WIRO BULLETIN

CURRENT UPDATES, INFORMATION AND TRENDS

ISSUE NO 6, DECEMBER 2016

MONTHLY BULLETIN OF THE

Workers Compensation Independent Review Office (WIRO)

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CASE UPDATES

Recent cases

The summaries are not intended to substitute the actual headnotes or ratios set out in the cases.

You are strongly encouraged to read the full decisions.

Some decisions are linked to AustLii, where available.

Phillips v JW Williamson and RW Williamson t/as Williamson Bros [2016] NSWSC 1681

(Supreme Court, Schmidt J, Date of Decision: 30 November 2016)

Facts and Issues: In January 2015, the injured worker was assessed by an Approved Medical Specialist (AMS) in the Workers Compensation Commission ("the Commission") for deterioration since 2014 for an injury sustained in 2011. The AMS opined he could not use the assessment results for the neck observed on examination due to inconsistent presentation and that he could not account for the deterioration in the worker's condition of the shoulder on the basis that there was significant functional overlay (or abnormal illness behaviour). Immediately after the medical examination, the worker sought further medical opinion from a neurologist and lodged a medical appeal against the AMS's Medical Assessment Certificate (MAC) on the grounds that there was new or additional relevant information (s 327(3)(b)), which evidenced the current deterioration since 2014 (s 327(3)(a), that the AMS utilised incorrect criteria (s 327(3)(c)), and that the MAC contained demonstrable errors (s 327(3)(d)).

Lukac v Berkeley Challenge Pty Ltd t/as Spotless [2016] NSWWCCPD 56

(WCC, Keating P, Date of Decision: 18 November 2016)

Facts and Issues: The injured worker, who previously received lump sum compensation for the cervical spine and the right upper extremity (right shoulder), made a claim for further lump sum compensation as a result of a consequential injury to the left upper extremity consequential upon the right shoulder injury. The insurer denied the claim. The arbitrator found that the worker did not suffer a consequential injury to the left shoulder and therefore was not entitled to further lump sum compensation, where there was insufficient evidence on the balance of probabilities that the overuse of the left shoulder to protect the injured right shoulder was observed by a doctor. On appeal, the worker argued that the arbitrator erred in finding that the left shoulder symptoms directly resulted from the repetitive movements inherent in the initial injury, as opposed to it being consequential to the right shoulder injury (factual error contained in the evidence). The employer submitted that the arbitrator's findings were more consistent with the history contained in the medical evidence available.

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Ky v Blue Leaf Food Group Pty Ltd [2016] NSWWCCPD 55

(WCC, Snell DP, Date of Decision: 15 November 2016)

Facts and Issues: The worker made a claim for lump sum compensation on the basis that he suffered an "injury" under s 4(a) of the Workers Compensation Act 1987 ("the 1987 Act") with a "deemed" date of injury. It was queried that: "If the allegation of injury to the right shoulder is made out, then providing the assessed impairments in respect of the knees and the right shoulder can be aggregated, the alleged impairment exceeds the threshold in s 66 (1) of the 1987 Act, and can be referred to an AMS for assessment". In the Commission, the arbitrator applied the High Court decisions in *Zickar v MGH Plastic Industries Pty Ltd* [1996] HCA 31; 187 CLR 310 (*Zickar*) and *Kennedy Cleaning v Petroska* [2000] HCA 45; 200 CLR 286; 174 ALR 626; 74 ALJR 1298 (*Petroska*) in finding that: (1) the condition in the worker's right shoulder was not a "personal injury", as there was no "sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state"; and, referring to *Commissioner for Railways v Bain* [1965] HCA 5; 112 CLR 246 (*Bain*), (2) the pathology in the worker's right shoulder constitutes a "disease condition" and of such a nature as to be contracted by a gradual process. The arbitrator made an award for s 66 for the right shoulder in favour of the employer which invalidated the worker's claim by virtue of s 66(1) of the 1987 Act. The worker appealed the decision on the basis that the arbitrator erred in making such findings and argued that there was evidence that the duties involved "a series of mirco traumata", among others.

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Cook v Council of the City of Sydney [2016] NSWWCCPD 51

(WCC, Keating P, Date of Decision: 25 October 2016)

Facts and Issues: In this matter, a previous medical assessment certificate had previously been subject to a medical appeal and had even gone to the Supreme Court for judicial review. Following the Court's decision on review, the matter was remitted back to the Registrar to re-convene a different Medical Appeal Panel (MAP). The new MAP came to similar findings but without a fresh re-examination of the worker. The Registrar then issued a medical Certificate of Determination (COD) to reflect the Panel's findings of permanent impairment. The worker lodged an appeal against the Registrar's decision to issue a medical COD where the Panel did not conduct a fresh medical examination, despite previous submissions and requests made by the worker. The worker alleged that the Registrar and the Panel denied him procedural fairness by not being afforded the opportunity to provide submissions on the need for a fresh medical examination before the COD was issued and that the Registrar acting as Arbitrator failed to provide sufficient reasons in issuing the medical COD.

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NSW Trustee and Guardian on behalf of Robert Birch v Olympic Aluminium Pty Ltd [2016] NSWWCCPD 54

(WCC, Keating P, Date of Decision: 10 November 2016)

Facts and Issues: On 9 October 2013, the insurer wrote to the worker and advised that he was being transitioned into the new weekly benefits scheme on the basis of a decision that he had capacity for work for "12 per week" and that he was entitled to

Chris Waller Racing Pty Ltd v Muscutt [2016] NSWWCCPD 57

(WCC, King SC A/DP, Date of Decision: 21 November 2016)

Facts and Issues: On 13 January 2015, the worker injured his back at work. A few days after, his symptoms worsened, prompting him to present at the hospital on 19 January 2015. On that day, his treating

the rate of $758.80 per week from 17 January 2014 under s 38 of the 1987 Act. It was accepted by both parties that the letter of 9 October 2013 was a work capacity decision. On 16 June 2014, the insurer issued to the worker a s 74 notice, denying liability for weekly payments beyond 11 August 2014 with the effects of the injury having ceased. In the proceedings, the arbitrator queried if the Commission could make an order under s 38(3) of the 1987 Act in circumstances where the worker was not working at least 15 hours per week during the relevant period. In a subsequent Certificate of Determination (COD), the arbitrator found that the worker was not entitled to an order under s 38 from 12 August 2014 to date. On appeal, the worker argued that the arbitrator erred: (1) when he failed to consider that the decision to pay weekly benefits during the s 38 period was itself a work capacity decision and he had no jurisdiction to make a decision inconsistent with that decision; (2) when he considered that a decision that the worker had capacity of "12 per week" meant that he had capacity to earn working 12 hours per week; and (3) by considering that he could engage in considering s 38 where there was a work capacity decision.

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specialist advised him he should undergo immediate spinal surgery. The worker, on the same day, advised his employer about the injury and the medical advice received. The employer then demanded that the worker instead see a GP first and get a referral to the same treating specialist so they could consider approving the referral. Subsequent to this, the worker had undergone spinal surgery on 21 January 2015 after being contacted again by the treating specialist the day before. A second spinal surgery occurred on 3 February 2015, following which the worker returned to full-time work on light duties and reduced hours. On 1 June 2015, the insurer issued a s 74 notice, denying liability for the surgical expenses, among other entitlements, on the basis that they were not reasonably necessary. Prior to an arbitration hearing, the insurer withdrew the s 74 notice and accepted that the surgery was reasonably necessary. However, the insurer asserted that they were not liable to pay the s 60 expenses by operation of s 60(2A) of the 1987 Act, where the treatment expenses is given or provided without prior approval.

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Deans v Roderic Neil Mitchell t/as RN Mitchell & Workers Compensation Nominal Insurer [2016] NSWWCC 279

(WCC, Arbitrator Carolyn Rimmer, Date of Decision: 6 December 2016)

Facts and Issues: On 12 January 2016, the worker tripped and fell at work and sustained extensive facial injuries, following which he attended a public hospital for treatment. Two days after, a treating specialist advised the worker that he required urgent surgery in order to minimise the risk of infection and further damage to his injuries. On the same day, 14 January 2016, the worker advised the employer (first respondent) about the injury and the medical advice for surgery. The employer believed it had worker compensation insurance for its NSW workers with a Victorian insurer and referred the claim to the said insurer. A claim was then made to icare, being the Workers Compensation Nominal Insurer (second respondent) which, on 22 January 2016, sent a letter to the worker advising that provisional weekly payments would not be paid due to a reasonable excuse. On 4 February 2016, the worker's lawyers claimed for weekly payments and s 60 expenses for the surgical costs with icare. On 25 February 2016, icare advised the worker that,

Skibola v AIG Australia Ltd [2016] NSWWCC 252

(WCC, Arbitrator Tim Wardell, Date of Decision: 2 November 2016)

Facts and Issues: The claim concerned weekly payments up to the end of the second entitlement period and medical treatment expenses under s 60 of the 1987 Act. The only dispute that came before the Commission was whether or not the worker's psychological injury was wholly or predominantly caused by reasonable action taken by the employer with respect to performance appraisal and discipline (which negate the worker's entitlement to benefits) pursuant to s 11A(1) of the 1987 Act. The worker submitted that he was subjected to denigrating, humiliating and belittling behaviour and bullying by his managers and co-workers, leading him to develop psychological symptoms that caused him being certified being unfit to work. The employer argued that the worker's symptoms developed after he was placed under a performance appraisal and improvement plan and being in receipt of three warning letters in relation to his performance.

Held: In considering all the evidence before him, the

as the Victoria insurer had accepted liability, they were precluded by s 9AC of the 1987 Act from paying compensation. Despite this, icare on 18 March 2016 sent an acceptance-of-claim letter for the weekly payments. However, on 9 May 2016, icare issued a s 74 notice disputing liability for the surgical expenses on the basis that s 60(2A)(a) operated where the surgery was provided to the worker without prior approval. There was no question that icare accepted the surgery as reasonably necessary but that liability was denied because the worker did not have prior approval for it. In the Commission, the worker argued that there was no insurer to provide approval and the provisions of s 60(2A) did not apply. With the existence of icare's s 74 notice, the worker further submitted that this was a denial of liability and that therefore the exemption (particularly in cl 3.2.1.1 of the Guidelines applied so that icare could not argue that liability was never denied and merely relied on s 60(2A), and that the reason for the denial of liability was irrelevant).

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arbitrator accepted the submission that the worker found himself overworked, overwhelmed by various changes in his work, was not given adequate training and support, and was micro-managed and heavily criticised by his manager, such that he was unfairly treated at work. Despite this, the arbitrator found that the imposition of performance management and the issuing of the three warning letters were the predominant cause of the worker's injury (at [48]). However, the arbitrator remarked that there is no evidence to contradict the worker's perception or assertion that the performance management was unfair, unwarranted and lacked bona fides in the sense that it was part of a malicious and targeted campaign against him (at [54]). Further, the arbitrator said at [55] that an inference could be made at the very least that the employer's actions, taken within such a short space of time and leaving the worker with little respite, were oppressive. At [57], the arbitrator held: "Because there is no evidence upon which I can undertake a considered and objective assessment of whether the respondent's actions were reasonable and carried out in a reasonable way, it inevitably follows that the respondent has failed to discharge its onus of establishing these matters on the balance of probabilities." Findings were made in favour of the worker and orders made for weekly payments and medical treatment expenses.

Virtu v Greenacres Disability Services [2016] NSWWCC 258

(WCC, Senior Arbitrator Catherine McDonald, Date of Decision: 11 November 2016)

Facts and Issues: The worker (with a disability) injured herself when she tripped on a pothole in a dark laneway on her way to work with the respondent, a place she was required to walk down on to catch a bus from her home to meet the "Greenacre bus" that would take her to work. According to the worker, a vocational worker at her workplace advised her to take this route. A manager gave evidence on behalf of the respondent that they were required by the National Standards for Disability Services to assist employees with disabilities to "access external sources of their choosing to enhance their quality of life". In the worker's case, the respondent's witness stated that public transport options were provided to the worker but that the choice of transport was decided by the worker herself. There was no dispute that the worker suffered an injury while on a journey; the issue remained as to whether or not there was real and substantial connection with the employment (s 10(3) of the 1987 Act).

Held: The senior arbitrator found that the respondent witness' statement to be less helpful and less probative, and was satisfied that the worker believed she was required by Greenacres to use the bus because that is what the vocational worker showed her to do when the bus route was extended (at [40]). The respondent's evidence failed to adequately take into account the worker's disability and her difficulty with changes in her routine. Considering the decisions in *Field v Department of Education and Communities* [2014] NSWWCCPD 16 and *Dewan Singh and Kim Singh t/as Krambach Service Station v Wickenden* [2014] NSWWCCPD 13, senior arbitrator McDonald held that the respondent's evidence did not rebut the worker's statement that she believed she was required to catch the "Greenacre bus" and that she was shown the route to take by a vocational worker, and determined that there was a real and substantial connection between the worker's employment and the injury while on a journey to work. Orders were made in favour of the worker for weekly payments and medical treatment expenses.

Bianco v ANZ Banking Group Ltd [2016] NSWWCC 257

(WCC, Arbitrator Glenn Capel, Date of Decision: 11 November 2016)

Facts and Issues: In 2010, after initially accepting the worker's claim for weekly payments and medical treatment expenses, the self-insurer arranged for the worker's medical assessment, which produced a degree of permanent impairment of 4% whole person impairment (WPI). On this basis, on 12 May 2010, the self-insurer made a pro-active offer to the worker for s 66 lump sum compensation. It became clear in the proceedings that the worker's doctor advised the self-insurer (on 25 June 2010) that the worker was looking into surgical options (subsequent to a separate motor vehicle accident). It was only on 16 June 2015 when the worker lodged a s 66 lump sum compensation claim with the insurer for 12% WPI (later upgraded to 14% WPI following later evidence) on the basis of a medical report obtained after the surgery. The insurer denied liability asserting that there was no valid claim and that, in the alternative, the pro-active offer made in May 2010 did not provide full particulars in accordance with s 282 of the *Workplace Injury Management and Workers Compensation Act 1998* ("the 1998 Act"), such that the worker was not entitled to lump sum compensation. The worker argued that the pro-active offer was a valid claim because it had all the sufficient particulars such that an offer could be made.

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OTHER DECISIONS OF NOTE:

Comcare v Martin [2016] HCA 43

(High Court of Australia, French CJ, Bell, Gageler Keane and Nettle JJ, Date of Decision: 9 November 2016)

"[42] Causation in a legal context is always purposive. The application of a causal term in a statutory provision is always to be determined by reference to the statutory text construed and applies in its statutory context in a manner which best effects its statutory purpose. It has been said more than once … that it is doubtful whether there is any 'common sense' approach to causation which can provide a useful, still less universal, legal norm."

Kellys Property Management Services Pty Ltd v Anjoshco Pty Ltd trading as McDonalds BP Chinderah [2016] NSWCA 341

(NSW Court of Appeal, Meagher JA, Gleeson JA, N Adams J, Date of Decision: 6 December 2016)

This was a duty-of-care / negligence case on a slip-and-fall injury. Appeal against the primary judge's factual findings dismissed. At [56]: "The primary judge's factual findings clearly preclude the making of any contrary determinations concerning the existence of a duty of care owed by Kellys, breach of that duty by Kellys and its causation of the worker's harm."

State of NSW v Wenham [2016] NSWCA 336

(NSW Court of Appeal, Beazley A/CJ, Meagher JA, Payne JA, Date of Decision: 5 December 2016)

This was an appeal against the decision of the District Court. The main issues included: (a) whether or not the worker was entitled to an action under s 151Z(1)(d) of the 1987 Act and to rely upon the "no-fault" provisions of the *Motor Accidents Act 1999* (NSW).

Section 151Z does not require that the person who is liable, within the meaning of that section, to be a "wrongdoer" or "tortfeasor". (See [52]-[58] per Payne JA.)

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Workers Compensation Nominal Insurer v Arcaba [2016] NSWSC 1647

(Supreme Court of NSW, Davies J, Date of Decision: 24

Cipriano v Sew Eurodrive Pty Ltd [2016] NSWSC 1630

(Supreme Court of NSW, Fagan J, Date of Decision: 18 November 2016)

November 2016)

This case was a judicial review of a (second) medical appeal decision. The summons was dismissed on all the issues advanced, particularly on the allegation that the MAP failed to provide adequate reasons and to take into account relevant consideration or evidence.

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This was a claim for common law damages lodged 19 years out of time of the limitation period and whether the worker could revoke a previous election made to receive statutory compensation instead of common law damages (s 151D of the 1987 Act). The summons was dismissed on all the issues raised.

PROCEDURAL REVIEW UPDATES

Work capacity decision reviews

All the procedural reviews of the WDC's are published by the WIRO and can be accessed at:
http://wiro.nsw.gov.au/information-lawyers/work-capacity-decisions

Decision WCD13616 (28 November 2016)

Facts: As a result of an injury to the knee on 12 October 2012, the worker was unable to return to pre-injury employment but worked on suitable duties until his termination on 19 July 2016. On 23 June 2016, the insurer issued a work capacity decision, informing the worker that his weekly payments would cease on 3 October 2016. As at August 2016, the worker had been in receipt of weekly payments for more than 170 weeks (well after the second entitlement period of 130 weeks). The worker lodged a merit review application with SIRA's Merit Review Service (MRS), which subsequently found that the worker had ability to return to work in suitable employment, had current work capacity and did not satisfy the criteria set out in s 38(3) of the 1987 Act. The worker applied to WIRO for a procedural review.

Held: In the WIRO review, it became apparent that the insurer had taken an incorrect work history. This led to an incorrect and incomplete explanation of the effect of s 38(3), particularly ss (3)(b) and (3()c).

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Decision WCD14016 (6 December 2016)

Facts: A work capacity decision issued on 12 July 2016 stated that the worker did not satisfy the special requirements in s 38 of the 1987 Act in order for the continued payments of weekly benefits. On internal review and merit review, similar findings were made that the worker had capacity to work for four hours per day for five days per week in suitable employment, was able to return to work and had current work capacity. On procedural review, the worker argued that the decisions made by the insurer and the MRS were incorrect, in general terms, but went to the merits of the case (which is outside the scope of the procedural review).

Held: Upon a review of the procedures undertaken by the insurer, the WIRO found that the insurer determined the considerations under s 43 of the 1987 Act (in making a work capacity decision) in a proper means, with it displaying "an adequate understanding of the Guidelines and legislation". No errors were identified and the review application was dismissed.

LEGISLATION UPDATE

Recent legislation changes

NEW FEES ORDER

On 9 December 2016, the various fees orders and schedules have been published in the ***NSW Government Gazette No. 111*** and will have effect from 1 January 2017.

The relevant fees orders (to the extent that they apply for the purpose of seeking ILARS funding for various disbursements) are:

Workplace Injury Management and Workers Compensation (Medical Examinations and Reports Fees) Order 2017

- The various maximum fee rates in Schedules 1 to 4 have been increased for each payment code.

Workers Compensation (Medical Practitioner Fees) Order 2017

- The rate for copies of medical records and clinical notes in paragraph 5 of the fee order has been increased, as follows:

  "(5) The maximum fee for providing hard copies of medical records (including Medical Specialists' notes and reports) is **$38** (for 33 pages or less) and an additional **$1.40** per page if more than 33 pages. If the medical records are provided electronically, then this would incur a flat fee of $38. This should be billed under State Insurance Regulatory Authority payment classification code WC005."

All the various other fees orders have also been gazetted here: NSW Legislation.

NEW COSTS REGULATION

The ***Workers Compensation Amendment (Legal Costs) Regulation 2016*** was published on 16 December 2016, and provides for legal costs in relation to merit review applications of work capacity decisions.

This only applies to work capacity decisions made after 16 December 2016 and in respect of which an internal review has been finalised.

The new regulations inserted the relevant provisions into Pt 17 of the 2016 Regulation.

Lawyers should note that these new legal costs for such a process do not fall under the scope of any ILARS funding, as the liability to pay such costs rests in the insurer.

The new provisions are now contained in the 2016 Regulation, excerpted HERE.

TRANSITIONAL ARRANGEMENTS FOR WEEKLY BENEFITS (260-WEEK PERIOD)

On 16 December 2016, the ***Workers Compensation Amendment (Transitional Arrangements for Weekly Payments) Regulation 2016*** commenced, following its proclamation. The object of the new regulation is to provide transitional arrangements for existing recipients of weekly payments as at 1 October 2012 where s 39 of the 1987 Act may have an impact.

The transitional arrangements include exemptions from the cessation of weekly payments at the five-year limit and the ability of a worker to have only one further medical assessment of the degree of permanent impairment despite a previous medical assessment and the impact of s 322A of the 1998 Act. This appears to be in line with the recent WIRO policy of funding s 39 applications (see WIRO WIRO – Section 39 funding).

Lawyers can access the transitional provisions inserted in Sch 8 of the 2016 Regulation HERE.

CASE STUDIES

Cases from ILARS and the WIRO's Solutions Group

Each week, the WIRO's Solutions Group and ILARS receives hundreds of inquiries and referrals, and deals with various issues concerning workers compensation claims and disputes. The following notes are examples of those issues.

Weekly payments and "workers with highest needs" under section 38A of the *Workers Compensation Act 1987*

A worker suffered injuries while fitting a mechanical part onto a drill and the drill was inadvertently activated, causing the mechanical part to fly off and into his eye. The worker was not wearing eye protective gear. Following surgery and recuperation, the worker made a claim for lump sum compensation, among other entitlements, after being assessed as suffering 35% WPI and received settlement with the insurer for that degree of permanent impairment. The medical assessment placed the worker in the "worker with highest needs" under s 38A of the 1987 Act. Despite this assessment, the insurer had not made a decision to pay the worker his weekly payments entitlement.

The worker's lawyer sought ILARS funding and submitted that:

- no Certificates of Capacity were obtained/provided because they were irrelevant in the circumstances where it had been established that the worker was a "worker with highest needs";
- the worker was not an existing recipient and, therefore, did not need to be "transitioned" as the minimum payment under s 38A of the 1987 Act was immediately payable for a "worker with highest needs", regardless of the worker's capacity for work and/or his earnings.

A follow-up made by ILARS with the insurer revealed that the worker had since returned to pre-injury duties, working in and for his own business. The insurer had requested the worker's earnings figure so that they could determine the required payments.

As directed by icare, the insurer sought legal advice on the application of s 38A of the 1987 Act. Following that advice, the insurer confirmed the position that the worker, being a "worker with highest needs", was entitled to the prescribed amount set out in s 38A of the 1987 Act, regardless of earnings. Payments for the weekly benefits were then immediately arranged for the worker.

This case highlights the need for clear processes and procedures to be in place in order for insurers to facilitate the efficient and quick determinations or claims for weekly payments under s 38A where there is no dispute and there is sufficient and qualified medical evidence that a worker is a "worker with highest needs". It is evident that the legislation intended for such a special provision to apply where it has been established and cannot be disputed that a worker falls under this category in s 38A of the 1987 Act, regardless of a worker's capacity for work or earnings.

WIRO MILESTONES

Recent WIRO outcomes and activities

WIRO Solutions Brief - Issue 2

The second issue of the *WIRO Solutions Brief* was issued in December 2016. The newsletter is a regular insurer brief distributed to scheme agents on updates and other information relevant to the operations of the WIRO. To subscribe to the *WIRO Solutions Brief* and/or the *WIRO Bulletin*, please make sure you send an email to editor@wiro.nsw.gov.au.

WIRO Solutions Brief – Issue 2 is also up on the WIRO website.

FROM THE WIRO

IMPORTANT EVENTS AND ANNOUNCEMENTS

The WIRO office will maintain normal business hours throughout the 2016 - 2017 holiday period, except for the designated public (and concessional) holidays, on a limited personnel capacity.

Problem with a workers comp...	Independent Legal Assistanc...

FEEDBACK ON THE WIRO BULLETIN

If you have any feedback on the WIRO Bulletin please let us know, we would appreciate hearing any suggestions or ideas

email us at
editor@wiro.nsw.gov.au

HOW WIRO CAN HELP YOU

Level 4, 1 Oxford Street