Insurance Council of Australia

A Sustainable Public Liability Insurance Market in Australia: The Case for Civil Liability Reform

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Introduction

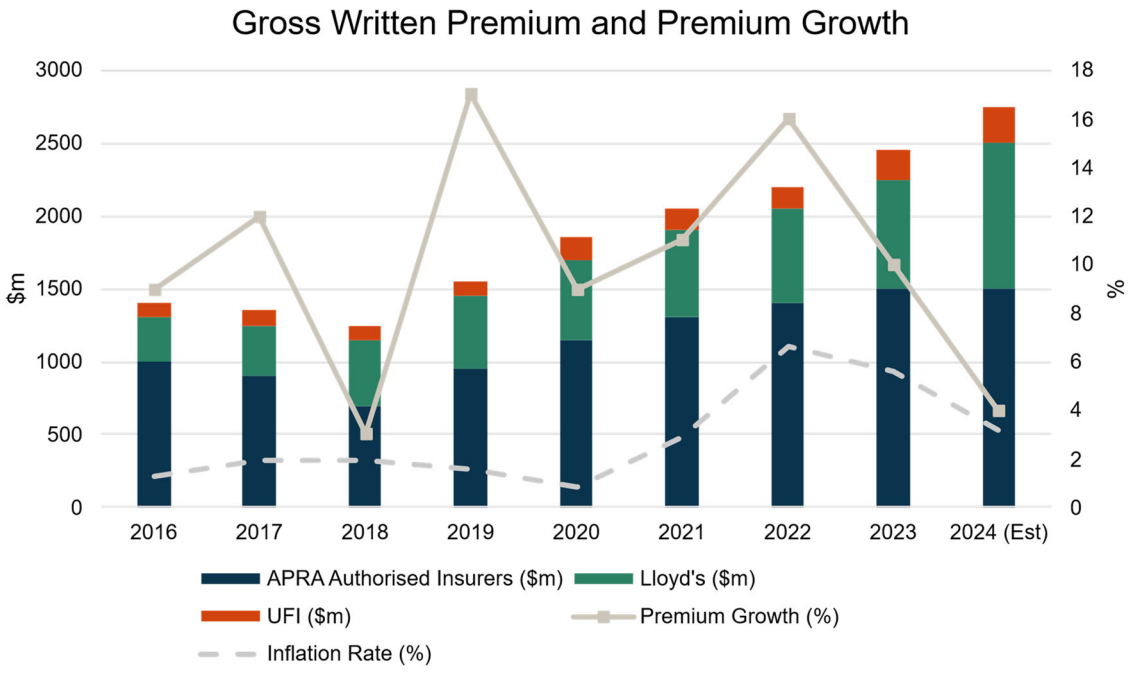
Public liability insurance, which provides coverage for personal injury and property damage claims brought by a third party, serves as a crucial financial safety net for businesses, not-for-profits, and community organisations.

However, increasing litigation and rising claims costs have made it difficult for some businesses to obtain the necessary coverage, threatening their viability. Similarly, grassroots community and non-profit organisations face uncertainty due to escalating premiums.

While risk management and mitigation are essential to ensuring ongoing market viability, the legal framework, and civil liability settings also play a significant role in determining underwriting risk and ensuring access to public liability insurance. This paper outlines the urgent need for governments to review and reform civil liability settings, especially in relation to personal injury claims, in Australia to maintain a sustainable public liability insurance market.

The Problem

Since 2019, in response to deteriorating performance and increasing claim headwinds, the average cost of public liability insurance has increased by 55-60%, outpacing inflation.[1]



Many small businesses and not-for-profit organisations have experienced even higher increases. For example, some live music venues have experienced premiums increase from $10,000 - $20,000 to $140,000 - $160,000.[2]

[1] Finity Optima Report 2024, page 94

[2] Pugh, W., The pain and perils of public liability, Insurance News, 2025

The Australian Prudential Regulation Authority (APRA) and insurance actuaries have identified rising claims costs as the primary driver,[3] including:

- Social inflation with the increase in claims cost trending above normal inflation (including from higher claimant demands for compensation)
- Increasing legal and litigation costs (including the influence of litigation funders)
- Rising claims for psychological injury
- Medical cost inflation
- Increasing claims for nervous shock by related third parties

These factors have led to unsustainable high loss ratios and unprofitability in the public liability insurance market, resulting in:

- Increasing premiums
- Higher claims excesses/deductibles
- Reduced capacity/coverage/appetite

While the market shows signs of improvement, certain sectors with higher underwriting risks, such as hospitality, live music, outdoor leisure, tourism, and non-profits, continue to struggle with obtaining coverage.

Potential Solutions

Availability and affordability of insurance products is driven by risk. In the case of civil liability, these risks can be influenced by the actions of the business, and by the civil liability settings in Australia. To create a more sustainable public liability insurance market, we must address two key areas:

1. **Risk Management and Mitigation:** Businesses implementing, enhancing and documenting appropriate practices and procedures to manage the risk of third-party injury and damage, and subsequently reduce underwriting risk.
2. **Civil Liability Settings:** Reforming some segments of legal frameworks to decrease underwriting risk, increase competition, and ensure insurance availability.

Where risk management and mitigation practices and procedures have been improved, it can take some time for these measures to flow through to the claims experience and be reflected in the cost of premiums.

[3] ibid.

Limitations of Risk Management

Several business sectors have unique characteristics and underwriting risks that mean risks remain high regardless of risk management practices in place.

For example:

- Organisations providing services to children or vulnerable individuals have a higher standard of care and supervision, which increases their potential exposure to liability claims.
- Outdoor adventure, entertainment or amusement businesses and community groups that provide physical activity services present a higher risk given the nature of accidents that can happen in those settings.
- Hospitality venues, particularly those serving alcohol and/or with large numbers of people, can have a higher underwriting risk despite recent improvements in safety measures.

These types of businesses provide valuable contributions to the economic and social fabric of communities and are often keystone businesses in regional areas. However, there may be limited further actions these businesses can take at an individual level to de-risk their offerings.

In this context, civil liability (tort) reform is a critical step to meaningfully reducing liability risk. This sort of reform has a proven track record of addressing insurance affordability and availability issues.

Previous Civil Liability Settings Review

The last significant review of civil liability settings in Australia occurred following the 2002 Ipp review, which examined reforms to negligence laws to address the rising cost of public liability insurance.[4]

The Ipp review saw reforms to civil liability settings which were not consistent across Australia but were successful in stabilising the public and products liability market, leading to improved insurer appetite to write public liability policies. Businesses, professionals, occupation groups and community organisations benefited from greatly improved availability of coverage.

The effectiveness of those reforms has eroded over time due to expansive judicial decisions, a more litigious society, an active plaintiff lawyer environment and increasing claims costs particularly resulting from psychological injury claims.

Recommendation

The Australian Government should lead a national review of tort law and civil liability settings to examine the impact current legislation is having on small-to-medium enterprises and not-for-profit organisations' ability to access insurance.

[4] Commonwealth Review of Law of Negligence Final report, 30 September 2002.

Reform Must Be Fair and Reasonable

Civil liability settings and regulations must be designed to balance the very real needs of injured people, whilst ensuring businesses can still access the insurance they need to keep operating.

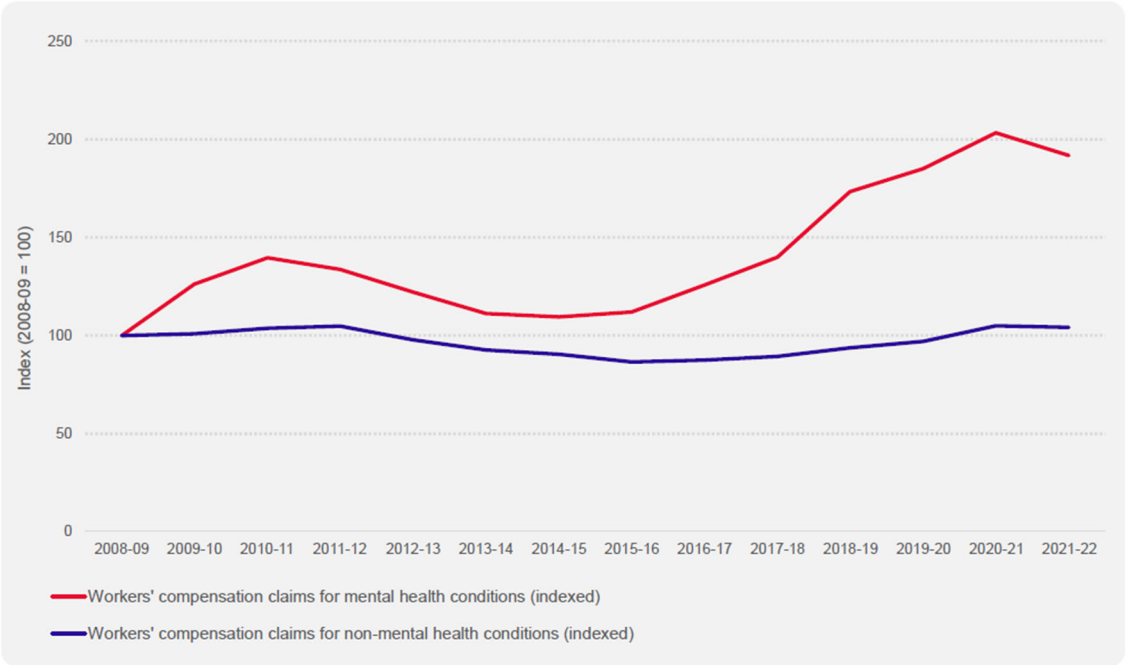
Access to compensation for injured people and damaged property needs to be fair and reasonable. Central to any reform should be ensuring that injured people can access the support they need to recover physically and financially.

Reforms must also look to address inefficiencies in the current compensation system. Ideally, these reforms will have little to no impact on injured people's access to compensation but would remove or lower additional costs such as legal fees and expert evidence costs.

Psychological Injuries

Significant increases in claims for psychological injury, in addition to any physical injury, are one of the biggest drivers of increasing claims costs for public liability insurance as well as other liability type classes, such as workers compensation and CTP insurance.[5] This is supported by APRA claims data, which shows an increasing number of psychological injury claims in recent years.[6] This is also consistent with the data in Figure 1 below that outlines work injury claims for psychological/mental health conditions compared to physical injury claims.

Figure 1: Indexed number of serious claims for mental health conditions and non-mental health conditions, NDS (2008-09 to 2021-22p).



Source: Safe Work Australia National Dataset for Compensation-based Statistics.

[5] Taylor Fry, RADAR FY2023, page 26.

[6] APRA, NCPD Analysis: Review of claims trends and affordability of public liability and professional indemnity insurance in Australia, May 2023, page 6.

It has also become commonplace for initial physical injury claims to be accompanied by claims for psychological injuries, with larger damages awarded. Compensation awarded for psychological injury claims also continues to rise, with Safework Australia finding psychological injury claims can cost four times that of physical injury compensation claims.[7]

Psychological injuries are now treated equivalently to physical injuries for civil liability purposes. There has also been a broadening of psychiatric illness definitions with the concept of "normal fortitude" becoming blurred and difficult to define due to higher numbers of people being diagnosed with conditions that allow a psychological injury claim.

This is made more complex as psychological injuries are extremely difficult to objectively assess because they are highly dependent on self-reporting. These injuries can also develop or appear long after the initial physical injury which creates delayed payments and increased claim durations, adding to costs.

There are also debates about the health and recovery benefits of providing broad access to compensation for psychological injuries through common law and statutory schemes.[8] Issues include individuals suffering from poor mental health on average faring worse when compensation or financial benefits are involved.

Some state workers compensation and CTP motor accident schemes have introduced restrictions on accessing compensation for psychological injuries. For example, in 2024 the Victorian Government amended the *Workplace Injury Rehabilitation and Compensation Act (Vic)* to address skyrocketing costs in the state's workers compensation scheme arising from psychological injury claims.[9] This has been done to ensure greater balance between providing compensation, and the cost of insurance premiums. It has also been necessary to ensure ongoing scheme sustainability. Changes include:

- Specifying that the severity of psychological injuries must be evaluated differently from physical injuries, and the 'greater of' used to determine the level of compensation.
- Restricting entitlements to compensation for psychological injury only to diagnosed cases of Post-Traumatic Stress Disorder (PTSD).
- Narrowing the range of circumstances in which psychological injury can give rise to a compensable claim.

These types of changes have effectively reduced the number of psychological claims and controlled compensation costs within these schemes.

Similarly, to address the impact increasing psychological injury claims are having on the financial viability of the state's workers compensation scheme, the NSW Government have prepared draft legislation that would raise the whole person impairment (WPI) injury threshold for a worker to receive ongoing compensation and benefits from 15% to 31%.[10]

However, to date, there have been no such changes to civil liability settings.

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[7] Insurance Business. How can insurance meet workers' comp's mental health claim challenges?, 2 April 2025.

[8] The Actuaries Institute, *Green Paper on Mental health and Insurance* 2017 GPMENTALHEALTHWEBRCopy.pdf

[9] The Guardian, Victoria to limit WorkCover compensation for stress after deal struck with opposition, 5 March 2024.

[10] Workers Compensation Legislation Amendment Bill 2025 Exposure draft

Recommendations

To address the impact of psychological claims on insurance, policymakers consider the following reforms:

- In a common law claim where there is both a physical injury and a mental/psychological injury, damages should be assessed as the greater of the physical or mental/psychological injury but not combined.
- Where the level of psychological whole person impairment is in dispute, the level of impairment be determined by a court appointed independent psychologist/panel.
- Allow consideration of a mental/psychological injury component of a claim only where treatment was sought and obtained by the claimant within 12 months of the initial physical injury.

Third Party Nervous Shock Claims

Access to common law compensation for personal injury is usually restricted to the directly injured person. Nervous shock claims are an exception to this as these claims can be made by other people who have not sustained the primary/initial injury.

Some Australian jurisdictions (NSW and WA) now restrict nervous shock claims to immediate family members or those present at the scene of an accident. NSW also sets out specific criteria for nervous shock claims.

Insurers have reported a substantial increase in the number and cost of nervous shock claims made by family members of injured people.[11] Insurers also report numerous examples of nervous shock claims being lodged by multiple family members, particularly in cases involving family members of people injured in aged care facilities and in relation to medical indemnity insurance claims.

For example, a recent case involving the death of an elderly hospital patient involved nervous shock claims being lodged by the deceased's:

- Spouse
- Four children
- Each of the children's spouses
- All grandchildren
- The girlfriend of one grandchild

None of these people sought medical treatment, and the evidence to support a diagnosis of nervous shock was based on uncorroborated accounts given by a psychiatrist paid by these parties. The cost involved just to respond to these claims, including legal fees and psychiatric assessments, was so high that the claims were settled to avoid excessive costs.

[11] Heaney, C, 'Time for a health check', Insurance News

This increase in nervous shock claims is part of the increasing claims costs identified by APRA that are driving the increasing costs of insurance premiums. This warrants relatively simple legislative changes to address the inflation pressure these claims have on premiums.

Recommendations

- Civil Liability legislation should be amended to impose a higher threshold for claims for nervous shock to access non-economic loss. For example, impose requirements that some third parties must have been present or directly witnessed the injury or incident.
- Alternatively, civil liability legislation in each state and territory could be amended to exclude access to common law compensation for nervous shock by a third party that has not sustained the primary/initial injury.

Gratuitous and Paid Care

A person making a common law claim can seek compensation for paid and/or gratuitous care,[12] which typically consists of things like attendant care, domestic services, and other types of daily living assistance.

Although these services may be provided without charge, in some jurisdictions, a claimant can seek the cost of gratuitous care equivalent to the cost based on commercial rates, while others calculate it on the basis of average weekly earnings. Compensation provided is paid to the injured person, not the caregiver. Damages sought for gratuitous care can amount to a significant proportion of the total of a personal injury claim. This is because gratuitous care is calculated by hours required per week at commercial rates and typically based on the claimant's life expectancy.

The adversarial nature of the justice system means plaintiff lawyers will aim to maximise the compensation amount obtained for their client. Plaintiff lawyers often focus on gratuitous care to maximise compensation amounts, using costly expert reports to demonstrate high future care needs. Unlike commercial care, because gratuitous care involves unpaid care, and minimal evidence required of care actually being provided, it can also be open to potential claims exaggeration.

In some jurisdictions, to be eligible to receive compensation for gratuitous care, a claimant must have received some gratuitous care in the past. For example, in NSW, a claimant must have received at least six hours of gratuitous care over at least six months.

However, in relation to eligibility to receive compensation for future commercial (paid) care, there are no similar requirements that a claimant demonstrate they have received commercial care in the past.

[12] known as Griffiths v Kerkemeyer damages

Recommendations

- Civil liability legislation should be amended across jurisdictions so that damages for gratuitous care (Griffiths v Kerkemeyer damages) are calculated on the basis of the average minimum wage (relative to a specific jurisdiction) rather than a commercial rate. This approach ensures fairness by reflecting that gratuitous care is provided by family members as opposed to paid staff, avoiding overcompensation through commercial rates.
- Limit damages for commercial care to situations where actual commercial care has been used to some extent and, but for the ability to pay, would continue to be used. For example, limit eligibility to receive compensation for commercial care where a claimant has received care for a minimum of 6 hours per week for at least 6 months.
- In addition to existing caps and thresholds, allowances for care should similarly only be allowed where an injury threshold has been met.

Gratuitous Care Provided to Third Parties (Sullivan v Gordon Damages)

In some Australian jurisdictions an injured person can also receive compensation for losing their ability to provide unpaid care to other people. This type of compensation is also known as Sullivan v Gordon damages. In 2005, the High Court ruled (in the decision of CSR Ltd v Eddy) that there was no basis to continue to award Sullivan v Gordon damages because the act that caused the injury did not cause the need to provide this care. The High Court determined that the only basis on which plaintiff could recover damages resulting from the loss of the ability to provide assistance/care to others was as a component of general damages.[13] However, following this decision some states and territories introduced legislation to preserve the right to seek Sullivan v Gordon damages.[14]

This ability to claim compensation for care a person can no longer provide to someone else runs counter to the principle that non-financial loss can only be recovered in the general damages part of a civil claim.

Damages for future care can make up a large component of common law personal injury claims. Legislative provisions allowing for Sullivan v Gordon damages can therefore result in disproportionately large awards. The size of payments is higher where an injured person might have been expected to provide care to multiple people, or where injury has a disproportionate impact on their ability to provide services to others compared to their own need for services.

It is also much harder to accurately determine the care needs of third parties compared to the care needs of an injured party. This means claims processes are longer and more complex, increasing court and legal costs. Australia's increasing life expectancy and ageing population may also cause an ongoing increase in people requiring care from others.[15]

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[13] Quinlan Miller & Treston Lawyers, Assessment of Damages – Gratuitous Assistance and Sullivan v Gordon Damages: CSR Ltd v Eddy ((2005), Insurance Case Note

[14] For example, in NSW section 15B of the *Civil Liability Act (2002) NSW* makes provision for a claimant to recover compensation for loss of capacity to provide domestic services to others. Other states and territories have similar provisions, though not all are identical.

[15] National Centre for Social and Economic Modelling Working Paper 11/07, Projecting the Need for formal and informal aged care in Australia, University of Canberra, June 2011, page 1.

The availability of Sullivan v Gordon damages will continue to increase claims costs and liability risk in the community. These additional costs and liability risks increase the underwriting risk for insurers that provide liability cover for personal injury claims, resulting in more expensive public liability insurance premiums.

Recommendations:

States and territory governments consider:

- Legislative reform to remove the right of a claimant to recover damages for gratuitous care for the loss of ability to provide care for others (consistent with the High Court decision in CSR Ltd v Eddy), with compensation only available as a component of general damages.
- Alternatively, review eligibility to receive Sullivan v Gordon damages to ensure these damages are limited to situations involving individuals who have the most significant, high level care needs.

Assessment of Damages: Non-Economic Loss Damages, Minimum Injury Thresholds, Caps and Injury Scales

Another component of compensation under civil liability law is for non-economic loss, also known as general damages or pain and suffering. Non-economic loss received close attention from the Ipp review but remains an area where jurisdictional responses varied widely.

Limitations on non-economic loss damages are designed to keep the overall cost of damages under control and to direct most of the compensation available to those with more serious injuries. They can also play an important role in providing greater clarity and predictability in the awarding of non-economic loss damages, which in turn helps insurers better price and underwrite risk.

The three main ways to control the cost of damages for non-economic loss are:

1. **Thresholds:** where injuries defined as minor or less serious are not eligible for non-economic loss
2. **Caps:** where maximum award amounts are set in legislation
3. **Scales:** where a method to establish the amount of non-economic loss between the threshold and the cap is used

Injury scales and WPI assessments are used to standardise compensation amounts and ensure a fair and consistent approach to claim assessment.

The use of injury scales assign a value to a particular type of injury to determine the quantum of a claim. A higher value or score indicates a more severe injury and potentially higher compensation amounts.

Injury scales are used in several statutory insurance schemes.[16] An Injury Scale Value (ISV) is also used in Queensland to assess personal injury claims.

[16] A statutory insurance scheme is a government mandated insurance program designed to provide benefits to individuals. These insurance schemes are funded government, employers or individuals. Examples of statutory insurance schemes are compulsory workers compensation insurance and compulsory third party (CTP) insurance for motor vehicle injuries.

The process of determining ISV involves assessing the severity of the injury using a predefined table and then possibly making an additional payment if multiple injuries are involved or if the standard compensation does not adequately cover the claimant's needs. This uplift is capped and requires substantial justification if it exceeds a certain threshold.

Assessment provided by injury scales can assist in more effective claims resolution by removing incentives for claimants and their lawyer to make unrealistically high compensation demands. The use of injury scales or WPI assessments also provide greater clarity and certainty to insurers in relation to the likely costs of claims, making it easier to underwrite and provide insurance for personal injury claims.

It is the experience of insurers and Finity Consulting that injury assessment by reference to injury scales or WPI determined by medical experts provides significantly greater clarity and consistency in assessment compared to a determination by a non-medical practitioner (eg. courts or judges).

Recommendations

- A threshold based on the severity of the injury should be applied before damages for non-economic loss can be claimed in all jurisdictions. Medically determined thresholds are generally more effective than those based on dollar amounts or descriptions of the severity of impact and are less likely to be eroded over time.
- Consistent caps on non-economic loss at a level equivalent to statutory schemes or at the mid-range of current jurisdictional caps should be established.
- The use of consistent injury scales or thresholds linked to a medically determined WPI assessment should be expanded across the jurisdictions.

Review of legislation regarding Dangerous Recreational Activities

In response to the rising insurance costs identified in the Ipp review, significant civil liability reforms were introduced. These reforms included provisions that limit access to compensation for injuries sustained during activities classified as ‘dangerous recreational activities’. Various state and territory civil liability acts were amended to stipulate that individuals or businesses are not liable for injuries sustained by persons engaging in high-risk activities.

For instance, the Civil Liability Act 2002 (NSW) includes the following definitions and provisions:

- **Recreational activity:** Encompasses any sport, pursuit, or activity undertaken for enjoyment, relaxation, or leisure, including those conducted at locations typically used for such purposes.
- **Dangerous recreational activity**: Defined as a recreational activity that involves a significant risk of physical harm.
- **Obvious risk**: A risk that would have been apparent to a reasonable person in the same circumstances.
- **Negligence exemption:** Individuals are not liable for harm suffered by others due to the materialisation of an obvious risk associated with a dangerous recreational activity, regardless of the plaintiff's awareness of the risk.

- **Duty of care:** Generally, there is no duty of care owed to individuals engaging in recreational activities if a suitable risk warning or signed disclaimer form has been provided.

Despite these provisions, judicial decisions over time have diminished their effectiveness, limiting the protections intended for business operators. The current insurance access challenges faced by segments of the leisure and tourism industry, including many not-for-profit groups, underscore the critical need to review these civil liability provisions. Any review should ensure a balanced approach to legal responsibilities and exposures for organisations providing these activities and those participating in them, thereby maintaining insurance availability.

Key areas for review include:

- Definitions of 'recreational activity', 'dangerous recreational activity', and 'obvious risk'.
- Reinforcing the legal impact of notices, warnings, and waivers on liability.
- The duty of care in providing recreational activities and services to both adults, vulnerable individuals, and children.
- The obligation of recreational activity providers to meet safety standards, creation of - and adherence to - industry codes of practice, and the interaction of risk management (e.g. incident reporting register) with duty of care and other liability provisions.
- The duty of parents/guardians in supervising minors engaged in recreational activities.

Recommendations

Potential changes to liability legislation could include:

- Amendment of the definitions for 'dangerous recreational activity' to refer to 'active recreational activity' and include a broader range of activities. For example, these could include activities like trampolining, diving, dodgem cars and other amusement rides and some forms of hiking.
- Simplification, clarification and publication of the requirements for notices, warnings and waivers for a person choosing to undertake a relevant activity.

The impact of "Worker-to-Worker" Claims

The growth of 'worker to worker' (WTW) claims has been identified as a significant driver of increasing public liability claims costs and premiums.

WTW claims have a higher average claims cost and longer claim duration than other civil liability claims, with delays in reporting and commencing of these claims being much greater.[17]

WTW claims occur when a person is injured during their employment through the negligence of a third party. Claims are often made against a head contractor, an occupier of a premises or a host employer.

[17] ibid.

Claims can come via two main avenues. An injured person working at a location (ie, not an employee) will either make a claim directly against the host employer, and therefore a public liability claim). Alternatively, the injured person will make a workers compensation claim through their employer (with weekly benefits and medical costs provided on a no-fault basis under the relevant workers compensation scheme). Then, often several years after the date of injury and when their workers compensation benefits have ended, the injured person will bring a common law claim against a third party, most commonly the occupier of the premises where the injury occurred, a host employer (where the worker was a labour hire employee), or a head contractor on a worksite.

WTW claims also usually involve a statutory recovery action by the injured person's workers compensation insurer, seeking reimbursement of payments and benefits made to the injured person.

Issues with WTW claims

WTW claims are difficult to underwrite and extremely costly for businesses and their public liability insurers compared to other types of public liability claims. This is due to:

1. **Delayed reporting:** These claims are often not reported to the insured business or the public liability insurer until several years after the injury has occurred, making them difficult to investigate, mitigate, and defend. This delay can be attributed to the following factors:
    - Workers' Compensation Recovery: Historically, workers' compensation insurers initiate recovery actions only after settling a workers' compensation claim, often claiming recoveries on payments up to 6 or 7 years old, depending on state or territory legislation.
    - Exhaustion of Statutory Benefits: Injured workers often file WTW claims only after their statutory benefits available through the relevant workers compensation scheme are exhausted. Many of these WTW claims are successfully made outside the typical three-year statute of limitations.
2. **Complexity:** WTW claims are more difficult and costly to manage because of the interaction between workers compensation and civil liability legislation and the involvement of multiple parties. The recovery provisions contained in many state-based workers compensation schemes (including the method by which contribution from a third party is calculated) are often extremely complex, and not reflective of the extent to which a third party has caused or contributed to the worker's injury.
3. **Significantly higher settlement amounts:** WTW claims typically result in higher settlements due to their prolonged nature and requirement to pay/reimburse any payments and benefits paid by the workers compensation insurer. The size of the workers compensation reimbursement is often as much or more than the compensation provided to the injured person as part of the settlement.

Previously WTW claims were mainly in isolated to particular industries such as construction. However, these have increased significantly and moved into many other industries in Australia over recent years as the workforce has embraced flexible working arrangements such as increased use of labour hire and subcontracting.[18]

The significant increase in public liability insurance premiums in recent years has been driven in part by WTW claims.[19]

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[18] Worker to Worker Claims in Liability Portfolios, Institute of Actuaries Australia, 2010

[19] Pearson, E., Wu, C., You, A., Worker-to-Worker Claims and the Changing Workforce, presented to the Actuaries Institute 2023 Injury and Disability Schemes Seminar, 12-14 November 2023, page 2.

The table below compare the average size of WTW claims with the average size of other bodily injury claims.[20]

	Claim Count		Average Claim Size ($000)		Finalised Cost ($M)		% of Finalised Cost	
Finalised Year	Worker	Other BI	Worker	Other BI	Worker	Other BI	Worker	Other BI
2009	*	*	226	83	*	*	15%	85%
2010	*	*	160	81	*	*	11%	89%
2011	*	*	172	80	*	*	12%	88%
2012	*	*	178	87	*	*	12%	88%
2013	*	*	184	88	*	*	11%	89%
2014	*	*	191	102	*	*	11%	89%
2015	*	*	192	95	*	*	12%	88%
2016	344	5,030	236	107	81	539	13%	87%
2017	288	4,654	220	105	63	488	11%	89%
2018	226	4,653	251	115	57	534	10%	90%
2019	241	4,642	298	114	72	529	12%	88%
2020	290	4,372	225	124	65	541	11%	89%
2021	*	*	262	135	*	*	12%	88%

APRA data shows recent WTW claims are on average approximately $260,000, which is more than double the average size of other bodily injury claims.[21] Further, insurance actuary Finity Consulting believe WTW claims comprise between 20% - 70% of bodily injury claims costs for individual liability portfolios depending on the portfolio composition.[22]

Finity Consulting and APRA have identified the higher number and cost of these claims have added to the increasing cost of public liability insurance for businesses.[23] Some insurers have introduced significantly higher excesses on policies for WTW claims compared to other public liability exposures, with excesses reported as high as $250,000.[24]

The number of WTW claims will likely continue to increase as the workforce continues to move towards more flexible work arrangements.[25]

[20] NCPD Analysis: Review of claims trends and affordability of public liability and professional indemnity insurance in Australia, APRA, May 2023, page 36.
[21] ibid.
[22] op. cit. Pearson, E., page 2
[23] ibid.
[24] Ibid.
[25] ibid.

Broader Impacts of WTW Claims

WTW claims can have broader impacts than other types of claims on both businesses and injured workers.

As well as experiencing higher insurance premiums, businesses also carry higher deductibles and excesses for WTW claims compared with standard liability excesses, meaning they must carry more financial risk for these claims.

Many workers compensation schemes have, over the years, moved away from an emphasis on provision of lump sum compensation payments to a 'health, recovery and return to work' approach. This is in line with consistent research that injured people have poor outcomes in drawn out adversarial systems focussed on demonstrating maximum impairment for maximise financial compensation. Research suggests that long delays often involved in settling WTW claims can have a negative impact on people's long term health outcomes.[26]

From a fairness perspective, WTW claims are also problematic. This is because they provide some, but not all, workers who have suffered the same level of injury, a pathway to seek additional common law compensation purely because of the involvement of a third party. This is contrary to the policy principle that workers compensation frameworks should provide fair and equitable access to compensation to all workers, regardless of who they work for and where they are working.

As outlined above, the third-party recovery and contribution provisions contained in the various state and territory workers compensation legislation are complex and operate differently to civil liability legislation. This means third parties are required to contribute more in a WTW claim and related recovery than they would in a standard personal injury claim. This is an area which would benefit from reform and simplification to achieve more efficient resolution of WTW claims and ensure workers compensation recoveries against third parties more appropriately reflect the third parties' contribution to the claim/injury.

Workers compensation insurers may benefit financially through recovery of workers compensation payments from a third party, which allows workers compensation premiums to be lower than they otherwise would be. However, the additional costs involved in WTW claims means the total costs to businesses across workers compensation and public liability insurance is likely to be higher.[27]

Addressing the problems caused by increasing WTW claims and the various competing interests will be challenging and complex and need to involve both workers compensation and civil liability legislative change across each state and territory.

[26] ibid. page 15
[27] ibid.

Recommendations

Policy responses and reform options that could be considered by governments to address these issues caused by WTW claims could include the following:

- If a person is injured while working, a civil liability claim should be dealt with according to the damages provisions of the common law/civil liability legislation of the jurisdiction. The third party should only be responsible for any compensation in excess of any no-fault workers compensation entitlements. This liability could be apportioned between the employer and the third party (on a joint tortfeasor basis).
- Governments consider the introduction of proportionate liability in relation to determining the contribution of a third party in workers compensation recoveries.
- Governments consider legislative amendments that only permit a workers compensation insurer to pursue recovery if they:
    - Commence recovery within 3 years of the incident or commencement of benefits/payments to the worker.
    - Within 1 year of the incident or commencement of benefits, notify potential/prospective third-party defendant of an intention to seek recovery from them and provide relevant information in relation to the incident and claim.

Procedural Reforms to Increase Efficiency and Lower Claims Costs

In addition to civil liability tort reform, several civil procedure reform options are available to governments. These reforms could enhance the efficiency of the personal injury claims process, benefiting all parties. Reforms would also alleviate pressure on claims costs and underwriting risks for insurers.

Restricting Multiple Causes of Action

Personal injury claims can be made using different laws, complicating processes. For example, a claim could be made under state civil liability laws and under the Australian Consumer Law (ACL).

Using both sets of laws to make a claim makes the process more confusing and expensive. Often this additional complexity does not provide any benefit to the person making the claim.

Clarifying that personal injury claims could only be made under either civil liability laws or the ACL, not both, would make the process simpler and cheaper. This amendment would not affect a claimant's ability to seek compensation. Instead, claimants would benefit from a more streamlined and expedient resolution of claims and reduce friction in the system. This was one of the Ipp Review recommendations.

Recommendation

Relevant laws should be amended so that a claim for personal injury may be brought either under the civil liability of the jurisdiction or under the Australian Consumer Law, but not both.

Streamline pre-litigation procedure for personal injury claims.

Various procedural elements significantly influence the management and overall costs of personal injury claims. The process typically begins with the injured party notifying the defendant of the injury, attributing fault, and seeking compensation. This often involves legal representation for the claimant.

While smaller claims may be resolved swiftly, litigation can extend the timeframe to years. The claimant's lawyer's role often focuses on tactical use of the legal system rather than solely addressing the incident's facts and losses.

In states lacking formal pre-litigation processes, minimal communication between plaintiff lawyers, defendants, and insurers is common during the initial years of a claim. Legal proceedings are frequently initiated just before the limitation period expires, with both parties withholding information tactically.

Queensland has addressed these issues effectively through the Personal Injury Proceedings Act (PIPA), which promotes efficient dispute resolution and reduces personal injury claims costs. Insurers report that from 2012 to 2022, Queensland experienced the lowest rate of claims cost increase compared to other states, highlighting PIPA's effectiveness.

PIPA outlines several pre-court procedures to enhance transparency, fairness, and speed in the personal injury claims process:

- **Early Notification**: Claimants must notify the alleged at-fault party within specific timeframes, encouraging prompt communication and early resolution efforts.
- **Mandatory Information Exchange**: All parties must exchange relevant information, including medical reports and evidence of financial losses, from the outset to facilitate fair negotiations.
- **Compulsory Mediation**: Parties are required to attempt to resolve disputes through mediation or a settlement conference before proceeding to court, promoting settlements without litigation.
- **Proof and Liability**: Claimants must demonstrate that the defendant's negligence caused their injury, ensuring claims are based on substantial grounds.
- **Advertising Restrictions**: Limits on how legal services for personal injuries can be advertised help prevent solicitation and exaggeration of claims.
- **Caps on Legal Costs**: Legal fees are capped relative to the compensation amount to prevent excessive legal costs from consuming a significant portion of the compensation.
- **Time Limits on Claims**: Claims generally must be filed within three years from the injury date, with provisions for extensions under certain circumstances.

In addition, the use of a non-binding arbitration process, particularly for lower value claims, could be considered. Arbitration has previously been effectively utilised in NSW. One of the benefits of this process is that it allows both parties to engage directly on a ‘without prejudice basis’, and where strict rules of evidence were not applied. This allows key issues associated with the claim to be discussed and addressed early in the claims process, thereby facilitating faster resolution.

Recommendations

- States and territories should implement pre-litigation procedures for personal injury claims, broadly modelled on PIPA, to complement the effective aspects of the various civil liability acts.
- Consider introduction of an early, non-binding arbitration process to facilitate early resolution of claims.

Clear and Consistently Applied Notification and Limitation Periods.

Limitation periods provide a time limit for bringing proceedings.

Limitation periods play an important role in ensuring defendants are not subject to indefinite legal exposure and in encouraging timely and efficient resolution of disputes.

Limitation periods, within which civil claims must be brought, are also crucial for insurers to underwrite risk and provide insurance, while also providing timely and efficient resolution of claims for injured individuals.

Limitation periods differ across jurisdictions. Most states and territories permit personal injury litigation to commence 3 years from the date of discoverability (as opposed to 3 years from the date of injury/incident).

In addition to the primary limitation period, some states have a long-stop limitation period, being a fixed deadline after which a claim can no longer be brought, regardless of whether the cause of action has been discovered. For example, NSW has a 12 year long-stop limitation period for personal injury actions.

Discoverability, the date that marks the beginning (when time starts running) of the limitation period in which a claim can be made, involves more than just a time when an injured person sustains an injury. The date of discoverability occurs when the injured person becomes aware of all the following:

1. That they have sustained an injury or injuries
2. They know the extent of the injury or injuries
3. They become aware the injury is sufficiently serious to justify bringing a claim
4. They become aware the prospective defendant is a party that may be liable to them to pay damages for the injury.

The practical effect of these multiple elements of discoverability is that it extends the time in which a personal injury action can be brought against a third-party and their insurers well beyond 3 years from the date of injury. To this extent, the discoverability requirements can render the commonly used 3-year limitation period ineffective in encouraging more proactive commencement and resolution of claims and providing greater underwriting certainty to insurers.

Insurers have reported that over recent years they have seen an increase in the time taken for personal injury claims to be notified, and in states and territories that have no pre-litigation processes, for proceedings to be commenced just prior to the expiry of the limitation period. It is also the experience among insurers for claims to be allowed to commence proceedings well beyond 3 years after the incident in which the claimant sustained injury.

Having a clear and consistently applied timeline within which a claim must be brought provides insurers with greater certainty about their potential liability exposure, allow them to better assess and underwrite risks. The longer the period an insurer is ‘on risk’ for claims increases underwriting risk for insurers, and results in more expensive insurance premiums to reflect the increased potential liability exposure.

Prolonged claims processes, spanning years from the date of injury to final resolution, offer no benefit to the injured parties and can hinder their recovery and health.

Typically, the primary beneficiaries of drawn-out claims are the lawyers on both sides, whose fees materially increase as the timeline extends.

At a practical level, early notification of injury and potential claim, through the application of clear and more concrete limitation periods, allows insured businesses and their insurers to investigate the claim's circumstances and support the injured party without requiring legal action, especially for less serious injuries. Late commencement and notification of claims, just before or after the three-year limitation period ends, frustrate businesses. This practice hampers their and their insurers' ability to gather evidence to mitigate and promptly settle or defend a claim, as late notification can result in:

- Potential loss of opportunity for businesses to retain CCTV footage and other contemporaneous records
- Key witnesses may not be contactable, reliable or able to recollect key events
- Inability of insurers to contemporaneously assess risk
- Inability to investigate the claimant’s injuries in a timely manner

This issue is particularly problematic for hospitality and live music venues, which frequently become aware of claims multiple years after the alleged incident and injury to a patron. Late notification and the initiation of proceedings appear to be tactical, as by this time, relevant surveillance footage may have been deleted, and staff may have moved on, eliminating opportunities to investigate, defend or negotiate the claim. Consequently, venues and their insurers often have no choice but to pay a ‘commercial settlement’ close to the full compensation amount sought by the claimant, along with significant legal fees incurred by the claimant's lawyer.

To address these issues, it is necessary to review the current design and application of existing statutory limitation periods as well as consider the application of more appropriate long-stop limitation periods that provide greater certainty to defendants and their insurers as well as encouraging more proactive case management by claimants’ lawyers.

Recommendations

- States and territories tighten the discoverability test to narrow the circumstances in which a claim can be brought more than three years beyond the date of injury.
- Require an injured person’s legal representatives to give notification of the injury and intention to bring a civil claim to the insured (and hence their insurer) within three months of being retained, while the period before which legal action must be commenced remain at three years.
- States and territories introduce a long-stop limitation period of 6 years.

Greater Oversight and control of legal costs

A business or individual's liability for a personal injury claim also includes covering the legal costs incurred by the claimant. According to APRA, recent increases in claims costs (and subsequent increases in insurance premiums) has also driven legal and litigation costs inflation.[28]

While insurers do not have direct knowledge of the exact amounts laws firms charge clients on a no-win-no-fee basis, they observe that hourly rates for these services are high, and it is not unusual for law firms to attribute 50% of an 'inclusive of costs settlement' towards legal costs and disbursements. Insurers also advise that disproportionately high plaintiff legal costs are a significant impediment to resolution of claims, reducing the efficiency of the claims process.

While it is crucial to uphold individuals' rights to seek valid compensation for legitimate claims, it is equally important to control legal costs associated with claims. Caps on legal costs can help manage overall expenses and encourage more efficient management and resolution of claims.

Legal costs caps also play an important role in ensuring parties apply a proportionate amount of resources, particularly for lower value claims. This, in turn, encourages parties to adopt a dispute resolution mindset towards these claims as opposed to a more adversarial approach, increasing the efficiency of the claims process.

Across jurisdictions there is an inconsistent approach to caps on recoverable legal costs.

Some jurisdictions, such as the ACT and Victoria, have no caps on legal costs. This has led to legal costs and expenses that are disproportionate to the reasonable assessment of damages.

NSW has implemented a legal cost cap for personal injury claims. However, this cap only applies to claims up to $100,000 and has not been increased since 2002 to keep pace with general inflation and the significant increases in claims costs. Subsequently, with the rising average cost of claims, fewer claims fall under the cap, diminishing its effectiveness.

The introduction and expansion of reasonable and appropriately set legal cost caps should be considered by all state and territory governments. The Legal Profession Uniform Law could also be utilised to implement more nationally consistent cost caps.

Recommendations

- A more consistent approach across Australia should be adopted for caps on legal fees (that can be charged and recovered for personal injury compensation claims) and in particular, for legal fees that can be charged for lower value claims. For example, for claims involving personal injury damages of up to $300,000 a cost cap of 20% of the value of the claim (plus disbursements and GST) be introduced.
- To ensure their ongoing effectiveness, legislation/regulations should make provision for legal cost caps to be indexed and increased over time.

[28] Op. cit., APRA, NCPD Analysis, page 4

Addressing Claim Farming: A national and consistent approach is required

Claim farming (or claim harvesting) has been identified as a significant driver of personal injury claims costs. This practice involves a third party, known as a 'claim farmer', initiating unsolicited approaches to individuals, encouraging them to make personal injury claims. These approaches can be made via phone, email, or in person, and often involve high-pressure tactics such as harassment, intimidation, and misleading promises to coerce individuals into lodging claims. Claim farmers then refer these individuals to law firms or medical practitioners in exchange for referral fees. Plaintiff law firms may also engage in claim farming by identifying potential claimants and soliciting them to file personal injury claims, which they manage and earn fees from.

Claim farming has been shown to increase the frequency of claims, including those without merit, exacerbated by claim farmers spreading false or exaggerated information about legal entitlements. Legal professionals have acknowledged that the rise of claim farming, particularly through online platforms, poses serious challenges for governments, insurers, and legal practitioners.[29] The unchecked growth of claim farming can encourage false claims and drive-up insurance premiums.[30]

Claim farming activities are also linked to fraudulent claims and organised crime, especially in cases involving physical and sexual abuse[31] and injury claims made through statutory insurance schemes.[32] Concerns about the exploitation of vulnerable individuals and the potential for fraudulent claims have led some jurisdictions to enact legislation banning certain claim farming practices.

For instance, in Queensland, and more recently in New South Wales, legislation has been passed prohibiting individuals from soliciting others to make personal injury claims.[33] In Queensland, it is also an offence to pay or receive payment for the referral of a potential claimant, thereby removing the financial incentives for claim farming.

However, given the increasingly sophisticated and cross-jurisdictional operations of claim farmers, comprehensive legislative reform at both state and federal levels are required to effectively address this issue.

Recommendation

All states and territories pass uniform laws that prohibit claim farming activities across all insurance lines, and the federal government should empower regulators (including regulators of legal practices) to supervise and enforce these bans.

[29] The Law Society of NSW, Claims farming is legal but is it ethical, LawInform
[30] ibid.
[31] Panagoda,M., Bowes, K., Kippax, S. Claim Farming: A Growing Focus of Legal reform in Australia, Colin Biggers & Paisley, 21 January 2025.
[32] Lyons, K. What is claim Farming and is there anything wrong with it, The Guardian, 19 February 2025.
[33] In Queensland the Personal Injuries Proceedings Act (2002) was amended in 2019 to prohibit claims farming; In NSW the Claims Farming Prohibition Act (2025) prohibits claims farming for certain personal injury claims.

Priority Actions

All recommended reforms will help improve ongoing access to public liability insurance.

However, insurers have identified the following as the most the most urgent and necessary:

- **Psychological injuries:** Reforms to address and manage the growing impact psychological claims on claims costs and cost of insurance premiums.
- **Review of legislative framework in relation dangerous recreational activities:** Limited public liability insurance capacity is damaging and threatening the ongoing viability of relevant industries, community groups and not-for-profit organisations that play a valuable community, social, health and economic role. The relatively simple recommended reform options in the report would immediately improve access to public liability insurance for these sectors, helping to ensure the services they provide can continue. For example, clarifying liability settings for recreational and leisure activities would immediately improve availability and affordability of insurance cover for many businesses in the tourism and recreation industry.
- **Reform to address the impact of increasing 'worker to worker' claims:** Growing public liability claims costs driven by high quantum 'worker to worker' claims represent one of the biggest premium cost pressures. Reforms that address the legal complexities, long claim periods, legal costs and settlement inflation that are associated with worker-to-worker claims will significantly reduce inflationary pressure of public liability premiums while maintaining injured workers' access to appropriate medical treatment and compensation.

Conclusion

Implementing the proposed liability law reforms will inevitably vary in complexity.

Some of the recommended reforms, such as changes to civil procedure rules to increase the efficiency of the claims process and reforms to address claim farming, could be implemented relatively easily with fewer points of contention likely to arise.

Other potential reforms that require review of eligibility to receive some heads of damage compensation will inevitably be more challenging to negotiate and implement given the broad interests of stakeholders involved. Such reform will of course involve consensus-building and a willingness of governments to engage and consider reforms that achieve an appropriate balance between providing ongoing access to fair and reasonable compensation and ensuring ongoing access to public liability insurance.

The ICA welcomes further discussions with policymakers on the issues raised in this report.

Glossary

Arbitration: A form of alternative dispute resolution where parties involved in disagreement or legal claim have a neutral third party (arbitrator) make a decision to resolve the dispute or legal claim.

Claims cost: The total expenses an insurer incurs when settling an insurance claim.

Claim farming: Unsolicited approaches made to a third party to encourage them to make a legal claim.

Cause of action: The legal basis or grounds on which a legal claim for compensation can be made. Examples of a legal cause of action include negligence (breach of duty of care), breach of contract.

Excess (also known as a deductible): An an amount of money a policy holder must pay if they proceed with making an insurance claim on their insurance policy.

Legal Profession Uniform Law: Operates in NSW, Victoria and Western Australia and is designed to create a common legal services market. It regulates the legal profession, governing matters such as practising certificates, cost disclosure and billing arrangements, complaint handling processes and continuing professional development requirements.

Limitation period: A legally defined time period within which a civil legal claim against a third party can be commenced.

Long stop limitation period: An absolute time limit within which a civil claim must be brought, regardless of when a cause of action has been discovered.

Social inflation: refers to rising cost of insurance claims that is greater than the rate of general economic inflation.

Proportionate Liability: A legal principle where wrongdoers are held responsible for only their portion of the damage or loss they caused, rather than being liable for the entire amount.

Public Liability Insurance: An insurance product that protects businesses and individuals by providing them insurance coverage for claims for from third parties for injury or property damage.

Gross Written Premium: The total premium income received by an insured during a specified period, before any deductions for reinsurance premiums.

Gratuitous care: Care and assistance provided to an injured person at no cost, often provided by a family member.

Nervous Shock: A legal term that refers to a psychiatric illness or injury inflicted by a negligent act or omission of another person/party. Nervous shock claims can be brought by people who have witnessed or experienced a traumatic incident.

Non-economic loss compensation: compensation paid to less tangible loss or impacts of an injury that affect their quality of life. Examples of non-economic loss compensation include compensation for pain and suffering, scarring or disfigurement, loss of amenity of life.

Injury Threshold: Refers to a minimum level of injury/impairment required to a claim for personal injury compensation.

Statutory Insurance Scheme: A statutory insurance scheme is a government mandated insurance program designed to provide benefits to individuals. These insurance schemes are funded by government, employers or individuals. Examples of statutory insurance schemes are compulsory workers compensation insurance and compulsory third party (CTP) insurance for motor vehicle injuries.

Sullivan v Gordon Damages: Damages/compensation for loss of capacity to provide gratuitous (unpaid) care to other people.

Whole Person Impairment (WPI): A measurement used to determine the percentage of permanent impairment resulting from a workplace injury or injury arising from a same event or circumstance.

Insurance Council of Australia

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