



Workers Compensation
independent review office

ANNUAL REPORT 2019 – 2020

The Workers Compensation Independent Review Office 2019/20 Annual Report has been prepared in accordance with the relevant legislation for the Hon. Victor Dominello MP.

Workers Compensation Independent Review Officer

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**Workers Compensation
independent review office**

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The Hon. Victor Dominello
MP Minister for Customer
Service Parliament House
Macquarie Street
Sydney NSW 2000

3 December 2020

Dear Minister

In accordance with section 27C of the *Workplace Injury Management and Workers Compensation Act 1998*, I have pleasure in submitting, for your information and presentation to Parliament, the Annual Report of the Workers Compensation Independent Review Officer for the period from 1 July 2019 to 30 June 2020.

Yours sincerely,

Simon Cohen
Workers Compensation Independent Review Officer

MESSAGE FROM THE INDEPENDENT REVIEW OFFICER

A common observation of the NSW workers compensation system is that it is complex. An injured worker's entitlements depend on factors such as the nature of their employment, when they were injured, when they first claimed compensation, when they last received weekly benefits and an assessment of impairment against technical medical guidelines. Given this complexity, it is critical that injured workers can find quick solutions to problems and easily access expert legal advice.

WIRO's roles in dealing with injured workers' complaints and granting funding to expert lawyers to advise and represent them respond to these critical needs. 2019/20 has seen the highest demand for our services since we were established in 2012. We responded to more than 7800 complaints and over 10,000 enquiries and decided over 17,500 applications for legal funding.

Our Solutions service aims for timely and fair outcomes. More than 90% of complaints were finalised within 14 days. Over 85% of all complaints and early intervention matters were resolved, including more than 2400 matters where the worker achieved an additional benefit.

Our Independent Legal Assistance and Review Service (ILARS) adopted a new funding policy in September 2019, enabling Approved Lawyers to apply earlier for funding to assist an injured worker, ensuring more immediate access to legal advice. More than 85% of applications were assessed within 5 business days, and in more than 95% of matters funding was granted.

In addition to focusing on timely, fair and effective services we aim to improve the workers compensation system. A priority has been improving notices to injured workers to both ensure legal compliance and reduce causes of complaints. We also reviewed every complaint and application related to COVID-19 to inform policy and operational responses across the system.


It is a credit to the WIRO team that we managed the increase in our work and improved

responsiveness while responding to COVID-19. For many here, that included not only undertaking remote work for the first time but juggling multiple caring and other responsibilities simultaneously. I offer my deep gratitude to every WIRO staff member for making sure we delivered high standard services over this extraordinary time.

Kim Garling, the first Independent Review Officer, completed seven years at the helm in December 2019. Kim's reputation as an honest broker in the workers compensation system was formidable. He established and led a highly effective WIRO, a unique organisation which has consistently delivered great outcomes for workers and the system during Kim's tenure. This report is a further reflection of Kim's substantial contribution.

All of us here are looking forward to the challenges and opportunities in the coming year, including implementing reforms in the *Personal Injury Commission Act 2020*. The Act expands our role to deal with complaints about insurers by persons injured in motor vehicle accidents. It also strengthens our independence by both providing a statutory basis to our ILARS function and establishing the Office of the Independent Review Officer as a separate Public Sector agency. The reforms are a strong endorsement of this office and our role.

I commenced as Independent Review Officer in February 2020. I have appreciated the warm welcome from all involved in the workers compensation system, who have generously shared with me their knowledge and insights. All share our passion for a high functioning system that assists injured workers to recover, return to work where possible and receive fair compensation.



Simon Cohen
Workers Compensation Independent Review Officer

ABOUT THIS REPORT

The 2020 Workers Compensation Independent Review Office (WIRO) Annual Report is prepared pursuant to section 27C of the Workplace Injury Management and *Workers Compensation Act 1998* (WIMA) and is a report on our activities for the 12 months ending 30 June 2020.

About WIRO

The NSW Parliament established the statutory office of the Workers Compensation Independent Review Officer (Independent Review Officer) in 2012 as part of significant reforms of the workers compensation scheme. The Independent Review Officer is assisted by a team of Department of Customer Service employees under the *Government Sector Employment Act 2013*. Collectively, this team and the Independent Review Officer are known as WIRO, the Workers Compensation Independent Review Office.

The statutory functions of the Independent Review Officer include dealing with complaints by workers who are injured in the course of their employment about the acts or omissions of workers compensation insurers and inquiring into matters connected with the operation of workers compensation legislation.

In addition, WIRO manages the Independent Legal Assistance and Review Service (ILARS) which funds Approved Lawyers to provide legal advice and assistance to injured workers pursuing workers compensation entitlements. WIRO intervenes in some ILARS grant funding matters to promote early solutions for workers compensation claims.

WIRO also runs seminars and publishes information about the latest cases and reforms in workers compensation. This contributes to the professional development of lawyers, insurers and others with an interest in NSW workers compensation.

WIRO 2019/20 SNAPSHOT

Key data to highlight WIRO impact over 2019/20

EARLY SOLUTIONS

7,835 complaints
from injured workers

UP 65%
from 2018/19

92% of complaints
FINALISED within 14 days

Top 3 complaint primary issues 2019/20:

- 1** Delay in determining liability **28%** (2,193)
- 2** Delay in payment **21%** (1,671)
- 3** Weekly Benefits **15%** (1,165)

87% of complaints and
early interventions matters
resolved, including 42% resolved
with an action or benefit in favour
of the injured worker

GRANTS OF LEGAL FUNDING

17,545 new applications
for ILARS grant funding

UP 50%
from 2018/19

86% of new applications
assessed within 5 business days

Top 3 issues – Approved ILARS Applications
by Primary Issue of Case 2019/20

- 1** Permanent impairment **55%** (7,674)
- 2** Weekly payments **15%** (2,100)
- 3** Medical treatment **13%** (1,808)

8,316 ILARS grant funding matters finalised with an outcome that the worker has improved their position or fully succeeded in the claim (76 per cent of all matters proceeding to an outcome)

PROFESSIONAL DEVELOPMENT

945 in-person and online delegates attended WIRO's February 2020 Sydney Seminar and 40 WIRO Bulletins and Wires published

EARLY SOLUTIONS

WIRO provides an informal, accessible and effective information and complaints service for injured workers. The core elements of this service include:

- informal access by injured workers (by telephone, online, email, mail or in-person) to expert WIRO dispute resolution officers
- fast and fair solutions for injured worker complaints
- expert information provided for general enquiries about how the workers compensation scheme operates
- early intervention in some ILARS funded matters to seek quick resolution
- collection of information to identify systemic issues that may warrant review.

Key data

Complaints and enquiries

The use of WIRO complaint and enquiry services has more than doubled over the past three (3) years. Complaints have grown 65 per cent from 4,744 complaints in 2018/19 to 7,835 complaints in 2019/20.

Table 1: Enquiries and Complaints received by WIRO 2017/18 – 2019/20

	Enquiries received	Complaints received
2019/20	10,355	7,835
2018/19	7,124	4,744
2017/18	3,536	3,122

Note: The above complaints data does not include early intervention matters. See data dictionary.

A key reason for an increase in demand is the reforms that commenced on 1 January 2019. Under the reforms WIRO is a single point of contact for injured workers to raise complaints about workers compensation insurers.

The continued increase may also in part be a result of improved awareness of WIRO and our role. In addition, there has been an increase between 2016/17 and 2018/19 in new workers compensation claims and open workers compensation matters, and possibly an increase in disputation generally as demonstrated by a parallel increase in applications for ILARS grant funding during 2019/20.

Table 2 includes the top three (3) categories of complaint issues received by WIRO, as defined by the primary issue.

Table 2: Top 3 number and type of complaints received 2017/18 – 2019/20

Complaint type	2019/20		2018/19		2017/18	
	No.	%	No.	%	No.	%
Delay in determining liability	2,193	28%	1,447	30%	684	28%
Delay in payment	1,671	21%	536	11%	416	13%
Weekly benefits	1,165	15%	1,290	28%	686	22%

Notes:

The above data is categorised as one issue per complaint. Where complaints have multiple issues, the primary issue is recorded.

WIRO undertook substantial changes to its issue categories from 1 July 2019 to reflect reforms in the broader workers compensation scheme including for work capacity decisions and pre-injury average weekly earnings calculations. These changes limit comparisons between issue types in periods prior to 1 July 2019.

Enquiries are more likely to be of a general nature. In 2019/20, the most common type of enquiry was about how to make a workers compensation claim (28 per cent), followed by general case management (15 per cent) and benefits queries (12 per cent).

Early interventions

In addition to finding fast and fair solutions to complaints, WIRO also identifies ILARS funded matters that may be appropriate for intervention to prompt early solutions. Most commonly, where grant funded matters relate to claims to which the insurer has not responded WIRO will raise the matter with the insurer to prompt a decision. Early interventions support just, quick and inexpensive solutions to workers compensation disputes.

In 2019/20 WIRO identified 974 matters suitable for early intervention and resolution (see Table 3).

Table 3: WIRO early intervention matters 2017/18 – 2019/20

	No. WIRO early intervention matters
2019/20	974
2018/19	1,244
2017/18	1,159

Note: An early intervention matter is one that is the subject of an ILARS grant of funding, where the injured worker has legal representation and where it may be appropriate for WIRO to intervene to prompt early solutions.

Timely solutions

A key element of WIRO’s service is to find early and quick solutions to disputes arising under the workers compensation legislation.

In 2019/20 approximately 67 per cent of complaints were finalised within seven (7) days of receipt and 92 per cent within 14 days.

Of the 974 early intervention matters, on average it took 4.5 days to close a matter, with 90 per cent of cases closed and resolved within 7 days.

Fair solutions

WIRO works to ensure fair solutions for injured workers and insurers.

WIRO assists injured workers who make enquiries by providing expert information about the operation of the workers compensation scheme. This can include providing information about making a claim and referring the worker elsewhere when WIRO is not the agency to assist.

For those workers who make complaints or where WIRO intervenes following a grant application, 87 per cent of matters finalised were resolved in 2019/20. Table 4 below summarises the outcomes of the complaints and early intervention matters.

Table 4: Complaints and early intervention matters outcomes 2019/20

Outcomes achieved	No. of matters (complaints and early intervention matters)	Complaints received
Resolved – action	1,328	15%
Resolved – benefit	2,403	27%
Resolved – information	3,972	45%
Referred	574	7%
Not resolved	252	3%
No action/ other	254	3%

Note: see data dictionary

In over a quarter of all matters (27 per cent), the resolution provided a direct benefit to the injured worker. This includes cases where the insurer accepted liability for the worker’s claim or increased the value of a benefit (for example, increased weekly payments).

In 15 per cent of matters, the resolution resulted in the insurer taking an action to progress a claim or resolve a complaint, such as by amending an injury management plan or arranging a medical examination.

Matters may also be resolved by providing further and better information to an injured worker about a decision or independently verifying that information provided by an insurer is correct. Almost 4,000 matters were resolved by obtaining, reviewing and explaining information about decisions affecting workers and their entitlements.

In instances where a complaint is not resolved to the satisfaction of the injured worker, WIRO may refer the worker to seek advice, at no cost to them,

from an Approved Lawyer. In these matters the Approved Lawyer will seek an ILARS grant of funding to assist the injured worker (see case study 7).

The case studies below are typical examples of matters that demonstrate the impact of these early solutions and interventions.

Case Study 1 – early solution to complaint

An injured worker complained to WIRO that their weekly payments had been suspended without notice and they were unable to buy food. The insurer advised WIRO that payments had been suspended as the worker had not complied with their statutory obligation to make a reasonable effort to return to work in suitable employment. After WIRO pointed out that the insurer had not complied with the notice provisions required before making such a suspension, the insurer reinstated weekly payments and paid the outstanding back payments.

Case study 2 – early solution to complaint

An injured worker complained to WIRO that the insurer had declined to pay for further pain relief injections which were a prerequisite for a planned exercise physiology program. WIRO's enquiries revealed the insurer had relied on an independent medical examination (IME) report which concluded that the worker's current symptoms were the result of a pre-existing degenerative condition rather than the workplace injury. WIRO noted that this report was at odds with other reports and clinical evidence and requested the insurer reconsider whether to approve the remaining injections to enable the worker to commence the exercise physiology program. Following WIRO's intervention the insurer agreed to pay for the medical treatment.

Case Study 3 – early intervention

A worker suffered both physical and psychological injuries following a workplace accident in which they received an electric shock. The worker's Approved Lawyer sought an extension of their grant of funding to proceed to the Workers Compensation Commission after the insurer failed to respond to the worker's claim for permanent impairment lump sum compensation. WIRO determined to intervene early in the dispute and contacted the insurer to seek a response to the claim. Following WIRO's intervention, the insurer accepted the worker's claim for 23 per cent whole person impairment and agreed to pay the lump sum entitlement. As a consequence, the dispute was solved within eight days of the grant extension application being received by WIRO and without the need for the dispute to be referred to the Commission.

Complaints made but not dealt with in 2019/20

There were 152 complaints opened but not finalised as at 30 June 2020. All of these cases were opened in May and June 2020 and all have now been finalised. As required by the annual reporting provisions of WIMA we provide details of the number and type of complaints made but not dealt with in 2019/20.

Table 5: the number and type of complaints made during 2019/20 remaining open at 1 July 2020

Issue	Open at 1 July 2020
Delay in determining liability	44
Delay in payment	26
Denial of liability	6
Employer Complaint	1
General Case Management	11
IME/IMC	5
Non-Insurer Complaint	1
Request for Documents	8
Weekly Benefits	32
Work Capacity Decision	13
Workplace Injury Management	5
Total	152

Early solutions observations

Delay in determining liability

Twenty-eight (28) per cent of complaints to WIRO are from injured workers who report that the insurer has not determined their claim within the required timeframe (see Table 2).

Timely determination of claims is required by the legislation. Injured workers rely on insurers making timely decisions so that they can progress their claim, access treatment to aid in recovery and meet financial commitments. A delay can have a deleterious impact on an injured worker's physical, financial and psychological wellbeing.

Case Study 4 – delay in determining liability

The injured worker notified the insurer of a psychological injury. The insurer sought to reasonably excuse determining the claim and therefore not commence weekly payments based on insufficient medical information. The injured worker then submitted a worker's injury claim form, which required the insurer to determine the claim within 21 days. The injured worker contacted WIRO after the 21-day period, complaining that the insurer had not determined the claim. The worker reported they were in financial hardship, having gone nearly a month without pay and being unable to pay rent. WIRO made enquiries with the insurer about the delay in determining the claim and provided information about the worker's vulnerable situation. As a result of the enquiries, the insurer agreed to accept provisional liability and pay weekly payments to the worker for a period of up to 12 weeks while it continued to investigate the claim. During the 12-week period the insurer determined to accept liability for the claim.

Given delay in determining liability is the most common issue raised in complaints, WIRO is finalising a systemic analysis project examining 100 complaints from the 2019/20 financial year. This will help provide a better understanding of the reasons for delay, how this has impacted injured workers and any opportunities for improvement.

Weekly payments by employers

Complaints about weekly benefits are the third most common issue raised, with more than 1160 complaints made in 2019/20. A common cause for this is errors made by employers who make weekly payments directly to injured workers.

It is common for employers to make weekly payments to injured workers on behalf of insurers and, when done well, this is often a preferable system. It is administratively streamlined from the injured worker's perspective and maintains their relationship with the employer.

Administering workers compensation payments can be complex and many small employers may do it infrequently without a full appreciation of the complexity involved in determining payments. Approximately 6 per cent (467) of all complaints made by injured workers to WIRO in 2019/20 were matters where WIRO established there had been errors by employers in making weekly payments.

WIRO's view is that insurers share a responsibility with employers to remedy any errors in payments. In some cases, WIRO's view is that an insurer is not active enough in remedying payment errors. WIRO is also concerned that delays in resolving these complaints can impact on the trust between the employer and worker, potentially impacting the speed and success of the worker's return to work.

WIRO proposes to monitor errors in payments attributed to employers closely in 2020/21, to identify any systemic causes and possible solutions to reduce these complaints and their substantial impact on injured workers.

Case Study 5 – errors in weekly payments by employers

An injured worker complained to WIRO that their weekly payments had been significantly reduced without explanation and that they were in severe financial hardship. The worker believed that the insurer may have been recouping an overpayment, but the insurer maintained it had been paying the correct amount to the employer. WIRO's enquiries revealed that the employer had been underpaying the worker due to confusion about the correct amount payable under the NSW workers compensation legislation. Following WIRO's intervention the employer agreed to make an out of cycle payment for the shortfall owed to the worker.

General case management

During the 2019/20 financial year, WIRO dealt with 595 complaints about general case management. This issue encompasses subjects such as communications style, changes of case manager and other matters of customer service. Poor customer service can be a cause of significant and unnecessary distress for workers and their families. In addition, when a worker feels like they are being treated with respect, they are more likely to engage with the insurer and focus on their recovery.

Case Study 6 – general case management

The daughter of a deceased worker who had been receiving workers compensation complained to WIRO that various letters and emails about weekly payments had been sent to the worker for several months after notification of their death. The daughter had complained to the insurer after each notification which caused trauma and distress. Following WIRO's intervention the insurer identified the cause of these repeated errors, took steps to prevent a repeat of these notifications and apologised to the daughter for the inappropriate and upsetting communications.

GRANTS OF LEGAL FUNDING

WIRO administers the Independent Legal Assistance and Review Service (ILARS) to ensure injured workers have access to lawyers who are expert at workers compensation law and practice to advise, assist and represent them in accessing workers compensation entitlements.

The core elements of this service include:

- simple, clear and accessible processes for lawyers to be approved to make applications for grants of funding
- fast, consistent and fair decision making on applications for grants and extensions of funding by expert WIRO Principal Lawyers, so that external Approved Lawyers can provide high-level services to injured workers
- early intervention in some matters the subject of an ILARS grant to seek early solutions
- collection of information to identify systems issues that may warrant review.

Key data

Applications for grants of funding

WIRO received 17,545 grant applications in 2019/20 as set out in Table 7. This represents a 50 per cent increase in demand, with 5,878 more grant applications received by WIRO in 2019/20 compared to the previous financial year.

Table 7: Number of new ILARS Grant applications 2017/18 – 2019/20

Financial Year	No. ILARS grant applications
2019/20	17,545
2018/19	11,667
2017/18	13,367

One reason for the increase in demand for grant applications is reform to the WIRO Funding Policy. A new WIRO Funding Policy and Grant Amount Guide were introduced on 2 September 2019 after extensive consultation.

A significant change to the Funding Policy was to bring forward the initial application by a lawyer for a grant of funding.

Previously funding was not applied for until after Approved Lawyers had undertaken substantial investigations and provided detailed advice. Approved Lawyers and WIRO were concerned this approach impacted on the access of workers to advice about rights and entitlement and timely legal assistance.

Approved Lawyers can now apply for funding at an earlier point in time, when a worker initially consults the lawyer for advice. Our early analysis indicates that this has brought forward applications for funding in matters where, previously, the application would not have been made until a later stage.

WIRO's analysis also indicates an increase in applications for grants of funding where:

- medical and other treatment claims have been denied on the basis that the treatment is not reasonably necessary
- workers are seeking assessment of the degree of whole person impairment to establish ongoing entitlement to medical benefits due to the cessation of their weekly benefits between September 2017 and June 2018 (the impact of the operation of section 39 *Workers Compensation Act 1987* (WCA))
- workers are seeking assessment of the degree of whole person impairment to establish ongoing entitlement to weekly benefits as a consequence of a work capacity assessment and work capacity decision between 78 and 130 weeks

The increase in demand for WIRO's funding services may also reflect an increase in new and open workers compensation claims between 2016/17 and 2018/19, or more generally an increase in disputation in the workers compensation system.

In over 55 per cent of approved applications, with an identified issue in 2019/20, funding was provided to pursue permanent impairment lump sum compensation including for hearing loss (7,674). Claims for weekly payments, including work capacity decisions, accounted for 15 per cent (2,100) of grants. A further 13 per cent of applications (1,808) related to claims for medical treatment, including the provision of hearing aids. In 2,162 approved applications general advice was sought.

There were also 2,968 cases where the nature of the claim had not yet been determined or identified, (Stage 1).

Timely decisions

Provided the application is made by an Approved Lawyer, and the injured worker is one whose rights and entitlements to benefits are provided for under the NSW statutory workers compensation scheme then generally there will be a presumption in favour of approving funding. In 2019/20, 95 per cent of all new applications for an initial grant of funding were approved. When funding was not approved, the most common reason was that the application concerned a matter where funding was already in place for the worker.

In more than 86 per cent of initial Applications a grant of funding was processed within five (5) business days, with the average assessment being conducted within 4 days of receipt. This is a significant improvement on the prior year's average of 10 days.

Fair outcomes

WIRO is focused on facilitating fast and fair resolution of disagreements or disputes and avoiding delay in achieving an outcome of a dispute. ILARS encourages Approved Lawyers to adopt the same practical approach and to harness the services and resources of WIRO in this regard.

In 2019/20 12,440 grants for funding were finalised, largely in line with trends over previous years.

Table 8 sets out the stage at which ILARS grants are finalised. Most matters are able to be finalised without the need for the injured worker to refer a dispute to the Workers Compensation Commission (WCC). This includes matters resolved by direct negotiation after investigation of a worker's claim and those matters where WIRO successfully intervenes at an early stage to prompt a solution.

Table 8: Outcome type for all finalised ILARS grants 2017/18 – 2019/20

Outcome		2019/20	2018/19	2017/18
Pre-proceedings	No.	5,070	4,843	3,603
	%	41%	39%	31%
WCC or Court	No.	3,921	3,936	4,078
	%	31%	32%	35%
Other outcome	No.	3,449	3,506	3,962
	%	28%	29%	35%
Total of Grants		12,440	12,285	11,643

Notes: 'Pre-proceedings' include funded matters where early solutions are achieved with the assistance of WIRO.

'Other Outcomes' include matters where the worker ceases to instruct a lawyer, where a lawyer has lost contact with a worker or where WIRO withdraws funding and the grant matter does not proceed to any outcome.

Whether the matter is resolved either before or at the Commission, the clear majority of ILARS grant matters (8,316 or 76 per cent of all ILARS grants finalised in 2019/20 with an outcome) result in an outcome where the worker has improved their position. Table 9 shows the results where a grant has concluded with an outcome.

Table 9: Finalised ILARS grants by outcomes achieved 2017/18 – 2019/20

Year		2019/20			2018/19			2017/18		
		Outcome Achieved	Outcome not achieved	Total	Outcome Achieved	Outcome not achieved	Total	Outcome Achieved	Outcome not achieved	Total
Outcome Prior to WCC	No.	5,065	1,908	6,973	4,726	1,613	6,339	3,508	2,291	5,799
	%	73%	27%	100%	75%	25%	100%	60%	40%	100%
Outcome in WCC/ Court	No.	3,251	670	3,921	3,318	618	3,936	3,459	619	4,078
	%	83%	17%	100%	84%	16%	100%	85%	15%	100%

In Table 9 above 'Outcome achieved' includes all grants where the worker has improved their position or fully succeeded in the claim or dispute.

'Outcome not achieved' includes those grants where the worker instructs a lawyer not to proceed after advice has been received, where the worker is advised a claim is not viable or where medical evidence is not supportive of the worker's claim. It also includes matters where the worker's injury is not yet medically stable (and hence the level of permanent impairment cannot be assessed) or where commutation negotiations fail.

Approved Lawyers

As at 30 June 2020, there were 780 lawyers approved to apply for grants of funding under the ILARS. To be approved, a lawyer must demonstrate that they have sufficient and contemporary experience in dealing with workers compensation claims. WIRO maintains a geo-mapped list of Approved Lawyers on its website so that injured workers can identify a lawyer to approach for assistance in a location convenient for them.

In addition, there were 175 barristers approved by WIRO to undertake advocacy for injured workers.

Consistent with the expectation that lawyers have contemporary experience in dealing with workers compensation matters, WIRO undertook an audit of all Approved Lawyers during 2019/20 and removed the approval of 135 lawyers who had not submitted an application for an ILARS grant of funding after 30 June 2017.

Funding paid in 2019/20

ILARS paid approximately \$37.1M in professional fees and \$24.8M in disbursements during 2019/20. This is an increase of 6 per cent from 2018/19 where \$35 M and \$23.3M were paid in professional fees and disbursements respectively.

Observations from grant applications

Clarifying the law through funding appeals

WIRO provides grants of funding to enable injured workers to challenge or defend decisions of the Workers Compensation Commission and the Courts. Where the worker is defending a decision in their favour, these grants are generally provided without condition. Where the worker seeks to challenge a decision, advice from an Approved Barrister about the prospects of success that supports the appeal is generally required. Conditions for these appeals may include that payment of legal costs will only be made in the event of a successful outcome.

Funding to support appeals in appropriate circumstances is not only important to the individual worker concerned but is often vital to clarify contentious legal issues that arise due to the complexity of the workers compensation legislation. Two Court of Appeal decisions in 2020 where the workers' appeals were supported by a grant of funding demonstrate this.

The first decision, in the cases of Hochbaum and Whitton (*Hochbaum v RSM Building Services Pty Ltd; Whitton v Technical and Further Education Commission t/as TAFE NSW* [2020] NSWCA 113), involved the construction of section 39 of the WCA.

In 2012 legislative amendments replaced section 39(1) of the WCA to provide that a worker has no entitlements to weekly payments after an aggregate period of 260 weeks. However, section 39(2) provides that the section does not apply to an injured worker whose injury results in permanent impairment of more than 20 per cent.

Both workers impacted by this decision had been assessed as having permanent impairment of more than 20 per cent at some point after the 260-week period. The issue was whether weekly payments were recoverable for the period between the cessation of payments to the workers at 260 weeks and the date of assessment of permanent impairment at greater than 20%. In each case an arbitrator had held that the worker was entitled to back payments for the disputed period. On appeal, the President determined there was no such entitlement.

The Court of Appeal held that the 260-week limit never applies to a worker whose degree of permanent impairment resulting from the relevant injury exceeds 20%, regardless of when the threshold is crossed. The workers were therefore entitled to back payment of compensation for the disputed period.

This decision resolved a highly contentious issue and clarifies that workers with reduced work capacity and high needs have continuing entitlements to weekly payments.

The second decision, in *Ballas v Department of Education (State of NSW)* [2020] NSWCA 86, concerned the construction of section 327 of the WIMA.

The injured worker suffered a psychological injury and claimed compensation for permanent impairment. The Approved Medical Specialist (AMS) appointed by the Commission assessed the worker as having an 8 per cent whole person impairment.

The injured worker appealed the assessment on the basis that the AMS had made a "demonstrable error" and "applied incorrect criteria", two grounds for appeal provided for in section 327(3) of the WIMA. A delegate of the Registrar refused the application on the basis that they were not satisfied the AMS had made the assessment based on incorrect criteria or that there was a demonstrable error. The worker was also unsuccessful in their application for judicial review in the Supreme Court.

The Court of Appeal, in upholding the worker's appeal, held that the delegate had misconstrued the "gatekeeper" nature of the task ascribed to the Registrar by section 327 of the WIMA. The key question for the Registrar was whether the appeal grounds were capable of being made out, and not whether in fact the grounds for appeal were made out, a role which is instead to be performed by a Medical Appeal Panel (MAP).

This important decision clarifies the threshold that parties to a workers compensation dispute need to establish in order to seek a review of an AMS assessment by a MAP.

SYSTEM OVERVIEW

Continuous improvement in the worker compensation system

WIRO has a role in contributing to improvements in the workers compensation scheme as a whole. WIRO draws on its complaints, enquiries and applications for ILARS grant funding data to identify opportunities to drive continuous improvement in the workers compensation scheme. WIRO uses the data to look at trends and patterns to help identify issues in the workers compensation scheme that may need to be improved.

Improving independent medical examination notifications

WIRO often works across functions to deliver outcomes for injured workers. A recent focus has been to improve independent medical examination (IME) notifications provided to injured workers by insurers.

An IME is a medical examination arranged for a worker by an employer or insurer and conducted by an appropriately qualified and experienced medical practitioner to help resolve an issue in injury or claims management. An insurer may direct a worker receiving weekly payments of compensation to attend an IME. All referrals for IMEs are to be arranged at reasonable times and dates, with adequate notification given to the worker and in accordance with the Workers Compensation Guidelines issued by SIRA.¹

WIRO has been engaging with icare about the content of IME notification letters. WIRO has found that the letters do not comply with the Guidelines as workers are not given adequate information, reasons for referral or notice about the appointment. As a result, any attempts to sanction workers for non-attendance at the IME by suspending weekly payments would be overturned by the Commission as occurred this year in the cases of *Craigie v Faircloth & Reynolds Pty Ltd [2020] NSWCC 40* and *Taylor v State of New South Wales [2020] NSWCC 5*.

Case study 7 – IME

An injured worker complained to WIRO that their weekly payments had been suspended. The notice sent by the insurer advised that the suspension was due to failure to attend a work capacity assessment and an independent medical examination (IME) organised by the insurer. Investigations by WIRO revealed an error with the insurer's suspension notice in that it did not correctly cite the applicable legislation used to apply the suspension. After WIRO intervened the insurer amended the notice and the worker received back payments up to the new date of suspension. The worker remained dissatisfied with the suspension and was advised they could seek advice from a WIRO Approved Lawyer.

An Approved Lawyer obtained an ILARS grant of funding to pursue an application for expedited assessment in the Commission and an interim payment direction was made for continuing weekly payments from the date of the new suspension notice. The Commission determined that the letter advising the worker of the IME appointment was invalid as it had not fully complied with Part 7 of the SIRA Workers Compensation Guidelines dealing with the proper notification of an IME appointment.

¹ Section 119(4) of the 1998 Act allows the Guidelines (SIRA Worker Compensation Guidelines) to specify the requirements for arranging independent medical examinations.

WIRO has been working with icare to achieve compliant notices which should result in clearer notifications, increased worker compliance, fewer suspensions and fewer challenges in the Commission.

Rectifying section 78 Notices

An important requirement of fairness is to provide notice to an injured worker whenever an insurer decides to dispute liability for a claim, or to discontinue or reduce weekly payments.

In early 2019 WIRO monitored reforms to these so-called 'section 78 notices' (as they are issued under section 78 of WIMA) and identified that over 90 per cent of notices were 'non-compliant' with the amended legislation. WIRO raised issues with section 78 notices with insurers and suggested steps insurers could take to rectify the notices.

Building on this analysis and review WIRO provided a copy of all instances of deficient or defective section 78 notices to SIRA. In July 2019, SIRA published an amended Form of Summary of Notice and undertook to discuss the form of the section 78 letters with the insurers with identified issues. WIRO will continue to monitor section 78 notices during the 2020/2021.

Improving reasonable excuse notices

WIRO's productive relationship with insurers allows us to assist with improvements in the workers compensation system. For example, through WIRO engagement with an insurer during 2019/20, we provided feedback on defects in its initial notification (reasonable excuse) letters. Based on WIRO's feedback, the insurer completed an audit and re-issued letters to affected claimants. The insurer then developed and implemented new templates in consultation with WIRO.

Contributing to the COVID-19 response

The COVID-19 pandemic has required WIRO to adapt quickly to both ensure the safety and wellbeing of WIRO staff and to provide effective services to injured workers and the NSW community.

From March 2020, WIRO recorded the number of complaints and enquiries received in connection with COVID-19. WIRO provided weekly reports to system participants with trend and issue information about matters raised with WIRO and case studies demonstrating the impact of COVID-19 on injured workers, to inform policy and operational responses to the pandemic.

Between 1 March and 30 June 2020, WIRO received over 230 complaints, enquiries and grant application matters with a COVID-19 issue. WIRO has used the information arising from these matters and our workers compensation expertise to actively participate in developing system responses to the impact of the pandemic.

The most common concerns arising are issues about attending medical appointments and treatment (35 per cent). This includes complaints about being required to travel and attend medical examinations, issues about obtaining certificates of capacity, and concerns about being unable to access treatment and rehabilitation services. The following case study provides an example of an injured worker's difficulty in obtaining a certificate of capacity:

Case Study 6 – attending appointments

An injured worker who lived in regional NSW was advised by their insurer that their workers compensation benefits would be suspended if they did not provide a current certificate of capacity. The worker's treating medical practitioner had closed their practice and the worker reported that as a result of COVID-19 they could not find a new practitioner. The worker was also being treated by a psychologist. WIRO provided advice about the recent legislative amendments which enable treating psychologists to issue subsequent certificates of capacity in certain circumstances. WIRO recommended the worker discuss with their psychologist whether they could certify the worker's capacity for work.

The next most common issue is about suitable duties (29 per cent), including enquiries about the interaction between JobKeeper and weekly payments where a worker was still able to access suitable duties, concerns about workers compensation entitlements where a worker's employer had ceased operations and suitable duties were no longer available, and complaints about changes to suitable duties where employers sought to redeploy injured workers.

The following case study looks at the interaction between JobKeeper and weekly payments:

Case Study 7 – suitable duties

An injured hospitality worker employed in suitable duties was stood down as their employer's business closed due to COVID-19 trading restrictions. The employer informed the worker they would be enrolled for JobKeeper payments and would no longer receive weekly workers compensation payments. The worker contacted WIRO to confirm whether their employer's advice was correct. WIRO confirmed that any JobKeeper payment made to an injured worker would be considered earnings for the purposes of determining a worker's entitlement to weekly benefits. WIRO encouraged the worker to inform the insurer that they are receiving JobKeeper.

The firms of Approved Lawyers, who are granted funding by WIRO to provide advice, assistance and representation to injured workers, are among the many businesses potentially impacted by COVID-19. As a consequence, WIRO has taken a number of steps to support Approved Lawyers, including:

- prioritising the processing and payment of invoices and reducing the terms of payment (from 30 days to seven (7) days) to assist cash flow
- permitting applications to be executed electronically to reduce the need for office administration
- offering to work with any Approved Lawyer who is in financial hardship, to identify matters where earlier payments of legal costs may be appropriate

- adapting grant amounts to revised procedures in the Commission, including to enable the participation of barristers in some matters at an earlier stage to assist in reaching resolutions
- communicating regularly with Approved Lawyers about any changes in laws, regulations or procedures to adapt to COVID-19, to assist them to keep up to date with these reforms

Case study 8 – Application for funding

An Approved Lawyer applied for a grant of funding for a care worker with a claim for a psychological injury. The worker was caring for a resident who was in isolation with suspected COVID-19. The worker advised they received no response to their enquiry about the availability of personal protective equipment (PPE), and after raising the enquiry their working hours were reduced. The worker's nominated treating doctor had diagnosed the worker as suffering from depression, anxiety and stress caused will by factors including the lack of PPE at work. WIRO granted funding for the Approved Lawyer to conduct early enquiries and provide preliminary legal advice.

WIRO outreach

Education for workers compensation practitioners

A major function of WIRO is as an educator to various scheme stakeholders and service providers.

WIRO held its annual **Sydney seminar** at the International Convention Centre on 19 February 2020 with 945 delegates in attendance. 560 delegates attending in person and 385 delegates accessed the conference online via live stream.

American work disability consultant and return to work expert Jason Parker was a guest speaker at the WIRO seminar. Jason also met with SIRA and icare in February 2020 to discuss Return to Work and Work Disability Prevention.

In addition to the Sydney seminar, WIRO also conducted a regional seminar in Newcastle on 5 March 2020. Further arranged regional seminars were postponed due to COVID-19.

WIRO also held a series of short question and answer seminars for Approved Lawyers about the new ILARS Funding Policy and Grant Amount Guide in the CBD, outer Sydney (Liverpool and Paramatta) and regional areas (Newcastle, Wollongong, Orange and Wagga Wagga) in September 2019.

WIRO's educational program is aimed at improving the standard of knowledge, competency and efficiency amongst the stakeholders in the workers compensation scheme, with obvious benefits for injured workers. It also aims to provide forums in which emerging issues and difficulties within the scheme and the dispute resolution model can be openly discussed.

Legal practitioners who attend WIRO's seminars are entitled to claim continuing professional development (CPD) points and insurer delegates can also earn CPD points from the National Insurance Brokers Association.

Publications with updates on cases and reforms

The **WIRO Bulletin** is published at least monthly and sent directly to almost 1900 subscribers, with over 30 bulletins published in 2019/20. It provides an analysis of recent and relevant decisions from the Commission and Courts, information about amendments to legislation, regulations and Fees Orders and emerging trends. The WIRO Bulletin is an important resource for those engaged daily in determining or advising upon the rights and entitlements of injured workers. A May 2020 survey of stakeholders found that the WIRO Bulletin was considered informative, timely and easy to read. One survey participant provided the following feedback:

'I find the bulletin great to read at the end of the day when it is received particularly as it is a great tool to assist with issues that arise with clients.'

In addition, WIRO also delivers immediate updates to subscribers about emerging issues and developments via the email publication – the **WIRO Wire**. Nine (9) WIRO Wires were published in the current reporting period.

Data insights

Based upon an analysis of data collected by ILARS, WIRO provides a report to lawyers and law firms on request regarding their performance within the workers compensation scheme. Nine (9) reports were provided to law firms in 2019/20. The service has proven to be an effective tool for identifying, addressing and overcoming particular issues that inhibit performance and assist in achieving better outcomes or understand their market share and market area. For example, one large law firm with multiple sites in metropolitan and regional NSW requested WIRO assist and advise on the development of their new template Tax Invoice to reduce their error rate and increase payment timeliness.

Internal continuous improvement

WIRO continues to refine internal processes to improve the delivery of its services and support the development and wellbeing of its staff.

WIRO's workplace response to COVID-19

WIRO adapted quickly to ensure the safety and wellbeing of WIRO staff in response to the COVID-19 epidemic. WIRO's crisis response team commenced meeting in February 2020 with the primary focus being to enable all WIRO functions to be performed by team members working from their home. A key advantage is that WIRO has been a paperless office since commencement. Set out below is a brief outline of the steps we have taken:

- All WIRO staff commenced performing their roles remotely from 30 March 2020. Ongoing improvements to WIRO's technology in partnership with the Department of Customer Service (DCS) have addressed some time-limited workarounds.
- Office equipment has been made available for WIRO officers to be able to work safely from home, and we have increased the support for staff welfare and connectedness.
- More flexible work options have been offered following whole-of-public service changes to increase the bandwidth in which work can be completed and removal of core hour requirements. These changes have enabled many WIRO officers to better balance work, caring and other responsibilities.

- We have published on WIRO's website frequently asked questions for injured workers about COVID-19 and workers compensation.

We have been embedded in a number of crisis response groups within the DCS cluster, and where appropriate have been able to coordinate our response with broader efforts within DCS.

A focus on continuing professional development

WIRO actively participates in international discussions about workers compensation systems. WIRO is a member of the International Association of Industrial Accidents Boards and Commissions (IAIABC), the international association for those involved in workers compensation world wide. The Director ILARS is a member of the Disability and Return to Work Committee and International Committee of the IAIABC. In October 2019, two members of the WIRO executive attended the IAIABC Conference and a study tour in the United States of America.

At the October 2019 Conference, discussions and papers were presented across a range of current issues affecting workers compensation systems across the world including Russia, Canada, Malaysia, Korea, Germany and across the states of the USA.

The study tour included visits to the Workers Compensation Research Institute (WCRI) in Boston, the Massachusetts Department of Industrial Accidents including the Massachusetts Workers Compensation Advisory Council, the Robert Arrigan Rehabilitation Center in Providence, the Connecticut Workers Compensation Commission, the New York Compensation Board and the New Jersey Compensation Rating and Inspection Bureau.

The learnings from the Conference and tour were shared with stakeholders at the WIRO seminar and through targeted stakeholder meetings.

WIRO also provides continuing education to internal team members focusing on significant decisions and legislative change. During 2019/20 four (4) seminars were delivered.

Direction 2020/22

WIRO has finalised its 2020/22 strategy, called our Direction 2020/22. It confirms key priorities to:

1. increase our impact in finding early solutions for injured workers by improving how we intervene in grant matters appropriate for early solutions and improving our capability to investigate hard-to-solve complaints
2. increase our impact in improving the workers compensation system by improving how we collect, analyse and share our information and insights.

We have also prioritised the wellbeing and development of the WIRO team as part of our recovery plan following COVID-19 and placed a strong focus on the efficiency and effectiveness of our operations.

Direction 2020/22 will build on the solid foundations of the WIRO office over the past eight (8) years including our paperless processes, expert team and easily accessible services. It compliments new initiatives to improve how we receive and act on feedback about WIRO and how we manage unreasonable conduct by people using WIRO's services. It will position us to quickly adapt for new functions we are asked to perform, increase our capability to manage any further increased demand for our services and better prepare us for unexpected events that may occur in the future.

DATA DICTIONARY

Complaint

A Complaint is an expression of dissatisfaction or grievance made to WIRO about an insurer where a response or resolution is explicitly or implicitly expected.

Sections 27 and 27A of the WIMA provide that one of the functions of the Independent Review Officer is to deal with complaints about the acts or omissions of insurers that affect a worker's rights, entitlements or obligations under workers compensation legislation.

Enquiry

An Enquiry is a request for information which does not require referral to an insurer.

Early intervention matter

An early intervention matter is one that is the subject of an ILARS grant of funding, where the injured worker has legal representation and where it may be appropriate for WIRO to intervene to prompt an early solution.

Outcomes of Complaints and early intervention matters:

Resolved - Benefit

to prompt the acceptance of a claim which had not previously been determined, an increase in the value of an existing benefit (for example, increased weekly payments) or the insurer to overturn a decision to dispute liability.

Resolved - Action

to prompt the insurer to take action to progress a claim, for example to amend an injury management plan or to arrange a medical examination.

Resolved - Information

to provide information to the injured worker, for example to confirm correct advice was provided by the insurer after independent examination by WIRO or ensure access to information the worker is entitled to.

Referred

to refer the injured worker to another entity (such as a WIRO Approved Lawyer) or organisation who is best able to assist them



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independent review office

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