fatality within the Agriculture industry emphasise the importance of considering workers' compensation coverage options further to accommodate this unique and important part of the Australian workforce.

²² See - Department of Agriculture, Water and the Environment (2021) [Agricultural overview: September quarter 2021](#), The Guardian (2021) [Australia's farmers set for record \\$70bn year – but labour shortages and Covid rules threaten harvest](#), accessed 9 November 2021

²³ Goldacre L, Guthrie R, Westaway J (2007) [Workers' Compensation and Occupational Health and Safety in the Australian Agriculture Industry](#), School of Business Law Curtin University of Technology, CSIRO & Data 61 (2019) [The Future of Australia's Agriculture Workforce](#), Queensland Farmers Federation, accessed 9 November 2021

²⁴ Goldacre L, Guthrie R, Westaway J (2007) [Workers' Compensation and Occupational Health and Safety in the Australian Agriculture Industry](#), School of Business Law Curtin University of Technology

²⁵ Safe Work Australia, (2021) [Comparative Performance Monitoring Report, Part 3 – Premiums, Entitlements and Scheme Performance, 22nd Edition](#), accessed 9 November 2021

Conclusion

55. This paper acknowledges the complex and diverse workers' compensation arrangements which co-exist within Australia. It discusses the impact of the changing nature of work, lack of certainty and inconsistent entitlements on existing workers' compensation coverage arrangements.
56. The paper also discusses the impact of existing definitions of coverage by workers' compensation systems on some of the non-traditional and often more vulnerable workers within the Australian workforce. It is designed to raise awareness of these issues and consider if existing arrangements are keeping pace with societal developments and expectations.
57. The paper provides two case studies, one on the emergence of the gig economy and the other relating to coverage within the agricultural industry particularly self-employed farmers, temporary and migrant workers and family members. The case studies are designed to demonstrate the impact of existing coverage arrangements on workers in vulnerable industries, noting that specific policy responses to these issues are beyond the remit of this paper. However, the examples illustrate the gaps in workers' compensation coverage for some workers, resulting in reduced access to financial compensation, rehabilitation and support with return to work for work related injuries.
58. It is hoped this paper will add to and build upon the existing discussions, reviews and inquiries that have, or are currently considering workers compensation coverage arrangements.²⁶

²⁶ See, Productivity Commission (2004) [National Workers' Compensation and Occupational Health and Safety Frameworks, Productivity Commission Inquiry Report](#) accessed 9 November 2021, Safe Work Australia, [The National Workers' Compensation Act Plan 2010-13](#) accessed 9 November 2021, Senate Education and Employment Committees (2017), [Corporate Avoidance of the Fair Work Act](#), Chapter 8, The gig economy: hyper flexibility or sham contracting?, accessed 9 November 2021, Victorian Government,(2020) [Inquiry into the On-Demand Workforce report](#), accessed 9 November 2021, Parliament of Australia (2020) [Select Committee on Job Security](#), accessed 9 November 2021