

Worker-to-Worker Claims and the Changing Workforce

Prepared by Estelle Pearson, Cathy Yu and Adrian Yiu

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Institute of Actuaries of Australia

ABN 69 000 423 656

Level 2, 50 Carrington Street, Sydney NSW Australia 2000

† +61 (0) 2 9239 6100

e actuaries@actuaries.asn.au w www.actuaries.asn.au

Abstract

Worker-to-worker claims have long been a feature of the public liability insurance class of business. They have recently been a driver of significant reserve deterioration for liability insurers. The changing nature of the workforce especially the move to a more flexible workforce is one contributor to an increase in worker-to-worker claims. Liability insurers have responded to the recent deterioration in claims experience through a combination of premium increases, stronger underwriting standards and higher deductibles for worker-to-worker claims. This paper will look at why worker-to-worker claims are such a problem for liability insurers. It will ask whether changes to workers compensation schemes are needed to better reflect the modern nature of employment and to achieve better outcomes for injured people and businesses.

1. What are Worker-to-Worker Claims?

Our definition of worker-to-worker (WTW) claims captures all circumstances where a person is injured during the course of their employment through the negligence of a third party.

Examples of WTW claim situations are –

- labour hire arrangements where a person is an employee of a labour hire company but is injured working for the host employer who has a duty to provide a safe work environment
- a sub-contractor doing work on the site of the principal where there may be multiple parties involved on the site each owing a duty of care to other parties
- within one company, workers employed by one subsidiary company who are injured working for a different subsidiary which has control of the physical working location, equipment and processes
- various contracted workers (cleaners/security guards) injured while working on third party premises
- delivery drivers injured during the course of the delivery of goods to a third party site
- workers injured at their workplace where the injury is contributed to by the negligence of a third party (for example, contract cleaners).

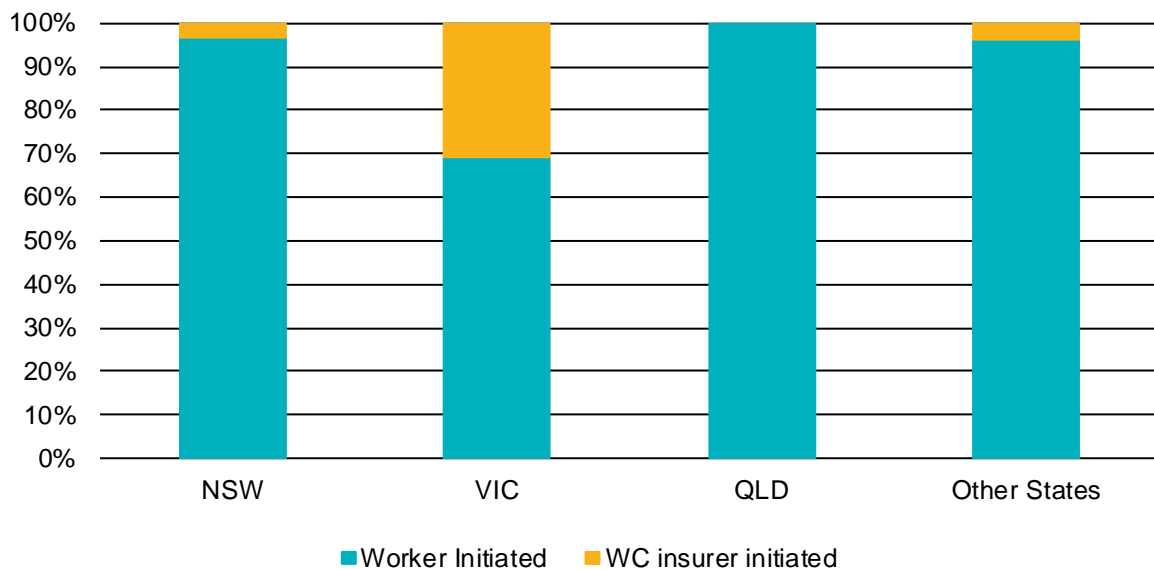
Commonly WTW claims are associated with workers compensation recovery actions, i.e. the recovery of payments made by a workers compensation insurer to an injured person from the ‘responsible’ third party – or more typically from the third party’s liability insurer.

However, our research has found that workers compensation recovery claims form only a portion of WTW claims against liability policies. There are many cases where the injured person initiates a civil claim against a third party¹ in order to either access common law damages (which may not be available under the workers compensation system) or to top up damages (which may be restricted under the workers compensation system). Common law access and entitlements vary across the different state jurisdictions, with differing levels of impairment thresholds to be met. Typically, the threshold for accessing civil liability claims tends to be lower than the workers compensation damages threshold.

Finity has built a database of 622 WTW claims based on court decisions made up to 6th September 2023. These decisions represent only a small fraction of all WTW claims and they may therefore not be representative of the whole population of claims. However, they show the following characteristics.

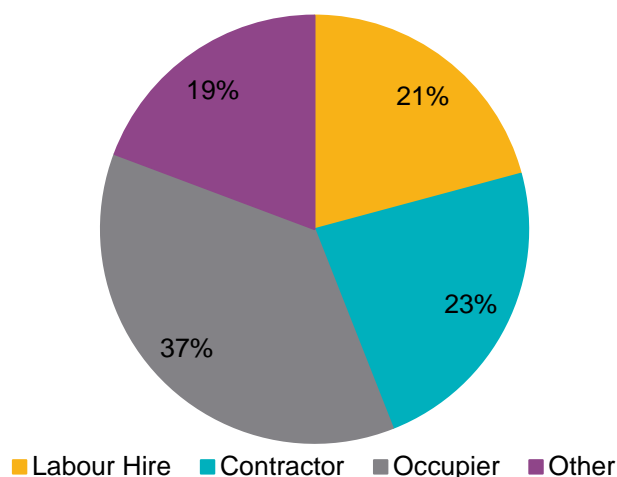
¹ Note that in these cases we would expect the employer (through the workers compensation insurer) to also be a party to the claim

Figure 1 – Proportion of cases initiated by the worker vs. workers compensation insurer



The majority of WTW cases in our database are initiated by the worker rather than the workers compensation insurer. The proportion initiated by the workers compensation insurer varies significantly by state. Victoria has the highest proportion of WC insurer initiated claims, while the Queensland cases are all worker initiated.

Figure 2 – Proportion of cases by WTW type



Claims involving labour hire arrangements and contractors comprise 44% of the overall WTW cases in our database. “Occupier” claims make up 37% of cases. These claims relate to

some of the situations described previously, for example a delivery truck driver being injured on the premises of a third party during the course of a delivery. These cases also include cases where a worker is employed by one subsidiary of a company but is injured on the premises of another subsidiary. The Other claims include multi-party claims when multiple parties are working together on the same site/project (e.g. a large civil construction project).

What we observe is that, regardless of the circumstances of injury and employment, these claims tend to show similar features – the injured person will generally commence workers compensation benefits with a subsequent claim against a liability policy.

2. Why are Worker-to-Worker claims problematic?

WTW claims have proved difficult for liability insurers because-

- they are often not reported to the liability insurer for a number of years after the injury has occurred; they are therefore difficult to investigate/defend
- they are complex because of the interaction of the workers compensation and civil liability legislation and involvement of multiple parties
- they add legal cost (because of the multiple parties)
- they have a high average settlement amount relative to other bodily injury claims.

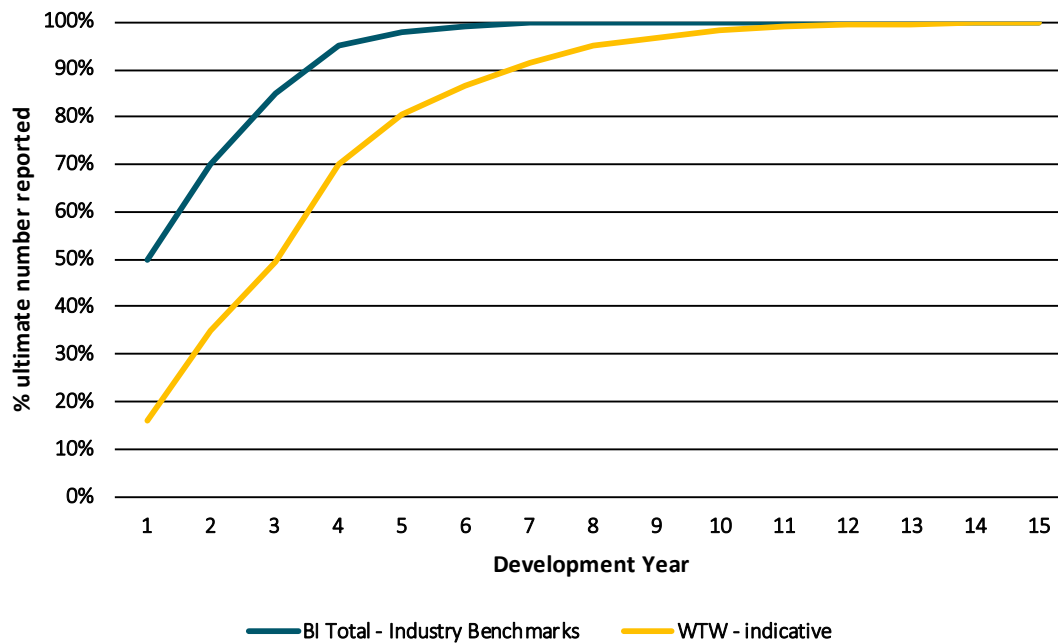
Why are they reported so late? There seem to be two key drivers of late reporting –

1. Historically workers compensation insurers have instigated recovery action after the settlement of a workers compensation claim and can generally claim recoveries on payments going back 6 or 7 years².
2. Where a claim is initiated by an injured person, this appears to occur once statutory benefits are exhausted; we observe many instances of claims made (successfully) after the three-year statute of limitations period.

The figure below compares the typical reporting delay for WTW claims with the reporting delay for all liability bodily injury claims. These patterns are based on a variety of sources.

² Depends on the specific legislation in each State/Territory

Figure 3 – Reported claim development for bodily injury liability insurance claims



For WTW claims, 3 years after the accident only around 50% of claims have been reported to the liability insurer with the remaining 50% reported over the next five years. For all bodily injury claims 85% of claims have been reported 3 years post-accident with the remaining 15% reported mainly over the next 2 years.

The complexity of WTW claims and the difficulties in obtaining adequate information may mean that there is a further significant delay between when a claim is reported and when it is accurately reserved.

The next figure compares the average size of WTW claims with the average size of other bodily injury claims. This is taken from the May 2023 APRA report “NCPD Analysis: Review of trends and affordability of public liability and professional indemnity insurance in Australia”.

Table 1 – Claim finalisation experience of bodily injury vs. WTW claims

Finalised Year	Claim Count		Average Claim Size (\$000)		Finalised Cost (\$M)		% of Finalised Cost	
	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%

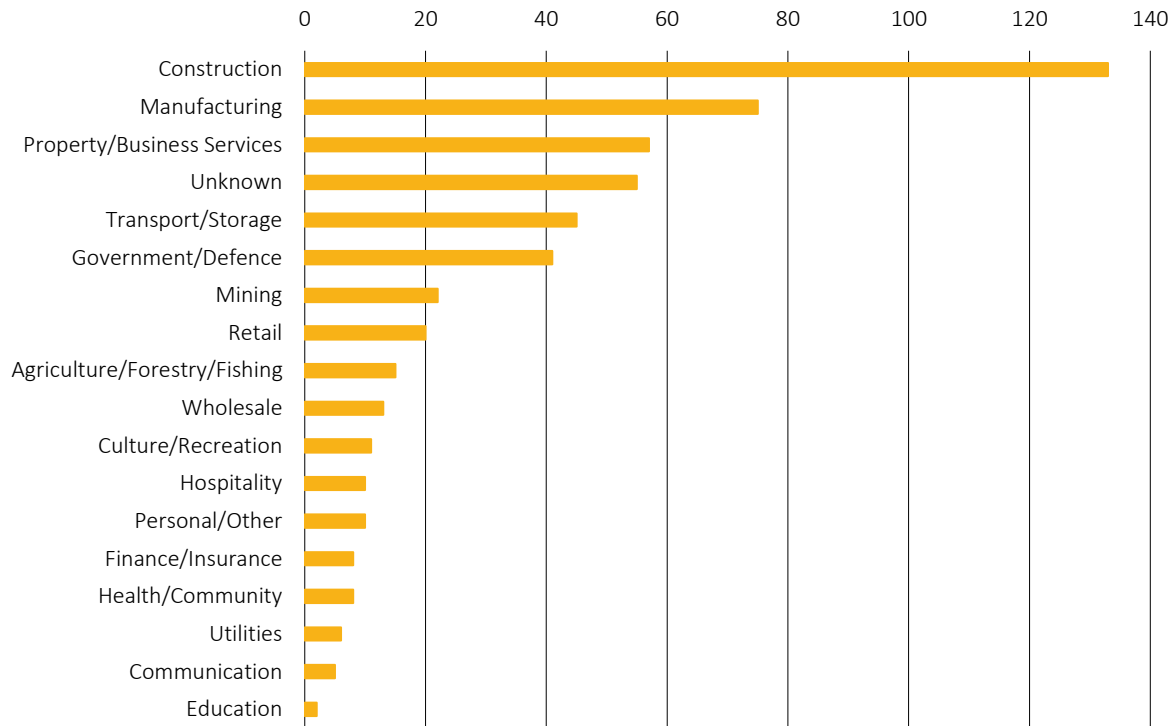
The NCPD analysis suggests that

- WTW claims have consistently represented 12% of the finalised cost of all bodily injury claims paid by liability insurers
- the average size of WTW claims is at least double the size of other bodily injury claims.

We believe that WTW claims in this NCPD analysis are vastly underestimated. In our experience WTW claims are not well identified in insurers' data. When insurers undertake claim file reviews or use algorithms trained to identify key words in claims narratives, many more WTW claims are identified.

We believe that WTW claims comprise between 20% and 70% of bodily injury claims costs for individual liability portfolios depending on the portfolio composition. Both our WTW database and the NCPD Analysis show large differences in the relative level of WTW claims by industry. The following chart shows the number of WTW cases by industry from our WTW database. Note that while these have not been normalised for exposure, when we do this large differences still persist by industry.

Figure 4 – Number of WTW judgements by industry



While construction has the largest number of decisions, there are other industries well represented in the WTW judgment database. The differences between industries will represent differences in employment and work arrangements including on-site/off-site work exposure.

3. Why are we talking about this now?

WTW claims are not a new problem for liability insurers. We found two earlier actuarial papers on this topic.

The 1988 General Insurance Seminar included a paper “Liability – Today’s Policies for Tomorrow’s Claims” by P Backe-Hansen. One of the issues raised in that paper was the problem of WTW Claims. The key points made were –

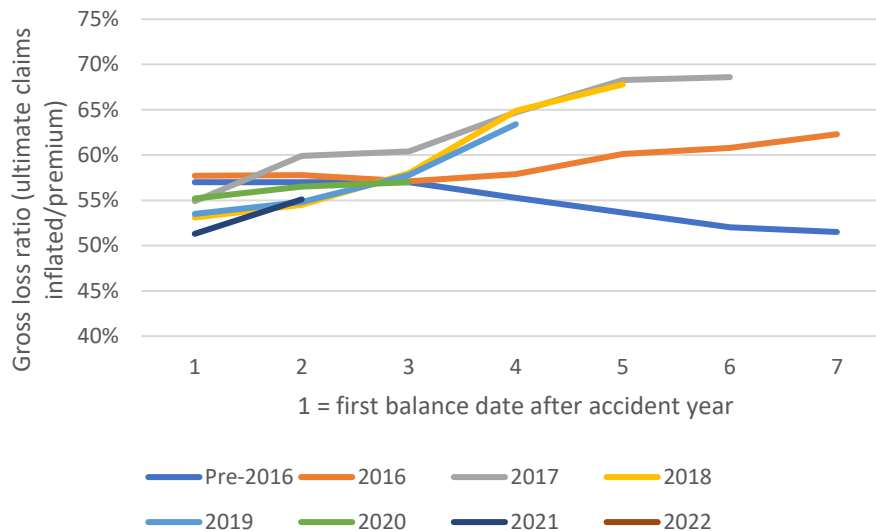
- The exposure for these claims under the liability section of contract works policies had only become apparent following changes to workers compensation legislation in NSW, Victoria and SA in the first part of the 1980s had led to a significant restriction or abolition of common law in workers compensation schemes
- These types of action take several years to work through the legal system
- This exposure exists not only in the contract works area but for commercial property owners where work is undertaken on their property by the employee of another business.

The 2010 General Insurance Seminar included a paper by Benoit Laganiere and Yan Zhao “Worker to Worker Claims in Liability Portfolios” using QBE claims experience. The key takeaways from this paper included:

- WTW trends have been impacted by changes in employment practices since the 1990s and the growth of more flexible worker arrangements, primarily use of labour hire and independent contractors
- Differences in the access thresholds for damages for Public Liability, Workers Compensation and CTP have led to “forum shopping” by plaintiff lawyers seeking to maximise damages amounts; in a number of jurisdictions the civil liability threshold is lower and damages higher than under workers compensation legislation
- There has been an increasing trend in the number of WTW claims relative to all BI claims with WTW claims (by the end of 2008) representing over 30% of all BI claims and over 50% of overall liability BI costs

While WTW claims are not new, we first became aware of a new potential ‘problem’ with WTW claims by observing persistent deterioration in insurers’ outstanding claims reserves for liability business. The figure below shows how insurers view of the ultimate loss ratio based on actuarial reserves plus payments has developed over time since the first balance date following the accident year.

Figure 5 – Gross ultimate loss ratio development by accident year

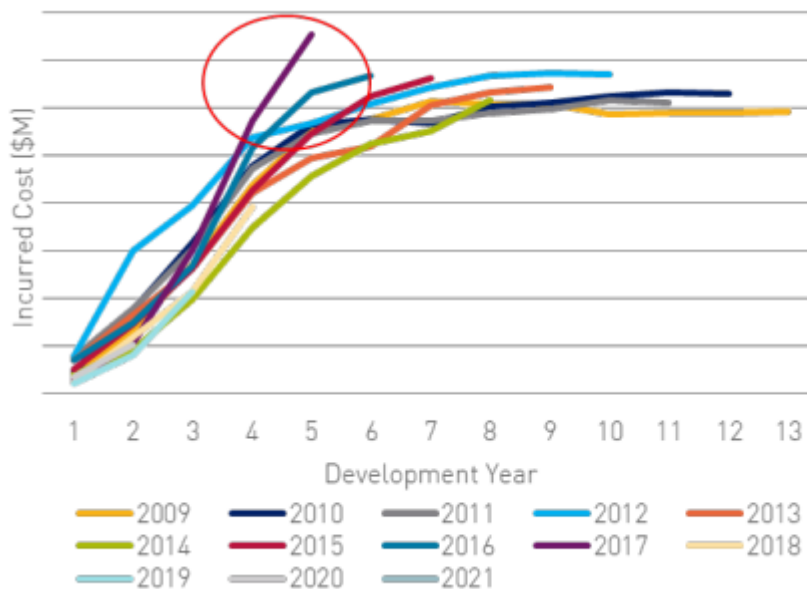


Prior to the 2016 accident year reserves were initially set at around a loss ratio of 55% to 60% and the view of this loss ratio improved over time (i.e. as the accident year matured). The 2016 accident year was roughly following this pattern until the 2019 accounting year when the loss ratio deteriorated slightly and then continued to increase at each subsequent balance date. Accident years 2017 to 2019 were all originally reserved to a loss ratio of 53% to 55% but have all deteriorated to loss ratios in 2022 of between 63% and 68% with strong increases after the 3rd balance date after the accident year. It is not yet clear whether the deterioration for these accident years has ended; we note that across all accident years liability reserves continued to deteriorate in 2023.

Working on individual insurance portfolios, we have typically identified WTW claims as one driver of this deterioration. The volume and cost of these claims has not been sufficiently reflected in initial actuarial reserves. Since actuarial reserves are typically based on historic patterns this suggests that WTW claims have become more prevalent or more costly than historically.

The NCPD data also shows a strong increase in the incurred cost for the claims classified as WTW in that dataset.

Figure 6 – NCPD WTW incurred cost (payments plus case estimates) development (source: NCPD)



The NCPD data highlights the late development of incurred costs for WTW claims – indicated by the strong increases after development year 4 (i.e. more than three years after the accident occurred). Accident year trends are highlighted by the red circle showing a particularly strong cost increase for accident years 2016 and 2017 especially after development year 4. There is uncertainty around how these accident years will now develop and what that means for the cost of subsequent accident years. These increased costs are largely not yet present in the finalised claim experience presented earlier.

While we do not have ideal data to validate the view that either the quantum and/or the cost of WTW claims has increased, we believe that it is a reasonable hypothesis given the deterioration for accident years 2016 and later that we have seen across the industry as well as for some individual portfolios.

Why would WTW claims costs have increased? We offer four possibilities-

1. More labour hire and contracted employment situations as employers seek a more flexible workforce. This will result in more exposure to WTW situations.
2. Legal environment. There has been a more aggressive legal environment since around 2014 in the Eastern states in particular. We saw claim farming activities increase claim volumes for CTP in both NSW and Queensland which was addressed through scheme design change in NSW (2017) and specific legislation banning claim farming in Queensland (2019). The Qld claim farming legislation was extended to apply more

broadly (including to workers compensation) in 2022. It is feasible that the claim farming activities have also identified opportunities for injured workers to make a claim for common law damages against a third party under civil liability rather than workers compensation legislation to access higher damages.

3. More severe workers compensation claims. We understand that there has been a steady increase in the proportions of claims with a psychological injury in workers compensation. Generally, these claims have a longer time off work and higher workers compensation amounts. This may also be a feature of the WTW claims being seen by liability insurers.
4. More recovery action by workers compensation insurers; we have particularly seen activity by the state-underwritten schemes ebb and flow over time.

We used the ABS series 6338.0 Labour hire workers, June 2023 to look at the trend in use of labour hire.

Figure 7 – All jobs worked in Labour supply services/All employed people

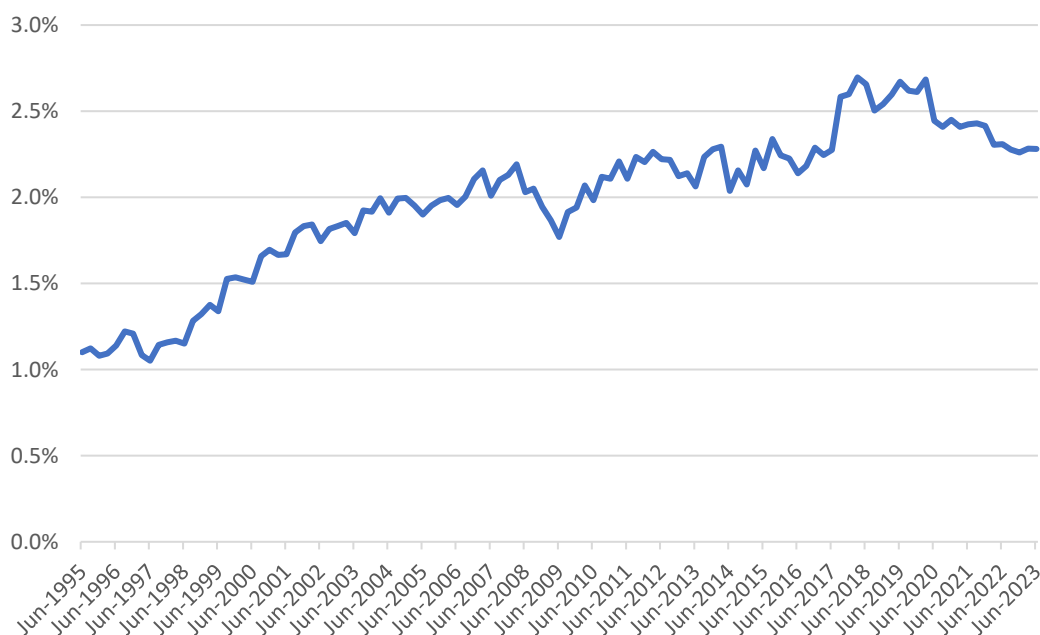
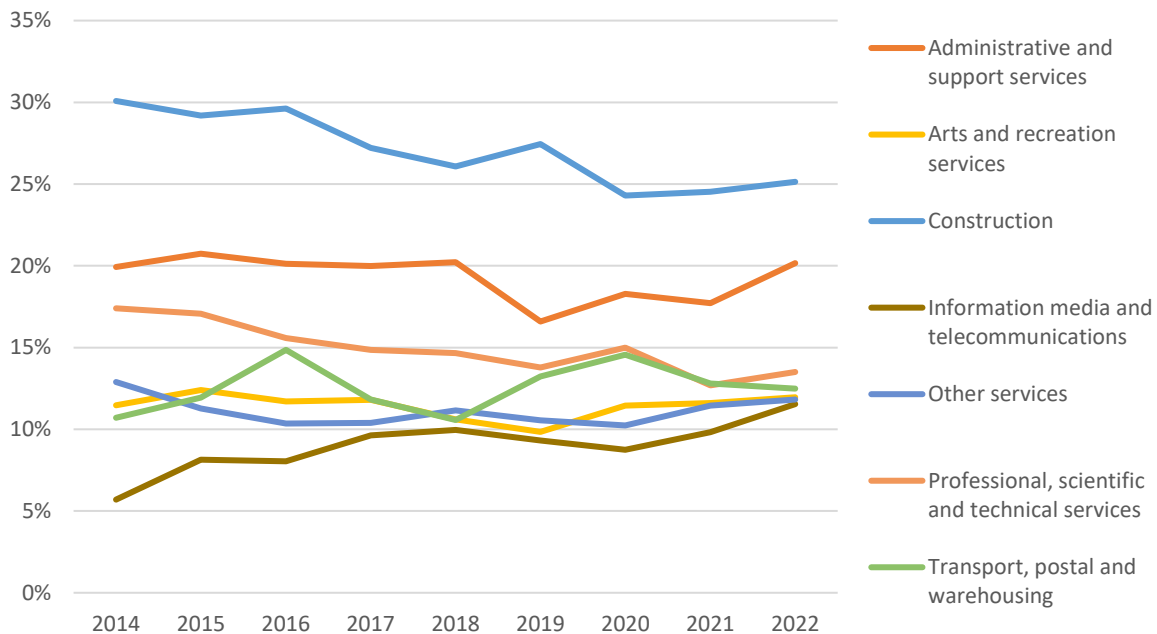


Figure 7 above shows a doubling of labour supply services from 1% to 2% of all employed people between 1997 and 2007 with a further increase from 2.2% to 2.6% between 2016 and 2019. While there appears to be a Covid impact that has reversed the trend, we anticipate this will revert back to pre-Covid levels over the longer term. We note, though, that employment in labour supply services represents a relatively small proportion of the total workforce.

We used the ABS series 6336.0 Working Arrangements, August 2022 to look at trends in independent contractors.

Figure 8 – Total Independent Contractors/Total Employed Persons



Independent contractors comprise more than 10% of all employed persons in these industries. Whether these contractors are workers for the purpose of workers compensation will depend on the ‘deemed worker’ provisions and the nature of the contracted arrangement. It is interesting to note however that industries with a higher proportion of independent contractors are consistent with those industries where we observe the most WTW cases.

This information does not suggest a growth in independent contractors relative to total employed persons over this period with mixed experience for different industries.

The use of subsidiary companies who act as employer for people working in different divisions of the company, creates labour-hire type arrangements, potentially unbeknownst to the workforce and staff themselves. We do not have data to understand whether this practice has become more commonplace.

4. Response to Worker-to-Worker by liability insurers

WTW claims are not a new issue for liability insurers who have responded through a number of mechanisms. Over the last 10 years, most of the larger local insurers have generally included rating for WTW claims in their liability prices. Exposure information (for example labour hire or contractor wages) is collected and workers compensation rates (adjusted) are applied to this exposure as part of the rating algorithm. Most policies will have a specific deductible for WTW exposure.

The recent deterioration in claim performance has led liability insurers to take a number of additional actions including –

1. Increasing valuation reserves, evidenced by ongoing prior year strains
2. Reviewing the adequacy of the current pricing approach for WTW including the adequacy of exposure data
3. Increasing premiums for WTW exposure and for liability generally
4. Increasing deductibles, or imposing a higher standard deductible for WTW claims compared to other exposures. In the standalone space we have heard of excesses as high as \$250k
5. Applying sublimits on WTW claim coverage
6. Declining cover and restricting appetite, in some instances insurers may choose to decline cover and not renew, especially in industries with particularly high WTW exposure.

The outcome for businesses is an increase in liability premiums contributing to affordability issues for some sectors and possibly a significant uninsured exposure to WTW claims through high deductibles.

5. Is there a better way?

Below we consider the impact of WTW claims for each of injured workers, businesses, and workers compensation insurers.

Injured workers

Many workers compensation schemes have, over the years, moved from a lump sum approach where the size of the payment received depends on the extent and permanency of injury to a recovery and return to health approach. Research consistently tells us that injured people have poorer outcomes in an adversarial system. From the perspective of fair and equitable compensation it appears anomalous that a segment of people injured during the course of their employment have access to an alternate lump sum compensation pathway compared with the majority of workers. The research would also suggest that the long delays often involved in settling WTW claims will have detrimental impacts on long term health outcomes.

Businesses

Public liability insurance premiums for businesses have increased significantly in recent years driven in part by WTW claims. Businesses are also carrying higher deductibles for WTW claims (in some cases very high) compared with standard liability excesses. This is exacerbating affordability issues for businesses. In some cases, insurers are avoiding certain types of business that have a high WTW exposure. The total of workers compensation and liability premiums paid by businesses is higher because of WTW claims due to the associated frictional costs and higher costs of civil liability damages compared with damages under workers compensation legislation.

Workers compensation insurers

Workers compensation insurers benefit financially through recovery of workers compensation payments from a third party. This allows workers compensation premiums to be lower than otherwise. However, the additional legal costs involved in WTW claims due to the involvement of multiple parties to claims means that the total cost to businesses across workers compensation and public liability insurance is higher.

The future

We do not see that the problem of WTW claims will reduce. We expect that businesses will continue to move to more flexible workforce arrangements. This will lead to an increase in the situations which give rise to WTW claims. We note that schemes are already having to

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ABN 69 000 423 656

Level 2, 50 Carrington Street, Sydney NSW Australia 2000

† +61 (0) 2 9239 6100

e actuaries@actuaries.asn.au w www.actuaries.asn.au

grapple with the changing workforce in terms of the gig economy. The February 2023 Productivity Commission Report “5-year Productivity Inquiry: A more productive labour market” discussed the issue of inadequate personal injury insurance arrangements for many platform workers.

In these circumstances we therefore ask whether workers compensation schemes need to evolve to recognise the changing nature of workforce arrangements as well as the impact that alternative compensation pathways may have on recovery and return to health for injured workers.

Undoubtedly change would be complex. It would need to involve both workers compensation and civil liability legislative change across each state and territory and maybe also WHS legislation and regulation.

Ultimately change should be focused on the following principles-

- Promotion of safe work places and conditions for all ‘workers’ regardless of the form of their ‘employment’ arrangement
- Fair and equitable compensation for all people injured during the course of their work with the focus on recovery and return to health
- Efficient systems which minimise frictional costs
- Availability and affordability of adequate insurance cover for businesses.