

Public health and workplace regulation:

Intersections and influences

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Introduction

Work and how it is performed and regulated is enormously influential in the health of society at large. Work can promote both economic and social well-being, but it can also be the cause of illness and injury. Poorly regulated work can produce particularly dire public health outcomes. Think for example, of the lives of the female laundry workers depicted in the film *Suffragette*.¹ Long hours of physically demanding work with boiling water and poisonous chemicals led to short life expectancies among these women and girls. Inherently dangerous equipment and substances are not, however, the only sources of risk to health and safety arising from work. Poorly remunerated insecure work also exposes individuals and communities to health risks.² Toxic workplace cultures, where bullying and sexual harassment are tolerated, inflict psychological harm on individuals, and contribute to the alarming mental health problems in the community.³ A broad view of work health and safety regulation includes not only the specific regulation of physically hazardous work, but also the influence of industrial laws promoting income and job security and the protection of human dignity at work.

This chapter adopts that broad view in assessing the intersections between laws regulating work, and public health objectives and outcomes. It explains the particular legal regimes in Australia specifically directed towards promoting work health and safety and

¹ 2015 Pathé Films. Written by Abi Morgan, and directed by Sarah Gavron. For a digest see <[en.wikipedia.org/wiki/Suffragette_\(film\)>](http://en.wikipedia.org/wiki/Suffragette_(film)>).

² P A Landsbergis et al, 'Work Organisation, Job Insecurity, and Occupational Health Disparities' (2014) 57(5) *American Journal of Industrial Medicine* 495.

³ See A M Hansen, A Hogh and R Persson, 'Frequency of Bullying at Work, Physiological Response and Mental Health' (2011) 70(1) *Journal of Psychosomatic Research* 19; S Einarsen and M B Nielsen, 'Workplace Bullying as an Antecedent of Mental Health Problems: A Five Year Prospective and Representative Study' (2015) 88 *International Archives of Occupational and Environmental Health* 131; B Smith, M Schleger and L Elphick, 'Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws' (2019) 32 *Australian Journal of Labour Law* 219.

how they have evolved over time in line with contemporary understanding of the drivers of efficient public health and safety outcomes. These laws include the specific occupational (OHS) or work health and safety (WHS) legislation⁴ and the separate workers' compensation regimes in each of the Australian states and territories.⁵

The chapter also considers those aspects of our Fair Work laws⁶ and some remaining state industrial laws that seek to ensure that work can be undertaken safely and without risk to the community.⁷ Principally, we consider laws providing for adequate remuneration, limits on excessive working hours, and entitlements to take leave from work for rest and recuperation from illness so that workers have adequate time to manage all the necessities for healthy living: time for proper nutrition, regular exercise, recreation and social engagement. Without general protection for these interests, work can cause illness and injury, not only for individuals but for broad sections of the community.⁸ Poorly regulated work can also have direct public health consequences if workers have incentives to engage in unsafe practices, such as attending work while infectious with communicable disease, or undertaking dangerous work that poses risks to others while exhausted.⁹ Some regulatory measures, such as 'safe rates' review of transport workers' remuneration, recognize the links between the economic conditions of work and public health and safety.¹⁰

⁴ *Occupational Health and Safety Act 2004* (Vic), supported by the *Occupational Health and Safety Regulations 2017*; *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas); *Work Health and Safety Act 2020* (WA).

⁵ *Workers' Compensation Act 1987* (NSW) and *Workplace Injury Management and Workers' Compensation Act 1998* (NSW); *Workers Compensation Act 1958* (Vic) and *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); *Return to Work Act 2014* (SA); *Workers' Compensation and Rehabilitation Act 2003* (Qld); *Workers Rehabilitation and Compensation Act 1988* (Tas); *Workers' Compensation and Injury Management Act 1981* (WA).

⁶ *Fair Work Act 2009* (Cth) and *Fair Work Regulations*.

⁷ See for example the *Industrial Relations Act 1996* (NSW) Ch 6, dealing with the terms and conditions of work of transport workers.

⁸ See the adverse health outcomes reported in the Senate Select Committee on Job Security, *The Job Insecurity Report* (Commonwealth of Australia, 2022) ('*Job Insecurity Report*'), Ch 3.

⁹ See S Gregson and M Quinlan, '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* 534, 548, endnote 21, citing 'Special Sanitary Commission on 'Sweating' among Tailors in Liverpool and Manchester, 21 April 1888, 131 (3373), 793 and other papers.

¹⁰ See M Quinlan and L Wright, *Remuneration and Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission (NTC)* (National Transport Commission, Melbourne, 2008); M Rawling, R Johnstone and I Nossar, 'Compromising Road Transport Regulation: The Abolition of the Road Safety Remuneration Tribunal' (2017) 39(3) *Sydney Law Review* 303.

Safe and healthy work also encompasses the promotion of psychological wellbeing. Work health and safety, and workers' compensation laws recognize this.¹¹ A more recently instituted jurisdiction of the Fair Work Commission is addressed at preventing workplace bullying and sexual harassment.¹² Early intervention to address these safety risks will not only assist in maintaining employment relationships, but should also contribute to improved mental health outcomes for victims of this kind of conduct.

Throughout this discussion, a contemporary challenge for work health and safety regulation is highlighted: how to ensure the goals of regulation are met, notwithstanding the increasing numbers of workers who fall outside of the scope of current regulatory schemes. Precarious work presents a significant public health challenge.¹³

Scope of workplace regulation

Before we consider specific legal regimes, it is useful to reflect on the scope of laws purporting to regulate work and working relationships. What distinguishes work from other kinds of human and indeed commercial activity, such that work warrants special regulation? Historically, our legal system has treated the relationship between those who hire others and the workers they hire, as a special category of relationship. The regularly reiterated assertion of the International Labour Organisation (ILO), that 'labour is not a commodity',¹⁴ signals that relationships whereby workers surrender up their labour power in the service of a 'master' (these days more often an incorporated business enterprise) warrant special regulation to reflect the imperative that those who benefit from others' labour should respect the dignity and humanity of their workers.¹⁵ In the field of health and safety, it is especially important that those with the power to control the work environment and influence health and safety outcomes are made subject to regulation.

¹¹ See for example the definition of 'health' in the model *Work Health and Safety Act 2011* (Cth). See also recognition of psychological and psychiatric injury in *Workers Compensation Act 1987* (NSW) s 65A, *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 3 definition of 'disease'.

¹² See *Fair Work Act 2009* (Cth) Pt 6-4B.

¹³ See M Quinlan, *The Effects of Non-Standard Forms of Employment on Worker Health and Safety*, Conditions of Work and Employment Series No 67 (International Labour Organization, 2015).

¹⁴ *Declaration concerning the Aims and Purposes of the International Labour Organisation*, adopted at the 26th session of the International Labour Organization, Philadelphia, 10 May 1944, Art 1(a). See also the ILO *Declaration on Social Justice for a Fair Globalization*, adopted by the International Labour Conference at its 97th Session, Geneva, 10 June 2008, 6. ILO documents are accessible at <www.ilo.org>.

¹⁵ See P O'Higgins, "'Labour is not a Commodity" – An Irish Contribution to International Labour Law' (1997) 26 *Industrial Law Journal* 225.

In Australia, as in much of the common law world, the concept of the ‘employment relationship’, or ‘contract of service’, has developed to distinguish those kinds of work relationships that deserve special consideration.¹⁶ In Australia, the test for determining whether a working relationship is one of employment or not is generally left to the judge-made common law, although some statutes extend coverage to a wider conception of worker.¹⁷ The common law test for employment involves assessing the contract of engagement made by the parties to determine whether that contract creates a relationship of subservience between the worker and the hirer whose business they serve.¹⁸ A range of indicia are assessed to determine the ‘totality of the relationship’ created by the contract at the time it is made.¹⁹ Subsequent conduct is irrelevant unless there is evidence of variation of the contract.²⁰ Workers who are paid not only for their labour but for providing the use of substantial capital equipment, are unlikely to be employees.²¹ Likewise, workers who are permitted by the contract to delegate tasks to others are unlikely to be employees, even though in practice the worker never does so.

Contract law favours the interests of the party with the greater bargaining power, who can determine the terms of the agreement to suit their own ends. While a hirer cannot simply label their contract as an independent contract to determine this question,²² the focus on the terms of the contract made by the parties at the outset of their relationship means that hirers can effectively choose to hire workers under independent contracts, so long as the terms of the contract indicate that kind of relationship. They can, for example, insist that the worker take responsibility for bringing capital equipment such as vehicles and

¹⁶ See J Riley, ‘The Definition of the Contract of Employment and Its Differentiation for Other Contracts and Other Work Relations’ in M Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 321.

¹⁷ See for example the *Superannuation Guarantee (Administration) Act 1992* (Cth) s 12(3), and the state workers’ compensation enactments discussed below and noted at n 56.

¹⁸ See *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1, [39] (Kiefel CJ, Keane and Edelman JJ).

¹⁹ *Ibid*, [61].

²⁰ *Ibid*, [44] (Kiefel CJ, Keane and Edelman JJ); [176]-[177] (Gordon J).

²¹ See for example *ZG Operations Pty Ltd v Jamsek* [2022] HCA 2.

²² See *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1, [63] (Kiefel CJ, Keane and Edelman JJ).

tools to the job.²³ By manipulating the terms of their contracts, hirers are able to avoid employment regulation.

The common practice of labour hire, which permits a host employer to hire labour through a commercial agreement with a labour hire agency, also allows the host to escape direct liability for observing employment law standards in respect of these workers.²⁴ The orthodox position under Australian law is that the workers are not in a direct contractual relationship with the host who directs their work, and must look only to the labour hire agency with whom they have a contract to meet employment obligations.²⁵ Typically, labour hire agencies engage their workers as either contractors or casual employees, with no entitlements to paid sick leave and little job security.²⁶

As we shall see, contemporary work health and safety laws have recognized the risk of regulatory avoidance, by extending coverage to all ‘persons in control of businesses and undertakings’, and all workers under their influence. While this approach has been adopted in specific safety regulation, it has not been extended (except in limited circumstances²⁷) to the regulation of the conditions of work that also influence public health outcomes. Ensuring safe and healthy working conditions for all who labour in our economy remains a challenge.

Specific work health and safety regulation

Work health and safety legislation has a long history in Australia, the first legislation being the *Factories Act 1885* (Vic), which adopted the British model of legislation at the time.²⁸

²³ See for example *ZG Operations Pty Ltd v Jamsek* [2022] HCA 2, where an employer required employed truck drivers to purchase the vehicles from the employer, and become independent contractors.

²⁴ For a thorough study of labour hire see A Forsyth, *Victorian Inquiry into the Labour Hire Industry and Insecure Work Final Report* (Industrial Relations Victoria, 31 August 2016).

²⁵ See *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1, [89]. See also *Drake Personnel Ltd v Commissioner of State Revenue* [2000] 2 VR 365; 105 IR 122, [54]; *Staff Aid Services v Bianchi* (2004) 133 IR 29.

²⁶ See J Riley Munton, ‘Work Health and Safety: Regulating for Safe and Sustainable Work Practices in a Post-Pandemic World’ in B Bennett and I Freckelton (eds) *Pandemics, Public Health Emergences and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 196, 197-202 for a more detailed explanation of labour hire.

²⁷ In limited circumstances, parent companies and franchisors may be liable for breaches of the *Fair Work Act 2009* (Cth), by subsidiaries and franchisees under their control: see *Fair Work Act 2009* (Cth) s 558B. See also the general accessory liability provisions in *Fair Work Act 2009* (Cth) s 550.

²⁸ See R McCallum and C Roles, ‘Harmonising Occupational Health and Safety Systems’ in J Riley and P Sheldon (eds), *Remaking Australian Industrial Relations* (CCH, 2008) 65, 67.

Other states followed with similar schemes.²⁹ This kind of legislation focused on prescriptive provisions suitable for factory work, by specifying particular safety measures (such as the fencing of dangerous equipment, rules for containing toxic substances, noise controls, etc), and relied on an inspectorate to police safety breaches.³⁰ This kind of regulation focused on the particular risks to physical safety created by industrialised work. In 1970, the British government established an inquiry headed by Lord Robens into the effectiveness of this style of regulation for a changing world of work, wherever evolving technology altered the conditions of work and presented new risks, unanticipated by existing regulations. The result was the Robens Report which proposed a new approach to safety regulation, moving away from detailed prescriptive rules, towards the imposition of a broad duty upon all persons in workplaces to take responsibility for ensuring health and safety, by whatever means were appropriate to the nature of the work and its risks.³¹ Many Australian states adopted Robens style legislation from the early 1980s.³²

The Commonwealth government commenced a program designed to encourage uniformity in state work health and safety law in 1985,³³ but did not achieve a harmonized system until the enactment of the *Model Work Health and Safety Act 2011* (Cth), adopted in most Australian states and territories.³⁴ Victoria has yet to enact the model legislation.³⁵

²⁹ Ibid.

³⁰ See R Johnstone and R Mitchell, 'Regulating Work' in C Parker et al, *Regulating Law* (Oxford University Press, 2004), 101,103. See also R Johnstone et al, *Work Health and Safety Law and Policy*, 3rd ed (Lawbook, 2012), 40-48.

³¹ Lord Robens, *Report of the Committee on Safety and Health at Work 1970-1972* (HSMO London, 1972), 12.

³² See *Occupational Health and Safety Act 1983* (NSW); *Occupational Health and Safety Act 1985* (Vic); *Occupational Health and Safety Act 1984* (WA); *Occupational Health Safety and Welfare Act 1986* (SA). See also the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth), adopting the Robens approach to the regulation of health and safety in the Commonwealth public service.

³³ McCallum and Roles, above n 28, 69

³⁴ See *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas). Western Australia came to scheme belatedly, when it enacted the *Work Health and Safety Act 2020* (WA). For an overview of the model legislation, see *Hunter Quarries Pty Ltd v State of New South Wales (Department of Trade & Investment)* [2014] NSWSC 1580, [30]-[44].

³⁵ The current legislation in Victoria is the *Occupational Health and Safety Act 2004* (Vic), supported by the *Occupational Health and Safety Regulation 2017*, administered by WorkSafe Victoria.

Key features of the model legislation demonstrate the aspiration to broaden its scope and effectiveness in promoting work health and safety.³⁶ First, the duty to ensure workplace health and safety, ‘as far as is reasonably practicable’,³⁷ falls upon all ‘persons in control of businesses and undertakings’ (PCBUs), and not only on the direct employer of workers.³⁸ More specific duties also apply to those responsible for the design, manufacture and supply of plant and equipment and chemicals and other substances used in work.³⁹ The workplace is defined extensively, to include ‘any place where a worker goes or is likely to be while at work’.⁴⁰ The duty of care is owed to all workers, defined comprehensively to include not only employees, but subcontractors, labour hire workers, trainees and work experience workers, and volunteers.⁴¹

Workers also bear a duty to take reasonable care for their own and others’ health and safety at work.⁴² They have a specific responsibility to comply with health and safety policies and procedures, and an entitlement to be consulted about work health and safety matters. Workers are able to elect Health and Safety Representatives who play a role in representing workers, investigating complaints, and monitoring compliance with work health and safety policies.⁴³ So the coverage provisions attempt to ensure that all persons who influence the performance of work (wherever that may occur), bear responsibility to take all practicable steps to ensure health and safety.

A second feature of the legislation is its recognition of a broad definition of ‘health’, to include not only physical, but also psychological health.⁴⁴ Many modern workplaces do not present the same physical risks as the factories and shops regulated by early statutes, but they nevertheless pose the risk of stress-related psychiatric illnesses.⁴⁵

³⁶ The description of the legislation here is necessarily brief. For a detailed study see Michael Tooma, *Safety, Security, Health and Environment Law* 3rd ed (Federation Press, 2019).

³⁷ *Work Health and Safety Act 2011* (Cth) s 17.

³⁸ PCBU is defined in *Work Health and Safety Act 2011* (Cth) s 5.

³⁹ *Work Health and Safety Act 2011* (Cth), ss 21-26.

⁴⁰ *Work Health and Safety Act 2011* (Cth), s 8.

⁴¹ *Work Health and Safety Act 2011* (Cth), s 17.

⁴² *Work Health and Safety Act 2011* (Cth), ss 28-29.

⁴³ *Work Health and Safety Act 2011* (Cth), ss 47-79.

⁴⁴ *Work Health and Safety Act 2011* (Cth), s 4 definition of ‘health’.

⁴⁵ See *Job Insecurity Report* above n 8, 45-50.

A third feature of the model legislation is the adoption of the regulatory ‘pyramid’ of sanctions for breach.⁴⁶ While serious breaches attract criminal sanctions, including potential imprisonment of those who commit intentional or reckless breaches,⁴⁷ there is also a range of potential sanctions for lesser breaches, designed to promote compliance and improve work practices. For example, one option for addressing safety breaches is to impose a Work Health and Safety Project Order, which requires an offender to implement improvements to their systems.⁴⁸ Workers who have breached their duties may be ordered to undertake suitable training programs.⁴⁹ The regulator is also empowered to negotiate enforceable undertakings, to encourage organisations to agree to a whole program of actions to improve health and safety compliance.⁵⁰ In this way, the legislation promotes compliance not only by fear of the most serious sanctions, but by methods designed to coach participants in the implementation of better practices. Prevention is invariably a better solution than punishment, especially when the potential consequences of health and safety breaches can be so catastrophic.

Workers’ compensation laws

Work health and safety legislation governs the management of hazards and risks in workplaces. Workers’ compensation laws also encourage the management of workplace safety by imposing an obligation on employers to insure against compensation claims from employees who have been injured or made ill as a consequence of their work. Workers’ compensation laws are state-based, and are generally ‘no fault’ schemes, meaning that employees can access benefits without demonstrating that the employer was negligent in causing their injuries.⁵¹ No fault schemes avoid the heavy costs of litigating the question of

⁴⁶ See I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

⁴⁷ See *Work Health and Safety Act 2011* (Cth), s 31, Category 1 offences attracting a potential prison sentence of up to five years. Note also the workplace manslaughter provisions in the *Work Health and Safety Act 2011* (Qld) ss 34A-34D; *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) ss 34A-34D; *Occupational Health and Safety Act 2004* (Vic) ss 39C-39G; and provisions introduced in the ACT by the *Crimes (Industrial Manslaughter) Act 2003* (ACT), enacting *Crimes Act 1900* (ACT) ss 49C-49D.

⁴⁸ *Work Health and Safety Act 2011* (Cth) s 238.

⁴⁹ *Work Health and Safety Act 2011* (Cth) s 241.

⁵⁰ See the enforceable undertakings listed by Safework NSW at < <http://www.safework.nsw.gov.au> >.

⁵¹ For the various state Acts governing workers’ compensation, see *Workers’ Compensation Act 1987* (NSW) and *Workplace Injury Management and Workers’ Compensation Act 1998* (NSW); *Workers Compensation Act 1958* (Vic) and *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); *Return to Work Act 2014* (SA); *Workers’ Compensation and Rehabilitation Act 2003* (Qld); *Workers’ Compensation and Injury Management Act 1981* (WA); *Workers Rehabilitation and Compensation Act 1988* (Tas). For information on the

who was to blame for the illness or injury.⁵² The employee need only prove that the illness or injury arose in the course of employment,⁵³ or that employment was a substantial or significant contributing factor'.⁵⁴

In the main, contemporary workers' compensation schemes provide for medical expenses, income support while incapacitated, and rehabilitation services, although most schemes also permit workers who can demonstrate a certain level of impairment to bring a common law claim for lump sum compensation if the employers' negligent act or omission caused their injury or illness.⁵⁵

Workers' compensation laws cover employees, and most state legislation extends coverage to a wider group of 'deemed' or 'presumed' employees to capture a range of workers who are not employees according to the narrow common law definition, but are nevertheless dependent upon their work with the hirer and are not operating businesses of their own. For example, the *Workers Compensation Act 1958* (Vic) s 3 includes tributers, who work in mines and are paid by receiving a share of the minerals they extract.⁵⁶ Taxi drivers who work under contracts of bailment are also covered.⁵⁷ These provisions vary between the states.⁵⁸ It is not clear, however, that they comprehensively cover all kinds of workers who would benefit from workers' compensation coverage. For example, the

evolution and nature of workers' compensation schemes in Australia see Safe Work Australia, *Comparison of Workers Compensation Schemes in Australia and New Zealand* (Commonwealth of Australia, 2010).

⁵² For an analysis of the features of no fault schemes see T Drabsch *No Fault Compensation Briefing Paper 6/05* (New South Wales Parliamentary Library, 2005).

⁵³ See *Workers Compensation Act 1958* (Vic) s 8; *Workers Rehabilitation and Compensation Act 1988* (Tas) s 25

⁵⁴ See for example *Workers' Compensation Act 1987* (NSW) s 9A ('substantial') and *Return to Work Act 2014* (SA) s 7(1)(a) ('significant'); *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 32(1) ('significant').

⁵⁵ *Workers' Compensation Act 1958* (Vic) s 63A and *Workplace Injury rehabilitation and Compensation Act 2013* (Vic) Pt 7 and s 318(1); *Workers' Compensation Act 1987* (NSW) s 151; *Return to Work Act 2014* (SA) s 71 (requiring an impairment of at least 30%); *Workers Rehabilitation and Compensation Act 1988* (Tas) s 132-133, s 138AB(3) (requiring impairment of at least 20%); *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 266; *Workers' Compensation and Injury Management Act 1981* (WA) s 93K(4) (requiring an impairment of at least 25%) and *Workers' Compensation (Common Law Proceedings) Act 2004* (WA).

⁵⁶ *Workers Compensation Act 1958* (Vic) s3(3). See also *Workers Compensation and Injury Management Act 1981* (WA) s 7, deeming tributers to be 'workers'.

⁵⁷ *Workers Compensation Act 1958* (Vic) s 3(5).

⁵⁸ See *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) Sched 1; *Workers Compensation and Rehabilitation Act 2003* (Qld) Sched 2; *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 5 and Sched 1; *Workers Compensation Act 1951* (ACT) ss 8-15; *Return to Work Act 2014* (SA) s 4 and Sched 1; *Workers Rehabilitation and Compensation Act 1988* (Tas) ss 3-4E; *Return to Work Act 1986* (NT) s 3b(1)-(19).

extension of workers' compensation coverage to certain self-employed contractors was held not to cover an Uber driver who suffered injury while working in *Hassan v Uber Australia Pty Ltd*,⁵⁹ apparently because his contract of engagement was with Rasier Pacific VOF, an unlimited partnership registered in the Netherlands, and not subject to the law of New South Wales. Likewise, an UberEats delivery worker who was assaulted while making a delivery was prevented from pursuing a claim, because the arbitrator hearing the matter decided that the Fair Work Ombudsman had determined that workers engaged by these on-demand delivery platforms were not parties to employment relationships.⁶⁰ These are the very kinds of workers who need workers' compensation coverage. They work in dangerous conditions, as has been evidenced by a number of deaths in recent times.⁶¹ It is not realistic to assume that these workers will take out their own insurance policies, given their modest incomes.

While the provision of an appropriate insurance scheme for these workers is important, regulation to ensure that they are not subjected to unsafe working conditions in the first place is equally necessary. Prevention is more valuable than compensation.

Decent work

The legislative schemes discussed above address work health and safety regulation directly. They are nevertheless not the only important laws promoting safe and healthy work. It has long been recognized that the terms and conditions under which work is performed can have a significant influence on the well-being of the worker and the community at large.⁶² To this end, our contemporary regulation of working conditions under the *Fair Work Act 2009* (Cth) includes a set of basic National Employment Standards (NES) protecting national system employees.⁶³ These include provisions protecting employees from excessively long working hours;⁶⁴ entitlements to take leave to attend to personal illness and caring

⁵⁹ [2018] NSWWC 21.

⁶⁰ *Kahin v Uber Australia Pty Ltd* [2020] NSWWC 118, [81].

⁶¹ See N Bonyhady and T Rabe 'Rider deaths reveal risky safety practices' *Sydney Morning Herald*, 3-4 October 2020, 24.

⁶² See Gregson and Quinlan above n 9; Landsbergis et al, above n 2; *Job Insecurity Report*, above n 8, 43-58; Quinlan above n 13.

⁶³ For a more detailed explanation of the National Employment Standards see J Riley Munton, *Labour Law: An Introduction to the Law of Work* (Oxford University Press, 2021), 106-119.

⁶⁴ See *Fair Work Act 2009* (Cth) ss 62-64.

responsibilities;⁶⁵ a certain amount of annual leave to permit periodic respite from work;⁶⁶ and permission to take time off for child care after the birth or adoption of children.⁶⁷ Excessive working hours, without adequate breaks, have been found to increase the risk of adverse health outcomes, including depression and anxiety disorders, and coronary heart disease.⁶⁸ The NES also include a right to request flexible working arrangements to enable an employee to manage the conflicting demands of early child care or elder care, or to accommodate the employee's desire to transition to retirement.⁶⁹

The basic provisions in the NES are supported by a battery of modern awards applying appropriate minimum standards for a large range of occupational groups.⁷⁰ These include further protections to promote the management of work in a way that accommodates the health and safety of the worker and the community at large. See for example the provisions in the *Nurses Award 2020* clause 13.1(d) which provides that the maximum length of a shift is 10 hours, and clause 13.4(a) which requires a rest break of at least 10 hours between shifts (although this may be reduced to 8 hours by agreement). These rostering restrictions benefit not only the nurses themselves, but the patients in their care. Rostering rules indirectly support the requirement that health facilities maintain certain staffing levels. A body of international research has identified an association between reduced staffing levels in health care facilities, and poor outcomes for patients, in terms of errors and infections.⁷¹

Awards also price labour by setting minimum rates of pay for ordinary hours of work, and penalty rates for unsociable hours (on evenings, weekends and public holidays) and overtime (i.e., hours worked in excess of a standard working day). Minimum pay scales ensure that workers can earn a decent living from working a standard working week of 38 hours, and penalty rates dissuade employers from requiring excessive additional hours from

⁶⁵ *Fair Work Act 2009* (Cth) ss 95-107.

⁶⁶ *Fair Work Act 2009* (Cth) ss 86-94.

⁶⁷ *Fair Work Act 2009* (Cth) ss 67-85.

⁶⁸ See Quinlan above n 13, 15, citing Y Liu and H Tanaka 'Overtime Work, Insufficient Sleep and Risk of Non-fatal Myocardial Infarction in Japanese Men' (2002) 59 *Occupational & Environmental Medicine* 447-451, and A Dembe et al 'The Impact of Overtime and Long Work Hours on Occupational Injuries and Illnesses' (2005) 62 *Occupational & Environmental Medicine* 588-597.

⁶⁹ *Fair Work Act 2009* (Cth) s 65.

⁷⁰ See the list of modern awards on the Fair Work Commission's website: <www.fwc.gov.au>.

⁷¹ Quinlan above n 13 at 7, citing M West et al, 'The Link Between the Management of Employees and Patient Mortality in Acute Hospitals' (2002) 13(2) *International Journal of Human Resource Management* 1299-1310.

their workers. These additional award provisions (above the NES) are intended to protect workers from the risks associated with excessive work, and (when adequately enforced) they promote safer conditions for the patients, clients and customers, who will not be exposed to treatment by a worker sick with exhaustion. Poorly paid work creates safety risks in a wide range of industries. The public safety risk of heavy vehicle accidents caused by exhausted long haul truck drivers working excessive hours to make a living is well-documented.⁷²

Despite this apparent safety net designed to protect individual workers and the community at large from the dangers of overwork, gaping holes remain in the system. Many workers do not enjoy the full benefits of Fair Work laws because they are engaged as casual employees, without paid leave to deal with illness.⁷³ A casual worker is one who is engaged without any contractually binding guarantee of continuing work.⁷⁴ Even though a casual worker may in practice work full time hours for many years,⁷⁵ they will remain a casual if their initial engagement was on terms foreswearing any commitment to ongoing work.⁷⁶ An employee in this position may seek conversion to permanent status, but this is largely within the gift of the employer who may refuse the request on a range of grounds.⁷⁷ In May 2021 it was estimated that casual employment made up 23 per cent of the employed workforce in Australia.⁷⁸ During the COVID-19 pandemic this meant that a large proportion of the workforce did not have access to paid sick leave, and were also vulnerable to the risk

⁷² See Quinlan and Wright above n 10.

⁷³ *Fair Work Act 2009* (Cth) s 95 excludes casual employees from access to paid personal leave.

⁷⁴ *Fair Work Act 2009* (Cth) s 15A. See also *WorkPac Pty Ltd v Rossato* (2021) 392 ALR 39; [2021] HCA 23, [57]; A Stewart et al 'The (Omni)bus that Broke Down: Changes to Casual Employment and the Remnants of the Coalition's Industrial Relations Agenda' (2021) 34 *Australian Journal of Labour Law* 132, 144-146.

⁷⁵ R Owens, 'The "Long-term or Permanent Casual" — An Oxymoron or "A Well Enough Understood Australianism" in the Law?' (2001) 27 *Australian Bulletin of Labour* 118. The Fair Work Commission recognised the significant incidence of long term or 'permanent' casual employment in its review of the award system: see *Re 4 Yearly Review of Modern Awards — Casual Employment and Part-time Employment* (2017) 269 IR 125; [2017] FWCFB 3541 [85], [115].

⁷⁶ See *Fair Work Act 2009* (Cth) s 15A(5).

⁷⁷ *Fair Work Act 2009* (Cth) Part 2-2, Div 4A.

⁷⁸ See Australian Bureau of Statistics [Characteristics of Employment, Australia, August 2021](https://www.abs.gov.au/characteristics-of-employment-australia-august-2021) | Australian Bureau of Statistics ([abs.gov.au](https://www.abs.gov.au)), Release 14 December 2021; Geoff Gilfillan, 'Recent and long-term trends in the use of casual employment', *Parliamentary Library Research Paper Series*, 2021-22, 24 November 2021, Canberra.

of losing their jobs if they missed shifts.⁷⁹ This created clear risks of sick workers attending for work, and spreading the disease.⁸⁰

Casual employees are still in a better position than the many workers who are engaged as so-called 'independent contractors', but nevertheless work in lowly-paid, insecure jobs. A casual employee is still entitled to the minimum wages set by a relevant modern award, plus a 25 percent casual loading as a form of compensation for the lack of leave entitlements and other benefits of permanency. The industrial relations system has been somewhat two-faced in its justification of trading off leave entitlements for a loading in the case casual work. Early cases heard by the Australian Industrial Relations Commission (forerunner to the Fair Work Commission) held that cashing out of leave entitlements was contrary to the public interest. The entitlement to a certain amount of paid leave to deal with personal illness was said to be a 'community standard' that should not be compromised by enterprise agreements that purported to exchange leave for extra pay.⁸¹ Similar decisions were made in respect of proposals to trade off the community standard of a certain amount of paid annual leave for recreation.⁸² Preservation of community standards is (or at least, was once) seen as a benefit to society at large.

Workers who fall outside of the boundary created by the common law definition of employment can make no claim to the benefit of these community standards. With very few exceptions,⁸³ the Fair Work system is not so comprehensive as work health and safety, or even workers' compensation regulation in its coverage.

Special state schemes

⁷⁹ Only casual employees who have served the same employer on a regular and systematic basis for at least 12 months, and have a reasonable expectation of continuing work, can make an application for unfair dismissal under the *Fair Work Act 2009* (Cth) s 384(2)(a).

⁸⁰ See R Clayton, 'No Paid Pandemic Leave for Healthcare Workers Forces Some to Come to Work Sick', *ABC News* (14 July 2020), <www.abc.net.au/news/2020-07-14/coronavirus-fears-health-workers-sick-cant-afford-leave/12451226>..

⁸¹ See *Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Tweed Valley Fruit Processors Pty Ltd* (1995) 61 IR 212, 233; *Re Independent Order of Oddfellows of Victoria Friendly Society* (1996) 65 IR 129; *Re Fabricorp Pty Ltd Enterprise Flexibility Agreement 1995* (1996) 64 IR 370.

⁸² See *Enterprise Flexibility Agreement Test Case May 1995* (1995) 59 IR 430, 456; *Re Application by Deckway Pty Ltd trading as Lilianfels Blue Mountains* [1995] AIRL 1,276; *Arrowcrest Group Pty Ltd re Metal Industry Award 1984* (1994) 36 AIRL 402.

⁸³ One notable exception is the coverage of 'outworkers' in the textile, clothing and footwear industries: see *Fair Work Act 2009* (Cth) Pt 6-4A.

Certain transport industry workers have the benefit of state-based regulation of decent rates of pay and conditions, even for those who are genuine independent contractors.⁸⁴ The earliest of these schemes pre-dated the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) which sought to exclude the operation of most state industrial laws. The survival of the state transport schemes is a testament to the industrial strength of the Transport Workers Union, and its efforts to ensure that self-employed owner drivers should have access to a means of securing decent, and hence safe, working conditions. Presently, this kind of regulation is limited to transport work.

For a brief period a federal scheme operated, with the explicit aim of ensuring road safety through regulation of the remuneration and contract conditions of heavy vehicle drivers, but it was repealed under political pressure from sections of the business community with an interest in maintaining a dangerously competitive trucking industry.⁸⁵

Perils of unregulated and insecure work

The rise in the numbers of Australians working in insecure jobs – as casual employees, or engaged through labour hire arrangements, or as so-called ‘independent contractors engaged to work ‘on demand’ through digital platforms – has focused the attention of a Senate Select Committee Inquiry on the particular dangers presented by insecure work.⁸⁶ The Report of this Inquiry dedicates a chapter to the alarming relationship between insecure work and serious risks to health and safety. The Report cites a study undertaken by the World Health Organisation that found that the relationship between insecure work and poor health and safety outcomes is ‘pervasive and overwhelmingly negative’.⁸⁷ A submission to the Inquiry made by the Australian Medical Association affirmed that in Australia today, patients in insecure work manifested the following health outcomes:

⁸⁴ See *Industrial Relations Act 1996* (NSW) Ch 6; *Owner Drivers and Forestry Contractors Act 2005* (Vic); *Owner Drivers (Contracts and Disputes) Act 2007* (WA).

⁸⁵ See the *Road Safety Remuneration Act 2012* (Cth), repealed by the *Road Safety Remuneration Repeal Act 2016* (Cth) after making only two orders: see M Rawling, R Johnstone and I Nossar, ‘Compromising Road Transport Regulation: The Abolition of the Road Safety Remuneration Tribunal’ (2017) 39 (3) *Sydney Law Review* 303.

⁸⁶ See Job Insecurity Report, above n 8. The Report, xiii, found that in 2018, the proportion of Australian workers who were in full time permanent employment fell below 50%.

⁸⁷ Ibid, 43, citing World Health Organisation Employment Conditions Knowledge Network, *Employment, Conditions and Health Inequalities*, Geneva: 2007, www.who.int/social_determinants/resources/articles/emconet_who_report.pdf.

- stress and anxiety resulting from uncertainty about future work;
- an increased likelihood of psychological distress and psychiatric morbidity;
- a higher risk of coronary heart disease;
- higher incidences of high cholesterol and hypertension; and
- feeling unable to report injuries or accidents suffered in the workplace.⁸⁸

The seriousness of the stress and anxiety effects of insecure work were also borne out by submissions from health experts who reported evidence of suicidal thoughts and behaviours, directly related to job insecurity.⁸⁹ The relationship between job insecurity and poor health conditions should come as no surprise. Insecure jobs are poorly paid and unreliable, and leave workers vulnerable to all the risks associated with poverty, including poor nutrition and potential homelessness.⁹⁰ It is not surprising that a key recommendation of the *Job Insecurity Report* is that the Australian government should review its model WHS laws and associated regulations to ‘provide a greater emphasis on supporting workers’ psychological safety in the workplace, and include “job insecurity” as a workplace hazard’.⁹¹

Bullying and harassment

Insecure jobs also expose workers to a greater risk of bullying and harassment.⁹² Mistreatment at work is also a source of potential health and safety risks.⁹³ Sorry tales of the ruination of peoples’ health and personal relationships as a consequence of unresolved workplace bullying and harassment problems are all too frequent.⁹⁴

The enactment of the *Fair Work Act 2009* (Cth) Part 6-4B in 2013 was addressed towards enabling early intervention in these kinds of workplace problems. These provisions allow workers who claim to be victims of workplace bullying to apply to the Fair Work Commission for orders directed at preventing the conduct from continuing. The jurisdiction adopts the definition of ‘worker’ from the *Work Health and Safety Act 2011* (Cth) so covers

⁸⁸ Ibid, 45, citing AMA Submission 36, 1.

⁸⁹ Ibid, 50 [3.28], citing Suicide Prevention Australia Submission 181, 5.

⁹⁰ *Job Insecurity Report* above n 8, 55 [3.47], citing Western Australian Council of Social Service (WACOSS) Submission 118, pp 17-18.

⁹¹ *Job Insecurity Report* above n 8, 58, Recommendation 3, [3.67].

⁹² *Job Insecurity Report* above n 8, 99-100, citing oral evidence given by the Sex Discrimination Commissioner, Ms Kate Jenkins, *Committee Hansard*, 16 September 2021, 32.

⁹³ See Smith, Schleger and Elphick above n 3.

⁹⁴ See for example the story of Mr Naidu, a labour hire worker whose life was ruined by years of racial vilification by a manager at the host enterprise, in *Nationwide News Pty Ltd v Naidu; ISS Security Pty Ltd v Naidu* (2007) 71 NSWLR 471. See also *Willett v State of Victoria* (2013) 42 VR 571, concerning a woman who suffered severe psychiatric trauma as a consequence of nasty rumour-mongering at work.

not only employees, but contractors, outworkers and volunteers.⁹⁵ At the end of 2021, in response to the Respect@Work Report,⁹⁶ the Commission's jurisdiction was extended to making 'stop sexual harassment' orders.⁹⁷

The Fair Work Commission's jurisdiction under these provisions is nevertheless limited in other ways. The Commission can make orders only in respect of workers who are still engaged by the organization, and where the alleged bully is also still engaged.⁹⁸ Where the victim and/or alleged perpetrator have resigned or been dismissed, the Commission has no authority to make any order, largely because orders are directed towards facilitating the continuity of work and preventing further harm, and not towards compensation of victims.⁹⁹ The Commission has no power to award financial compensation.¹⁰⁰ The kinds of orders that the Commission has made include orders directing employers to implement policies to control workplace conduct, and provide for adequate investigation and complaints handling procedures.¹⁰¹

In the case of bullying claims, the employee must show that they have been subjected to repeated conduct which threatens health and safety.¹⁰² A single incident will not satisfy this definition.¹⁰³ In the case of an application for a 'stop sexual harassment' order, however, it is not necessary to allege that the conduct was repeated, nor is there any requirement to show that it constituted a threat to health and safety. The health and safety risks of unchecked sexual harassment at work are assumed.

This jurisdiction, although still developing, has the potential to educate those in control of workplaces in ways of inculcating more respectful, and hence healthier, practices

⁹⁵ *Fair Work Act 2009* (Cth) s 789FC(2).

⁹⁶ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, 2020 Report.

⁹⁷ See amendments made by the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth), effective from 11 November 2021.

⁹⁸ See *THDL* [2021] FWC 6692.

⁹⁹ See *Re Simmonds* [2016] FWC 5065; *Re Fnadni* [2016] FWC 1286.

¹⁰⁰ *Fair Work Act 2009* (Cth) s 789FF(1).

¹⁰¹ See for example *Re Ms LP* [2015] FWC 6602; *CF and NW* [2015] FWC 5272.

¹⁰² *Fair Work Act 2009* (Cth) s 789FD(1).

¹⁰³ See *Re Singh* [2015] FWC 5850.

in workplaces. It is another form of regulation directed towards early prevention, on the theory that prophylaxis is better than cure.

Conclusion

Australian work health and safety laws have evolved in recent decades to focus attention on preventing work-generated harm by placing responsibility for managing hazards and risks in the hands of all who influence and participate in work. While work health and safety regimes, and to a lesser extent workers' compensation schemes, extend their coverage to the wide range of workers potentially affected by workplace conditions, our basic system of regulation for pay and conditions of work is generally limited to employment relationships. Large numbers of Australians working in precarious jobs, as casual employees or in low paid contracting arrangements, can make limited claims on the system for a guarantee of job and income security. As the *Job Insecurity Report* revealed, the lack of protections for these workers creates significant public health risks. These health risks have been particularly apparent during the COVID-19 pandemic, when casuals and contractors were under pressure to keep working, often at a number of different workplaces in the space of a week, despite being 'close contacts' of cases, or even suffering symptoms themselves. The outbreaks of the disease in aged care facilities was clearly related to the high incidence of insecure working arrangements in the community care sector. According to the Australian Institute for Health and Welfare, around 64 per cent of workers in this sector are casuals or part-time workers.¹⁰⁴

One of the greatest public health challenges in Australia today involves recognizing and addressing the risks created by insecure work. The system of laws ensuring decent pay and conditions of work, protection from capricious loss of a job contract, and protection from bullying and harassment at work, needs to extend to all workers. Our model Work Health and Safety laws have achieved extensive coverage, but our Fair Work laws presently lag behind. Concentrating coverage of Fair Work entitlements only on those workers who meet a narrow common law definition of employee permits some employing enterprises to engage large numbers of vulnerable workers on rates of pay below award minima, and on

¹⁰⁴ See Australian Institute of Health and Welfare, *Welfare Workforce Snapshot* (11 September 2019), www.aihw.gov.au/reports/australia-welfare/welfare-workforce.

terms that disregard the risks of excessive working hours. Some of these risks involve physical risks, as has been manifest in the number of deaths of food delivery cyclists. Some involve the anxiety-induced risks of deteriorating mental wellness. Until our system of laws properly recognizes the relationship between the economic aspects of working conditions and health and safety outcomes, our Robens' inspired work health and safety laws will always fall short of their aspiration to ensure safe and healthy working conditions for all citizens.