# WIRO BULLETIN

CURRENT UPDATES, INFORMATION AND TRENDS

ISSUE NO 9
APRIL / MAY 2017

**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.**

### *Robbie v Strasburger Enterprises Pty Ltd t/as Quix Food Stores & Ors* [2017] NSWSC 363

(NSW Supreme Court, N Adams J, Date of Decision: 7 April 2017)

**Facts and Issues:** (*incorrect criteria on judicial review*) In a claim for lump sum compensation supported by a medical report with 17% whole person impairment (WPI), the worker was medically assessed by an approved medical specialist (AMS) of the Workers Compensation Commission ("the Commission") to be suffering 14% WPI. The worker lodged a medical appeal against the AMS's decision on the basis that the medical assessment certificate (MAC) contained a demonstrable error, in that the AMS erred in applying the correct criteria set out in the *NSW workers compensation guidelines for the evaluation of permanent impairment, Fourth edition – 1 April 2016* ("the guidelines") and the *American Medical Association's*

### *Toll Pty Ltd v Harradine (No 2)* [2017] NSWCA 75

(NSW Court of Appeal, Meagher JA, Sackville AJA, Schmidt J, Date of Decision: 10 April 2017)

**Facts and Issues**: (*whether costs follow the event on appeal*) Following adjustments in the calculation of the worker's damages award, the worker submitted that the costs in the primary proceedings at the District Court of NSW fell under cl 94 of the *Workers Compensation Regulation 2016* ("the 2016 Regulation"), which provides that the court is to order the insurer to pay the claimant's costs on the claim on a party and party basis, if the claimant obtained an order that was no less favourable to the claimant than the final offer of settlement in mediation under the *Workplace Injury Management and Workers Compensation Act 1998* ("the 1998 Act"). The result of the appeal was that the worker obtained damages of more than $600,000 with credit to the insurer for amounts

*Guides to the Evaluation of Permanent Impairment, Fifth Edition* (AMA 5). The Commission's delegate of the Registrar declined to refer the medical appeal to a Medical Appeal Panel (MAP). The worker sought judicial review of the delegate's decision, alleging the demonstrable error to be the AMS's failure to apply the modifiers or allowances for effect of multiple surgeries contained in parag 4.37 of the guidelines and the Combined Values Chart in the AMA 5 and the correct methodology for assessing the final WPI percentages in Table 4.2 of the guidelines.

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previously paid (the worker's initial offer at mediation was for $600,000 plus costs), and at a slightly higher amount than the damages awarded by the primary judge. The insurer argued that cl 94 would apply if the worker was awarded damages no less than the offer at the mediation. The insurer also relied on *Smith v Sydney West Area Health Service (No 2)* [2009] NSWCA 62 (*Smith*) and submitted that cl 96 of the 2016 Regulation applied, which provides that parties in work injury damages proceedings must bear their own costs of the proceedings. In relation to the costs of the appeal, the worker submitted that there was to be no favourable costs order, despite the insurer being successful on the appeal due to s 346 of the 1998 Act, which imports the operation of cl 96 of the 2016 Regulation.

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## *Ivaneza v Dalsil Constructions Pty Ltd* [2017] NSWSC 218

(NSW Supreme Court, Button J, Date of Decision: 9 March 2017)

**Facts and Issues:** (*whether appeal or review was appropriate*) The worker sought judicial review of a medical assessment certificate (MAC) issued by an approved medical specialist (AMS) on 24 July 2013, asserting an error of law. In was accepted that there was no application made to appeal the MAC to a MAP. The respondent submitted that the Court had no power to make a determination on judicial review because there was no medical dispute and no proceedings on foot upon which an order for a further medical assessment may be ordered.

**Held:** His Honour held that the AMS provided a line of logical reasoning that was legally adequate, and that there was no error on the face of the record or a jurisdictional error. The Court also determined that it had no power to order a further medical assessment because there was no medical dispute and no proceedings on foot between the parties (at [46]).

**Note:** There was no evidence that the AMS's MAC was subject to a medical appeal in the Commission.

## *Jones v Qantas Airways Ltd* [2017] NSWWCCPD 11

(WCC, Keating P, Date of Decision: 4 April 2017)

**Facts and Issues:** (*whether arbitrator erred in findings, exceptions from making a claim within timeframes*) The worker, who retired in May 1991 as a flight attendant with Qantas, made a claim for hearing aids on 4 April 2016. The insurer declined the claim on the basis that it was not made within six months after the injury (s 261(1) of the 1998 Act). In the Commission, the worker argued that he did not make the claim within the prescribed timeframe because he was not aware of the requirement and that 'Qantas had been good to him'. The Commission found that there was no evidence the worker had been ignorant of his rights and held that the worker delayed making a claim based on his subjective belief about the way hearing aids worked and that he understood that the function of hearing aids was merely to amplify sound and that by suing them would further damage his hearing (at [34]-[35]). The senior arbitrator held that, despite suffering from a serious and permanent disability, the worker could not satisfy that his failure to make a claim within six months was occasioned by ignorance, mistake,

absence from the state or other reasonable cause (as set out in s 261(4)). The worker appealed on the basis of a misconstruction of s 261 and error in finding 'other reasonable cause' for not making a claim within time.

**Held:** The President rejected the worker's submissions and stated that "the question of reasonableness of [his] conduct is not measured by an objective view of [his] mindset but rather it is measured objectively in light of every circumstance in the case relevant to showing why the failure occurred" (at [82], following *Garratt v Tooheys Ltd* (1949) WCR 80 (*Garratt*))). Keating P also held that the senior arbitrator did not err in construing s 261 beneficially "in light of the fact that [the worker] acted promptly after his mistaken belief in relation to the benefits to be derived from the use of hearing aids was corrected upon receipt of medical advice" (at [94]). No error was found in the senior arbitrator's reasons and the appeal was dismissed.

**Note:** *Jones v Qantas Airways* [2016] NSWWCC 241 was reported in *WIRO Bulletin* Issue No 5.

## *Workers Compensation Nominal Insurer v Demasi* [2017] NSWWCCPD 9

(WCC, Keating P, Date of Decision: 29 March 2017)

**Facts and Issues:** (*whether arbitrator erred in declining reconsideration; jurisdiction of the Commission on work capacity decisions*) The worker lodged a claim for weekly benefits and medical expenses. The uninsured employer through the Nominal Insurer disputed the claim. In the Commission, the Nominal Insurer argued the worker did not suffer an injury, that he had no ongoing incapacity and that he was working for himself, not the employer, at the time of injury. The employer did not initially participate in the proceedings. The arbitrator eventually found in favour of the worker and made awards accordingly. The Nominal Insurer lodged a reconsideration request pursuant to s 350 of the 1998 Act on the basis of a work capacity decision (WCD) by way of a letter issued two months prior to the s 74 notice (which was admitted into but not advanced in the initial proceeding). The arbitrator declined to reconsider on the basis, among others, that it was not a matter for him to determine whether the letter was a WCD. The Nominal Insurer lodged an appeal against the arbitrator's refusal to reconsider the orders. Later, the employer sent its own reconsideration request, submitting that the worker was not its employee at the time of the injury, but a sole trader, a favourable consideration of which would lead to a different result in the claim. The arbitrator again declined the employer's reconsideration request.

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## *Cunningham v State of NSW (Sydney Local Health District)* [2017] NSWWCC 45

(WCC, Senior Arbitrator Catherine McDonald, Date of Decision: 22 February 2017)

**Facts and Issues:** (*whether or not employer was sufficiently noisy to cause hearing loss*) The worker was employed as a security officer by RPA and alleged hearing loss due to noise exposure during his 12-hour shifts for four days a week from an average of 40 to 60 alarms per day, loud ringing telephones, and helicopter landings on Sydney University Oval, among others. He also described being exposed to loud noise from fire alarms, duress alarms, ambulance and police sirens and noise in the control room, as well as previously working in noisy environments with Parramatta City Council and the Department of Main Roads as a plant operator. The hospital provided expert evidence that the noise of the fire and duress alarms from within the control room, as objectively measured, was not hazardous, particularly in relation to the nature and duration of the worker's shift duties. On evidence, Dr Scoppa reported that the worker's history of noisy employment was consistent with the development of hearing loss, but that his previous employment with Parramatta City Council and the Department of Main Roads was likely to have exposed him to noise levels well above those in the RPA control room as a security officer.

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### *Robin-True v Stella Maris College* [2017] NSWWCC 48

(WCC, Arbitrator Paul Sweeney, Date of Decision: 28 February 2017)

**Facts and Issues:** (*s 32A, worker with high/highest needs, s 39 and s 322A*) The worker sought a MAC from an AMS for the purpose of proving she was a worker with high/highest needs pursuant to s 32A of the 1987 Act so that she could be entitled to continuing weekly benefits after five years or 260 weeks under s 39. The employer disputed the action on the basis that the worker was prevented by s 322A of the 1998 Act from obtaining another MAC and by s 66(1A) of the 1987 Act from making a claim for further permanent impairment lump sum compensation. The agreed facts include that the worker received a complying agreement in January 2013 for 12% WPI and received lump sum compensation on that basis (which was a binding agreement). The issue in the proceeding was the meaning of "worker with high needs" and of "worker with highest needs" and whether or not the worker was precluded from obtaining a MAC (s 322A) following the complying agreement.

**Held:** The arbitrator construed the relevant provisions and the impact of cl 28D Pt 2A of Sch 8 of the *Workers Compensation Amendment (Transitional Arrangements for Weekly Payments) Regulation 2016* which had import in the case and determined that:

> "[68] … The claim made in this case is not for permanent impairment compensation. It is, therefore, difficult to understand why s 66(1A) has any application at all. It cannot be the leading provision on the issue of when a referral can be made for the purpose of a medical assessment of workers with higher (sic) or highest needs. It only forbids multiple claims for permanent impairment compensation. Unlike s 322A(2) of the 1998 Act, the language of s 66(1A) of the 1987 Act does not purport to place any general embargo on the number of medical assessments."

The Commission opined that s 66(1A) had no work to do in the current case, while also determining, (and relying on *Roche v Australian Prestressing Services Pty Ltd* [2013] NSWWCCPD 7) that the complying agreement did not form an estoppel and that the worker could pursue a further claim for lump sum compensation because the issue in that agreement concerned an issue that was capable of change (degree of permanent impairment) (at [70]). The restrictions in s 322A did not operate in the case as it dealt with a completely different subject matter. The worker was not precluded from a medical assessment of permanent impairment in this case (at [76]). The matter was remitted to the Registrar for a referral of the medical assessment to an AMS for the purpose of the definition of "worker with high/highest needs" in s 32A of the 1987 Act.

### *Kimber v NSW Police Force* [2017] NSWWCC 53

(WCC, Arbitrator Deborah Moore, Date of Decision: 9 March 2017)

**Facts and Issues:** (*costs entitlement by exempt worker*) The police officer worker, who was exempt from the impact of the 2012 reforms, made a claim for permanent impairment lump sum compensation for 19% WPI as a result of a psychiatric injury, with a deemed date of 12 March 2013. Following the insurer's dispute, the matter was referred to an AMS, who subsequently assessed 8% WPI. On appeal, the MAP confirmed the AMS's decision. The Commission issued a COD with no order as to costs made. The worker approached the Commission and sought an order of costs, noting her classification as an exempt worker (from the restriction of costs in the 2012 amendments) and for reason that she was only unsuccessful in meeting the requirement in s 64A(3) of the 1987 Act. It became apparent that the worker was also seeking the costs of obtaining the medical examination report pursuant to s 73 of the 1987 Act, and that she was entitled to costs as set out in cl 6 of Pt 1 of Sch 6 of the 2016 Regulation.

**Held:** In construing the relevant provisions and the common law principle of "costs follow the event", the arbitrator held that the worker would also not be successful in obtaining the costs of the medical report. Further, cl 6 of Pt 1 and the other relevant provisions in Sch 6 did not apply in circumstances where the claim was wholly unsuccessful. At [29], the arbitrator applied the general rule of "costs follow the event" and declined to make an order of costs in favour of the worker.

### *Miller v The State of New South Wales (Home Care Services Division)* [2017] NSWWCC 66

(WCC, Arbitrator Brett Batchelor, Date of Decision: 21 March 2017)

**Facts and Issues:** (*onus of proof of injury*) The deceased worker suffered an asthma attack and subsequently died while transporting clients to medical appointments from Brewarrina to Dubbo ((the worker was relieving another driver at the time of the incident). She had a predisposition to suffering severe asthma attacks all her life, but the applicant submitted that the deceased worker's asthma condition was "well controlled".. The applicant claimed death benefits on the basis of his wife's death arising out of or in the course of her employment. The insurer accepted that the injury occurred in the course of the deceased worker's employment, but disputed that it arose out of employment or that the employment was a substantial contributing factor.

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### *Thadsanamoorthy v Teys Australia Southern Pty Limited* [2017] NSWWCC 73

(WCC, Arbitrator Josephine Bamber, Date of Decision: 27 March 2017)

**Facts and Issues**: (*worker outside Australia; entitlement under s 53*) The worker was on a work experience visa as a meat labourer with the employer when he slipped on a patch of fat on the abattoir floor and injured his knee. He had three knee operations after the injury, following which he returned to light duties. In March 2016, the worker's visa status became uncertain, but he continued to receive weekly payments under s 36. On 2 August 2016, the worker was deported to his country of origin. The worker's lawyer notified the insurer and sought continued weekly payments under s 53(2) of the 1987 Act. In September 2016, the insurer issued a s 74 notice disputing the worker's continued entitlement to weekly benefits, and discontinued the payments on the basis that the worker failed to provide certificates of capacity to prove the incapacity to work under s 44B of the 1987 Act.

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# PROCEDURAL REVIEW UPDATES

## Work capacity decision reviews

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

### Decision *WIRO – 3717* (28 April 2017)

**Facts:** The insurer issued a WCD on 24 October 2016 that informed the worker his weekly payments would cease on 28 October 2016 on the basis of evidence that the worker could work in suitable employment for 40 hours per week and could actually earn more than his PIAWE.

### Decision *WIRO – 3017* (29 March 2017)

**Facts:** The insurer informed the worker that a WCD in accordance with s 43(1)(d) had been issued with the calculation of his PIAWE to be $1,669.08. The worker lodged an internal review with the insurer, which resulted in the reviewer finding an error in the PIAWE calculation

The worker's own nominated treating doctor (NTD) surmised that the worker had current work capacity of 40 hours per week but with restrictions on prolonged standing and lifting. The decision was confirmed on internal review. The Merit Review Service, however, recommended that the insurer determine the worker's weekly entitlements in accordance with their own findings of the worker's ability to earn. The worker sought procedural review, with further submissions made that the insurer also advised him in the WCD that his entitlement to rehabilitation assistance would also cease on 28 October 2016. This further submission appeared to be contrary to the provision under s 59A of the 1987 Act, where the worker would be entitled to these rehabilitation services for a period of at least two years after the weekly payments had ceased. The worker alleged that the insurer had misinformed him about this entitlement in the WCD.

**Held:** The WIRO considered the Guidelines in effect as at 1 August 2016, which remained valid despite any technical breaches, unless the worker had been "misled" and consequently suffered prejudice or fell victim to procedural unfairness. The WIRO found that, in informing the worker about the cessation of rehabilitation services on the same date as that of weekly payments, the insurer had misled the worker. Accordingly, there was a material breach of the Guidelines which rendered the WCD invalid. The WCD was set aside and the WIRO recommended the insurer make a new WCD.

and re-calculating it at $1,400.00 after taking into account the employer superannuation contributions. On further review, the Merit Review Service issued a finding that the worker's PIAWE was $1,400.00. The worker sought procedural review on the basis that his salary sacrifice contributions towards superannuation had been ongoing since 1994 and were incorrectly excluded in the calculation of his PIAWE both by the original decision-maker and the internal reviewer.

**Held:** The WIRO held that the worker's salary sacrifice contributions towards his superannuation are additional amounts that could not be disregarded when calculating PIAWE, since they were amounts payable to the worker, but for his direction to the employer otherwise. "They are not the same as payments mandated by the [Superannuation Guarantee Corporation] which are exempt from PIAWE calculation by virtue of section 44E(2)" (at [9]). There was error of law and a procedural error in that both the insurer and the Merit Review Service calculated the worker's PIAWE on the false assumption that the worker's salary sacrifice contributions were to be disregarded by virtue of s 44E(2). The WIRO set aside the WCD and the internal review decision, and recommended the insurer to make a new WCD which includes the salary sacrifice amounts as part of the worker's base rate of pay.

# WIRO POLICY UPDATES

## Recent WIRO policies

### New arrangements for provision of clinical notes and obtaining medico legal reports

WIRO has entered into a new agreement with Unified Healthcare Group Pty Limited (UHG) in relation to obtaining various clinical information. The new arrangement allows legal practitioners to access the Medibridge online system in order to obtain clinical notes and historical medical reports and information from various treatment and health services providers.

In order to access the new arrangements with UHG for the provision of clinical notes, approved legal services providers must obtain specific ILARS funding for UHG service costs, in addition to the actual costs of the reproduction of clinical notes and data.

The WIRO has also circulated an agreement to a number of medical service providers that advanced an interest in entering

into proposed arrangements with the WIRO Office to include in existing arrangements for clinical notes the provision and obtaining of medico legal reports from independent medical specialists. Talks are continuing towards facilitating a pilot program for this purpose.

Separate WIRO Wires have recently been issued in this regard:

Obtaining Medico Legal Reports – 19 April 2017;
Obtaining Medico Legal Reports – 24 April 2017.

# CASE STUDIES

## Cases from ILARS and the WIRO Solutions Group

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

***WIRO successfully pursues insurer to backdate s 38A payment:*** The worker's lawyer sought ILARS funding to pursue a claim for payment under s 38A of the 1987 Act from the date of injury on 29 August 2015. The worker had been assessed by an AMS at the Commission with 35% WPI. The insurer refused to make the payments and stated that they would not make backpayments prior to the MAC, even though the permanent impairment had arisen directly as a result of the surgery that the worker had undergone a week after the injury.

The worker had his right eye removed and was assessed as having 24% WPI (for loss of vision in the right eye) and 15% WPI (for facial disfigurement on account of the loss of the eye), which were combined to be 35% WPI. The insurer relied on the case of *O'Donnell v Abroandco Ply Ltd* [2016] NSWWCC 129 (*O'Donnell*), where the Commission held that "the relevant entitling factor in the definition of worker with highest needs is not the suffering of injury but the assessment of permanent impairment or the exceptions from that assessment in paragraphs (b) and (c) of the definition of worker with highest needs" (at [54]). The notice to deny liability further stated that "the definition of worker with highest needs turns on the assessment of impairment, not the award of compensation".

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# WIRO MILESTONES

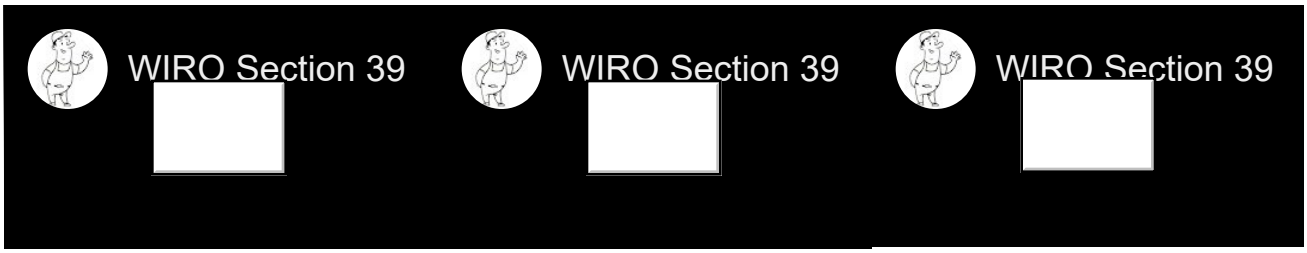
## Recent WIRO outcomes and activities

### New WIRO videos on section 39

WIRO has released three new videos in relation to the operation of s 39 for informational purposes. Each video caters to specific audiences: **lawyers**, **insurers** and **workers**.

To watch the videos click on the WIRO YouTube videos below:

Section 39 Lawyers Video  Section 39 Workers Video  Section 39 Insurers Video




## *WIRO Solutions Brief* Issues 5 and 6

Issues 5 and 6 of the ***WIRO Solutions Brief*** have issued. 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 5 and WIRO Solutions Brief – Issue 6 are also up on the WIRO website.

## Successful back-to-back WIRO Courses

Paralegals and administrative staff from various law practices enthusiastically attended two back-to-back sessions of the popular WIRO Course for Paralegals and Administrative Staff in Sydney's College of Law on 4 May 2017. Once again, the WIRO staff talked on topics as diverse as the steps and pointers in filling in ILARS grant applications forms, preparing tax invoices to WIRO, the complex stakeholder structures within the scheme, to commencing proceedings in the Workers Compensation Commission. Watch out for future course dates.

## Insurer Workshops

WIRO is still inviting insurers / scheme agents to put forward expressions of interest if you want the office to conduct workshops. Send your EOIs to Jeffrey Gabriel, A/Director Solutions, at jeffrey.gabriel@wiro.nsw.gov.au.

## WIRO Seminars 2017

The successful WIRO Seminars are back in 2017. Please mark your calendars for the following dates. If you wish to attend, please register your interest and send an RSVP through the WIRO electronic invitations recently sent out.

Full agenda items will be released for each of the seminars.

5 June 2017 (Monday) – Sydney
16 June 2017 (Friday) – Orange
23 June 2017 (Friday) – Newcastle
21 July 2017 (Friday) - Albury

# FROM THE WIRO

IMPORTANT EVENTS AND ANNOUNCEMENTS


I am pleased to let you know of my successful attendance as a Jurisdictional Member (International Committee) at the 2017 Forum of the International Association of Industrial Accident Boards and Commissions (IAIABC) in Kansas, USA, in April. The forum was a complete success, with various heads and representatives of accidents and compensation entities from all over the world discussing recent trends and projections within the individual schemes.

**Photo courtesy of the IAIABC**

Preparations by my office are also now in full swing for the series of regional seminars across New South Wales, which

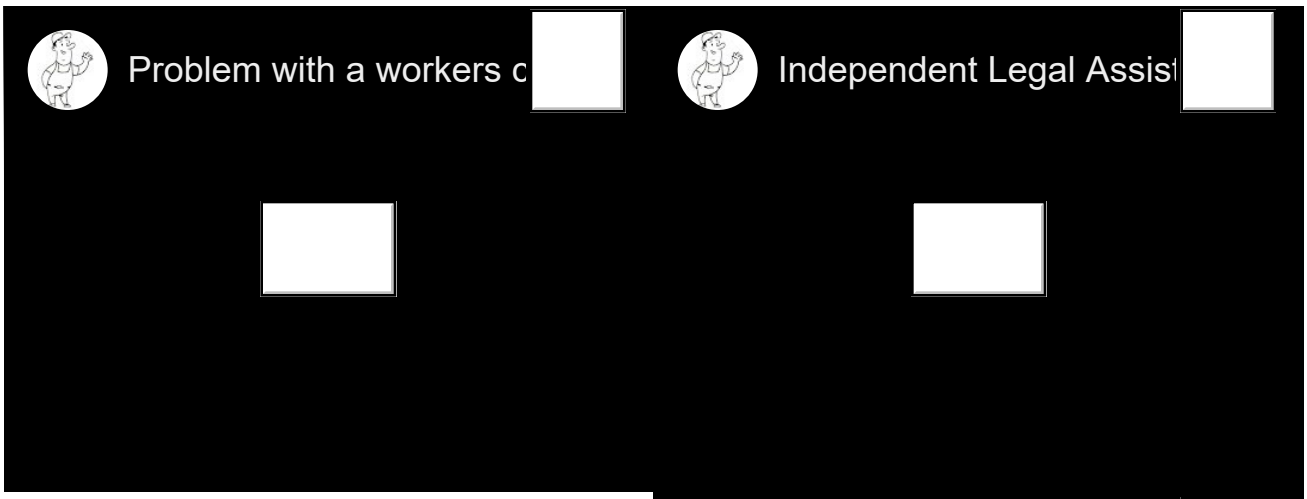
commenced in Ballina on 19 May 2017 and in Wollongong on 26 May 2017.

There are still places available for the Seminars in Sydney (5 June), Orange (16 June), Newcastle (23 June) and Albury (21 July), so send your RSVP, if you haven't done so. I look forward to seeing you all in the seminars, which have the underlying theme of "the future of workers compensation in NSW".

I draw your attention to the recent announcement from icare to appoint EML (formerly Employers Mutual Limited) as the sole claims manager for new workers compensation claims made on or after 1 January 2018. This is a significant change in the claims management system and is expected to impact various stakeholders including the employers.

Please let me know any concerns that you have about the transition to the monopoly claims manager.

**Kim Garling**




## 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