



Independent
Review Office

IRO Regional Seminars

Albury

March 2024

IRO acknowledges traditional owners



We acknowledge the Wiradjuri, Waverreo and Dhudhuroa people as the Traditional Custodians of the land we are meeting on today, and part of the oldest surviving continuous culture in the world. We recognise their continuing connection to Country and thank them for protecting this land and its ecosystems since time immemorial.

We pay our respects to Elders past and present, and extend that respect to all First Nations people present today





Agenda

- **Welcome** – Jeffrey Gabriel, A/Independent Review Officer
- **Safework NSW – An Overview and Recent Legislative Changes** –
Alicia Smith, Assistant State Inspector, Safework NSW
- **IRO Solutions Update** – Jeffrey Gabriel, A/Independent Review Officer
- **ILARS Update** – Philip Jedlin, Director ILARS
- **Estoppel in the Personal Injury Commission** - Jeffrey Gabriel,
A/Independent Review Officer
- **IRO Priorities 2024 and Closing Remarks** - Jeffrey Gabriel,
A/Independent Review Officer



SafeWork NSW

SafeWork NSW

SafeWork NSW role, legislation and focus on
Psychosocial hazards & Respect at Work

Alicia Smith

Assistant State Inspector, Health & Safe Design

27 March 2024



Contents



Topic

1. SafeWork NSW & our Inspectors

2. Legislation – Work, Health & Safety (WHS) and Workers Compensation

3. Legislation – psychosocial hazards

4. SafeWork NSW role - Respect@Work

5. Reporting to SafeWork NSW

6. Useful resources

SafeWork NSW & our Inspectors

- Work Health and Safety (WHS) Regulator for NSW
- Investigate workplace incidents and enforces WHS laws in NSW
- Provide advice on improving WHS practices in NSW
- Authorised to act on behalf of SIRA in relation to employer obligations under workers compensation legislation
- Provide licenses and registration for potentially dangerous work
- We are funded under the WCOF (Workers Compensation Operational Fund) - S35 of 1998 Act



Legislation –WHS and Workers Compensation



Work Health & Safety Act 2011

Work Health and Safety Regulation
2017

Workers Compensation Act 1987
(authorised under S161 & 174)

Workplace Injury Management and
Workers Compensation Act 1998 (S238
& 238AA)

Workers Compensation Regulation 2016





Inspector Role: Workers Compensation



RTW Verifications

RTW Checks

Requests for Service

Free Advisory Visits / Workshops

Case example – Request for Service

Request for Service: injured employee requesting suitable work and the employer failing to provide.

Inspector response:

- Clarify employer details, size (Category 1 or 2) and employee concerns, fitness for work, barriers to RTW.
- Workplace visit to sight relevant documents
- Clarify compliance relating to workers compensation requirements such as
 - displaying a summary of the Act
 - developed and implementing a return to work program
 - injury register
 - offering suitable work
- Offer advice: recovery at work, seeking assistance and other agencies that may assist.



SIRA

If you get injured at work

- 1 Tell your employer**
Tell your employer as soon as you can. Your employer must notify the insurer within 48 hours. If your injury is serious, your employer must notify SafeWork NSW immediately on 13 10 50.
- 2 See your doctor**
See your doctor and get a certificate of capacity for your employer to send to the insurer.
- 3 Recover at work**
If you are able, stay at work or plan how to return to work to help you get better sooner. Your employer is required to provide suitable work to help you recover.

You can make a workers compensation claim which may cover medical expenses, and weekly payments if you need time off work. Talk to your employer's insurer for more information.

Your employer's workers compensation insurer / Contact

Your employer or return to work coordinator / Contact

State Insurance Regulatory Authority



SafeWork NSW Employer Improvement Notices



Section 41 of 1998 Act- Object and application of Chapter 3

Establish a system that seeks to achieve optimum results in terms of the timely, safe and durable return to work for workers following workplace injuries. Chapter applies even when liability disputed.

Do NOT cover:

Treatment
Weekly payments
Dismissals
Liability decisions
Insurer obligations
Worker obligations

- S44 Fail to notify insurer of workplace injury within 48 hours.**
- S49 Fail to provide suitable employment**
- S52 Fail to establish RTW Program (or nominate RTW Coordinator)**
- S231 of 1998 Act** -Notification of summary of Act and insurance details
- Referral pathways provided to worker/employers if WC issues not under authority.

Regulatory Priorities 2023 (watch this space for 2024)

- Vulnerable and ‘at-risk’ groups (young workers, CALD, aboriginal people)
- Priorities chosen on potential for harm, emerging issues and frequency in issue.
 - Gig economy
 - Safety around moving plant
 - Seasonal workplaces
 - Psychological safety
 - Respect at work
 - Exposure to harmful substances
 - Falls

<https://www.safework.nsw.gov.au/about-us/safework-nsw-regulatory-priorities-2023>



Psychological harm - the cost

- Compensation/legal costs
- Costs of replacement staff
- Training & supervision costs
- Staff turnover rates increase
- Cost to the individual, their families and the their community
- Bullying/harassment and work pressure top two mechanisms of injury in NSW (2014-2018)



In 2018-19 the gross incurred cost to the NSW workers' compensation system from psychological injuries was over **\$585 million**.



53% increase in claims 2014/15 to 2018/19 compared to 3.5% for physical



The average cost for an individual claim is around 4 times that of physical



Absenteeism, presenteeism, compensation claims due to mental illness is estimated to cost NSW employers **\$2.8 billion per year**.

Examples of Psychosocial Hazards?

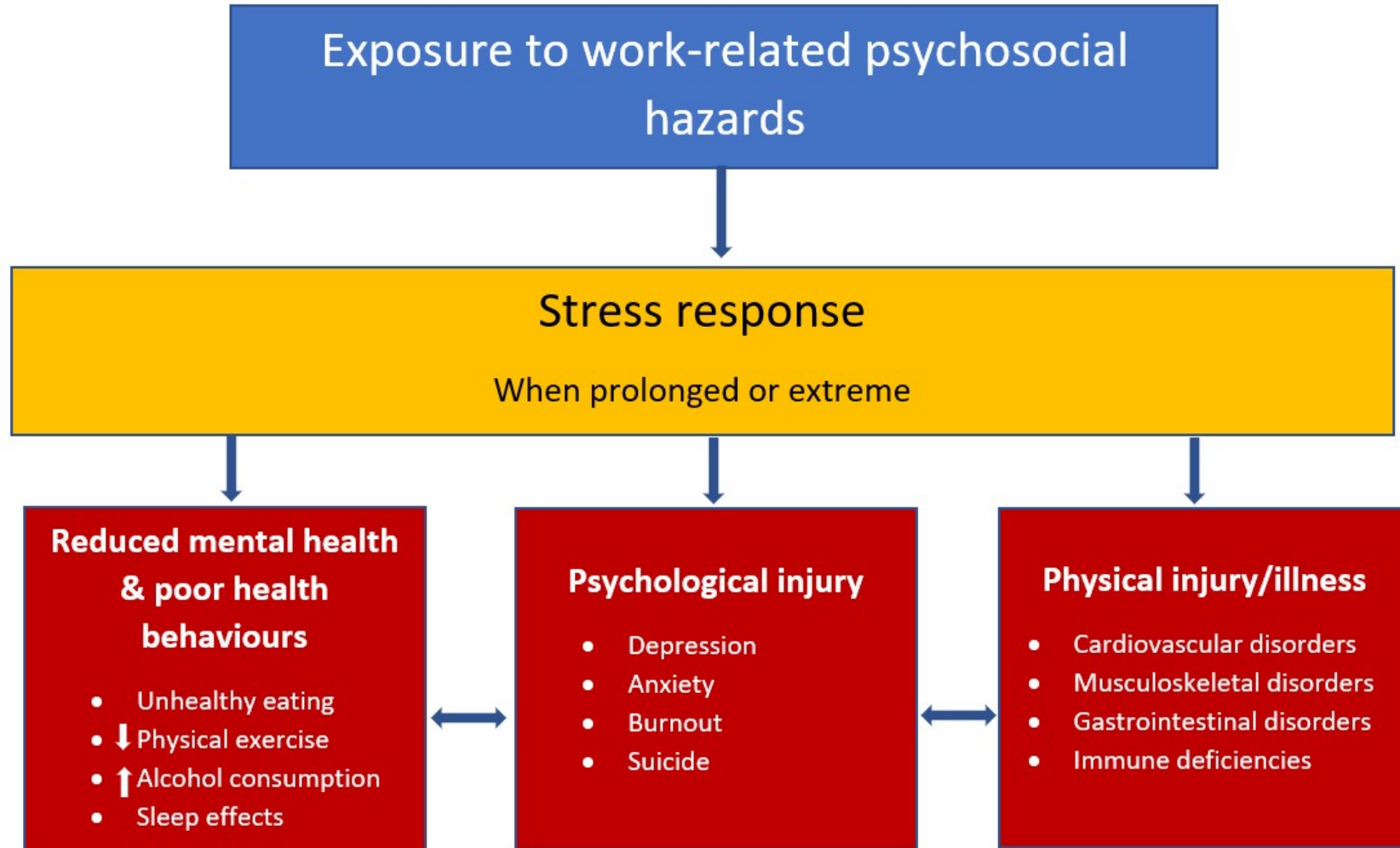
Psychosocial Hazards

- Exposure to traumatic events
- Role overload
- Lack of clarity
- Workplace violence
- Bullying
- Remote or isolated work
- Hazardous working environment



**Demands
vs
Resources**

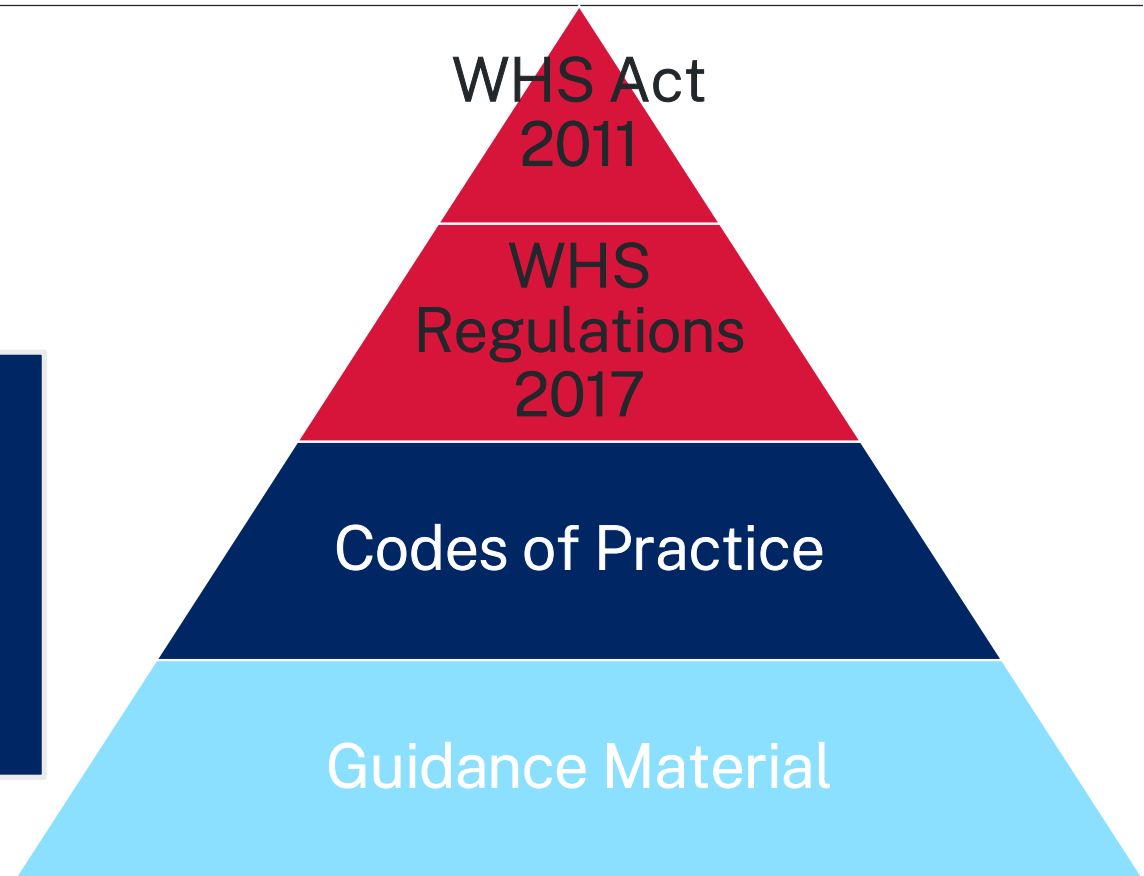
The Mechanism of Injury



Legislation – NSW Framework for psychosocial hazards

- Duty holders must follow these
- The WHS Regulations have been amended to specifically include Psychosocial Hazards

- Practical guides to clarify duties
- What is expected & could be enforced
- What is reasonably practicable & what compliance looks like
- A systematic approach



Legislation – psychosocial hazards

From 1 October 2022, there are new requirements for managing the risks of psychosocial hazards in the workplace. [Read more](#)

55A Meaning of “psychosocial hazard”

A hazard that (a) arises from, or relates to —

- (i) the design or management of work, or
- (ii) a work environment, or
- (iii) plant at a workplace, or
- (iv) workplace interactions or behaviours, and

(b) may cause psychological harm, whether or not it may also cause physical harm.

55B Meaning of “psychosocial risk”

A risk to the H&S of a worker or other person arising from a psychosocial hazard.



Legislation – psychosocial hazards



Managing psychosocial risks (clause 55C *Work Health and Safety Regulation 2017*)

A person conducting a business or undertaking (PCBU) must manage psychosocial risks in accordance with Part 3.1 other than clause 36.

Control measures (55D *WHS Regulation 2017*)

- 1) A PCBU must implement control measures –
- (a) to eliminate
 - (b) to minimise

Control measures

- (2) must have regard to all relevant matters, including –
- a) duration, frequency and severity of the exposure
 - b) how the psychosocial hazards may interact or combine
 - c) design of work - job demands and tasks
 - d) systems of work –
 - e) design, layout, and environmental conditions, of the workplace, including the provision of safe entering/existing & facilities for the welfare of workers
 - f) the design and layout, and environmental conditions, of workers' accommodation
 - g) the plant, substances and structures,
 - h) workplace interactions or behaviours, &
 - i) information, training, instruction and supervision provided to workers.
-

Managing psychosocial hazards at work - Code of Practice for NSW

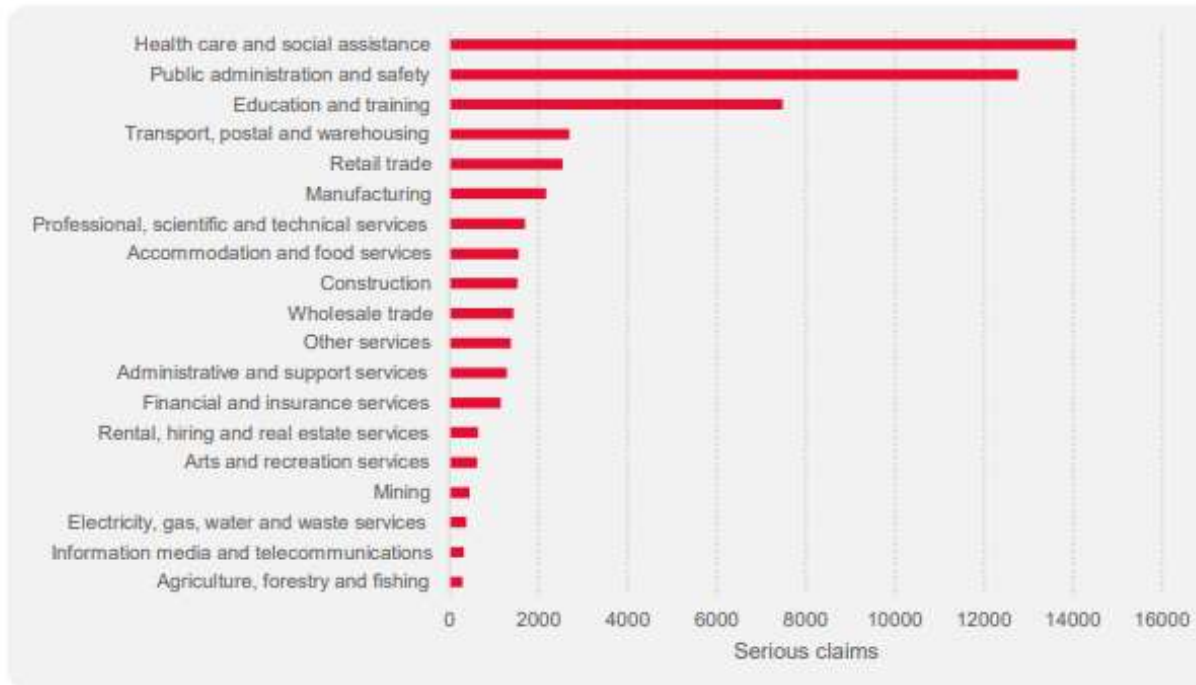
What is in the Code:

- Duties (PCBU, workers, consultation)
- Common Psychosocial Factors
- Risk management (leadership, data, control with work design, safe systems, reasonable adjustment)
- Supporting Return to Work
- Responding to Reports (investigating, confidentiality)
- Industry Scenarios
- Example risk register



SafeWork NSW – responding to psychosocial hazards

Figure 5: Number of serious claims for mental health conditions by industry, NDS (2017-18 to 2021-22p)



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

- Requests for Service
- Incidents (suicide / harm)
- Proactive engagement programs (Disability sector, Education)
- Free Advisory Visits / Requests for presentations
- Administration Verification Program

SafeWork NSW role – Respect at Work

What is sexual harassment?

unwelcome conduct of a sexual nature (*subjective test*)

which makes a person feel **offended, humiliated and/or intimidated**, where a **reasonable person** would anticipate that reaction in the circumstances (*objective test*)

Source: Sex Discrimination Act 1984 (Cth)



Often not just about sex - it reflects power dynamics + cultural and organisational norms.



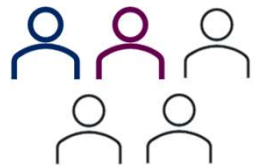
Often is the result of a **failure to design work well + provide safe systems of work**



Cluster of interrelated behaviours, such as:

- gender harassment
- unwanted sexual attention
- sexual coercion

Australians impacted by Sexual harassment in the last five years



41% of women



26% of men



46% of people aged **18-29**



56% of Aboriginal and Torres Strait Islander people



46% of those who identify as **LGBTQIA+**



48% of those with a **disability**

People who are **insecurely employed** (e.g. gig workers, migrants)

Underreporting is an issue

Intersectionality between groups

Source: Time for respect: Fifth national survey on sexual harassment in Australian workplaces, AHRC 2022.

Work related causes and drivers of increased risk



WHS Regulation – Sexual Harassment is a psychosocial hazard

cl35: Managing risks to health and safety

A duty holder, in managing risk to health and safety, must –

- (a) Eliminate risks to health and safety so far as is reasonably practicable, and
- (b) If it is not reasonably practicable to eliminate risks to health and safety – minimise those risks so far as reasonably practicable

cl 55A Meaning of psychosocial hazard

A psychosocial hazard is a hazard that –

(a) Arises from, or relates to –

- (i) The design or management of work, or;
- (ii) A work environment; or
- (iii) Plant at a workplace; or
- (iv) Workplace interactions or behaviours, and

(b) may cause psychological harm, whether or not it may also cause physical harm

cl55D – Control Measures

(1) A person conducting a business or undertaking must implement control measures –

- (a) to eliminate psychosocial risks so far as is reasonably practicable, and
- (b) if it is not reasonably practicable to eliminate psychosocial risks – to minimise the risks so far as is reasonably practicable.

SafeWork NSW role – Respect at Work



SafeWork NSW



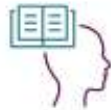
SafeWork NSW Respect at Work Strategy: preventing sexual harassment

October 2023 – October 2027



Vision to secure safe and respectful workplaces for NSW workers

Outcomes



Educate

Raise awareness that NSW businesses have a proactive duty to prevent and respond to workplace sexual harassment as a WHS issue



Capability

NSW workplaces are better equipped to prevent and respond to workplace sexual harassment



Action

NSW workplaces take effective and systematic actions to prevent and respond to workplace sexual harassment








Effective regulation

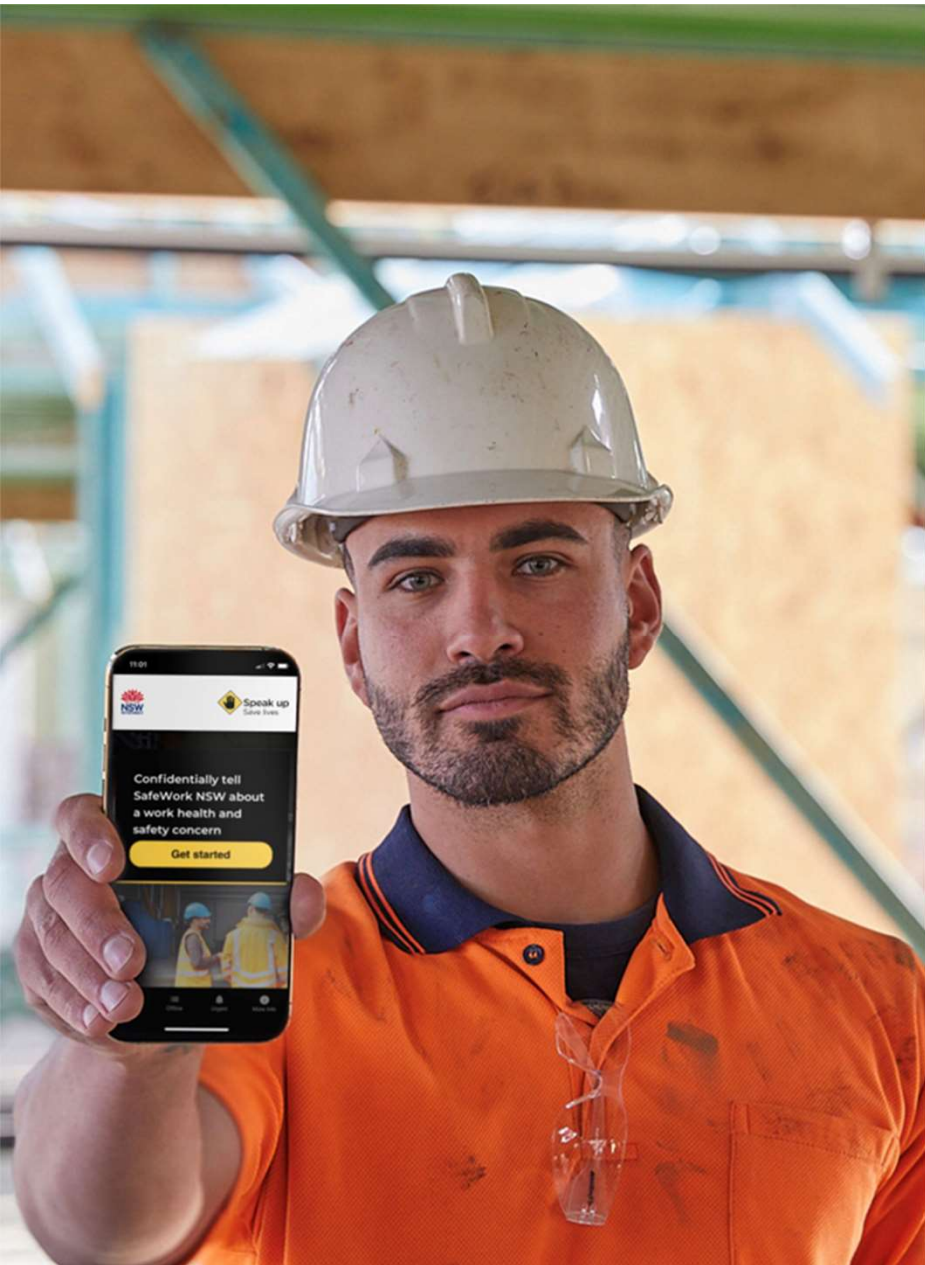
SafeWork NSW is a more effective regulator, including strengthening and enforcing WHS laws to protect workers from sexual harassment.

Concurrent jurisdictions – workplace sexual harassment



What are the agency's enforcement and compliance powers?

	 <p>SafeWork NSW</p>	 <p>Anti-Discrimination New South Wales</p>	 <p>Australian Human Rights Commission</p>	 <p>Fair Work Commission</p>	 <p>Fair Work OMBUDSMAN</p>
	<p>SafeWork compliance and enforcement powers include:</p> <ul style="list-style-type: none"> • Providing advice on compliance • Inspecting workplaces and conducting investigations • Compelling the production of information, documents, and responses to questions • prohibition notices that require duty holders to remedy contraventions • Revoking, suspending or cancelling authorisations • Accepting alternative enforcement measures (e.g. enforceable undertakings, letters of caution) • Commencing civil penalty or criminal prosecutions. 	<p>ADNSW provides assistance with resolving complaints by:</p> <ul style="list-style-type: none"> • Investigating the complaint • Requiring the people involved in the complaint to provide relevant information and documents • Providing dispute resolution processes such as voluntary conciliation to try to help the people involved reach an agreement on how to resolve the complaint. <p>ADNSW does not make determinations about whether sexual harassment occurred or not.</p> <p>If the complaint is not resolved, and at the request of the complainant, ADNSW can refer the matter to the NSW Civil and Administrative Tribunal (NCAT) for a decision.</p>	<p>AHRC powers in relation to complaints from individuals alleging sexual harassment include:</p> <ul style="list-style-type: none"> • Investigating complaints and understanding the workplace's response to the allegations • Requesting further information from the parties • Facilitating conciliation to resolve disputes. <p>If the complaint is not resolved at conciliation the complaint will be terminated.</p> <p>Once your complaint is terminated, you have 60 days in which you can apply to the Federal Court of Australia or the Federal Circuit and Family Court of Australia to seek a decision about your complaint.</p> <p>In some situations the complainant will need the Court's permission to take the matter to Court.</p> <p>AHRC enforcement powers in relation to the positive duty under the SD Act include:</p> <ul style="list-style-type: none"> • Making inquiries into compliance with the positive duty if the AHRC reasonably suspects non-compliance • Issuing compliance notices requiring a business to take or refrain from specified action within a reasonable period • Applying to the Court for an order directing a business to comply with a compliance notice, or to enter into, and enforce, undertakings in relation to compliance with the positive duty. 	<p>The FWC's powers include:</p> <ul style="list-style-type: none"> • Making a stop sexual harassment order to prevent further sexual harassment from occurring • Referring disputes to alternative dispute resolution • Dealing with disputes by facilitating mediation, conciliation, making a recommendation or expressing an opinion • Arbitrating the dispute if the parties consent. 	<p>The FWO's functions include:</p> <ul style="list-style-type: none"> • Providing education, assistance, and advice about obligations under the FW Act • Monitoring compliance with the FW Act • Investigating a workplace for non-compliance with the prohibition on sexual harassment in the FW Act • Investigating a workplace for failure to comply with FWC stop sexual harassment orders • Referring matters to relevant bodies where issues are raised that are outside of the FWO's statutory functions. <p>The powers of FWO Inspectors include the ability to:</p> <ul style="list-style-type: none"> • Enter premises, conduct interviews and inspect documents • Commence court proceedings for breaches of the prohibition on sexual harassment under the FW Act • Enforce certain orders made by the FWC.



Reporting to SafeWork NSW



- Contact us on 13 10 50 or Speak Up app.
- The Speak Up Save Lives app is a quick, easy and anonymous way to report an unsafe work situation directly to SafeWork NSW.
- Website <http://www.safework.nsw.gov.au>
- Psychosocial hazards request for service form

Designing Work to Manage Psychosocial Risks

SafeWork NSW

February 2024



Useful Resources



- SafeWork NSW: Code of practice – Managing psychosocial hazards at work
- People at Work is a psychosocial risk assessment process.
- Designing Work to Manage Psychosocial Risks
- Mentally Healthy Workplaces
- Workplace SH: Regulation map
- AHRC Guide for Compliance on SH Positive Duty
- Free Advisory Visits and Workshops
- SafeWork WRAP – sign up



safework.nsw.gov.au



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IRO Solutions and the IRO Direction

Jeffrey Gabriel

A/Independent Review Officer



IRO Solutions Jurisdiction

- Complaints

Schedule 5, Clause 8 of the *Personal Injury Commission Act 2020*

- Workers Compensation Enquiries
- Early Solutions

Schedule 5, Clause 9 (2)

"The purpose of ILARS is to...provide assistance in finding solutions for disputes between workers and insurers."



Operationalising our function

- **The IRO Complaint Handling Protocol**
 - Defines how and which matters we deal with
 - Consultation with industry participants
 - A complaint outcome that is “fair and reasonable”
 - What complaints we may not deal with?
 - Matters the subject of the PIC
 - Where no attempt to resolve with insurer



MISSION OF THE INDEPENDENT REVIEW OFFICE

The Independent Review Office (IRO) helps persons who are injured at work or in motor accidents and insurers find fair solutions to complaints and claims. IRO also recommends improvements to the statutory compensation schemes for workers compensation and motor accident injuries. IRO is established under the *Personal Injury Commission Act 2020*.

IRO SERVICES – WHAT WE DO

- help persons who are injured and insurers find fair and fast solutions
- fund experienced lawyers to assist workers who are injured access their workers compensation entitlements
- identify, report on and recommend solutions to emerging and systemic issues in the statutory compensation schemes.

IRO VALUES – HOW WE WORK

IRO has six core Values that inform how we do our work:

- integrity, trust, service, and accountability, which we share with the NSW government sector
- independence and expertise, which are unique to IRO.

IRO PRIORITIES AND STRATEGIES – WHERE WE WILL FOCUS

<p>An effective and valued agency</p>	<p>Achieving fair and quick solutions for injured persons' complaints and claims</p> <ul style="list-style-type: none"> • increasing IRO's capacity and capability to deal with motor accident injury complaints • identifying more opportunities to implement early solutions in Independent Legal Assistance and Review (ILARS) matters 	<p>Enabling injured workers' access to appropriate legal assistance</p> <ul style="list-style-type: none"> • acting on the recommendations of the 2022 ILARS Review • completing the review of medical report provider arrangements and appeal costings, and acting on the outcomes • reviewing matters where workers' outcomes not improved to identify any opportunities to refine Funding Guidelines 	<p>Offering insights that improve the operation of the injury compensation schemes</p> <ul style="list-style-type: none"> • making suggestions to improve the complaint and claim handling of insurers • contributing to external reviews of the injury compensation schemes • improving the experience of injured persons who are dissatisfied with the compensation schemes
<p>A great place to work</p>	<p>Fostering the wellbeing and expertise of IRO's team</p> <ul style="list-style-type: none"> • enhancing the connection and effectiveness of IRO teams and team members in a hybrid work environment • responding to the results of IRO's People Matter Employee Surveys • making ongoing development of IRO's team a hallmark of our culture, and supporting the training and development of every IRO team member <p>Improving how we work</p> <ul style="list-style-type: none"> • embedding continuous improvement as a way of working at IRO • improving how we engage with those who rely on us • increasing the quality and value of our data, and improving the use of data in all our functions • embedding good practice in our financial, governance, ICT, and risk management arrangements 		

IRO SUCCESS MEASURES – HOW WILL WE KNOW IF OUR STRATEGIES ARE SUCCESSFUL

- improving satisfaction by injured persons as measured by user experience surveys
- achieving timeliness and quality measures in how we perform our work
- identifying more ILARS matters for early solutions
- increasing IRO team member engagement as measured by People Matter surveys.





CTP Focus

- Uplift in CTP work
 - CTP Care
 - Adapt to changes in legislation
 - Emerging case law from PIC
- Deal with increasing volumes
- More engagement with insurers





IRO Early Solutions

- Specifically called out in PIC Act
- No Response to Claim (NRTC)

TIP: If NRTC – carefully check timelines and check with insurer before seeking Stage 3 funding

- Medical disputes pilot
- Other early solutions



IRO Early Solutions – Medical Dispute Pilot



- A limited pilot
- To assist parties to find early solutions for disputes about medical treatment
- Run through Solutions Group in parallel with No Response To Claim (NRTC) and other early solution matters
- Applies to disputes meeting eligibility criteria



IRO Early Solutions – Medical Dispute Pilot



- Eligibility criteria:
 - > Eligible for funding
 - > Approved Lawyer (AL) asks for stage 3 funding
 - > Liability for injury not disputed
 - > Only medical/treatment disputes
 - > Only disputed on basis of insufficient evidence
 - > Not affected by s.59A
 - > Medical support
 - > AL has already requested s.287A review
 - > Currently excludes ifnsw/TMF (except Department of Education)



IRO Complaints – the numbers

- 1 July – 31 December 2023
4091 WC complaints (compared to 3766 in the same period H1 2022-2023)
359 CTP complaints (compared to 408 in the same period H1 2022-2023)



Common Workers Compensation Matters

Percentage of all workers compensation complaints for H1 2023-24

- Delay in determining liability 29.1%
- Delay in payment 23.3%
- Denial of liability 9.7%
- Request for documents 9.2%
- General Case Management 9.2%





Common CTP Complaint Matters

Percentage of all motor accident complaints for H1 2023-24

Subjects

- Treatment and care 29.5%
- Income support/weekly payments 23.6%
- Case Manager 10.0%

Issues

- Decisions 39.0%
- Timeliness 30.1%
- Service/Communication 17.8%



CTP Focus

Treatment and Care

- Complaints related to medical expenses and domestic assistance
- Most prominent issue for this complaint subject is timeliness
- Timeliness is critical in claims where compensation period is limited (e.g., minor injury / threshold injury or at fault claims). Claimants often miss out due to untimely decisions.
- Changes to minor / threshold injuries
- Case studies

CTP Focus

Income Support/Weekly Payments

- Biggest driver of IRO CTP complaints in 2022-23 but not the biggest driver in H1 2023-2024
- Time taken to commence weekly payments
- Time taken to confirm PAWE, meaning extended periods on interim rate
- Case studies



CTP Focus

Case Manager

- Complaints of this kind often relate to customer service issues
- Often tied to processing of benefits
- Case studies





After the IRO Intervention

IRO Impact

- At a local level with insurer – changes to payment cycles
- Referral of matters to SIRA
- Aggregated data and significant matters
- Contributes to SIRA's regulatory work
 - Licence conditions on insurers
 - Penalties
- Legislative change



Key Lessons from our Experience in Complaints



Service

- Unreturned phone calls + emails are behind a lot of complaints
- Communication – keep claimants updated
- Timeliness
- Start weekly payments ASAP – MAIA claims
- Try to find out the issue behind the question

Detail

- Notices that lack detail attract complaints. e.g., dispute notices in MAIA claims





How to help IRO help you deliver early Solutions to Injured Workers - Approved Lawyers

ILARS Grant Number (if applicable)

A clear summary the issues and proposed solution – remember IRO does not adjudicate disputes

All necessary information (copy of claim, communication serving the claim, details of how, when and to what address the claim was made)

Details of any follow up with insurer (when/how/who)

If there has been any acknowledgement by the insurer or their representative about the claim/issue (including date and nature of communication)





How to help IRO help you deliver Early Solutions - Insurers

If you are relying on a document/decision, please provide it.

If a claim has been overlooked in error, please provide a date for when the claim will be determined, and, when it is determined please provide a copy of the decision once issued.

If you consider you are inside timeframes for a decision, please provide a brief timeline establishing that.





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ILARS Update

Philip Jedlin

Director ILARS



ILARS Update

- ILARS – key statistics
- Applications and invoices – how to improve efficiency
- Right to reviews under the ILARS Funding Guidelines
- Changes to ILARS Processes
 - Automated Updates
 - Centralised email management

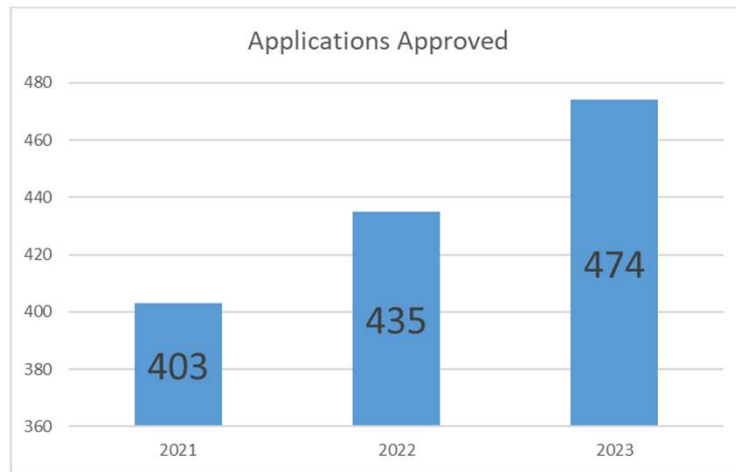




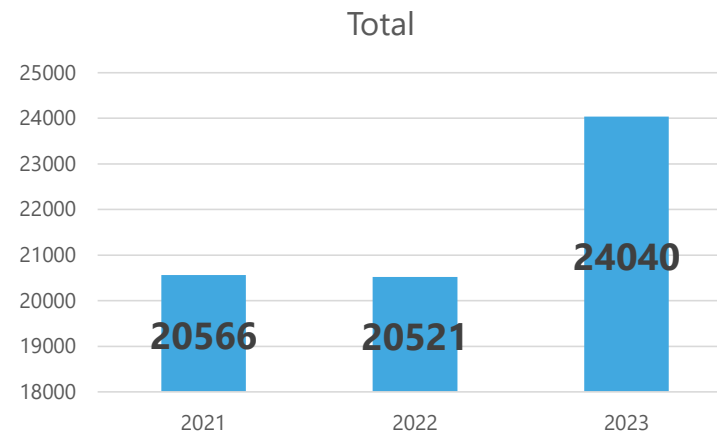
Applications Approved

Your region includes Riverina, Murray, ACT and Victoria

Your Region

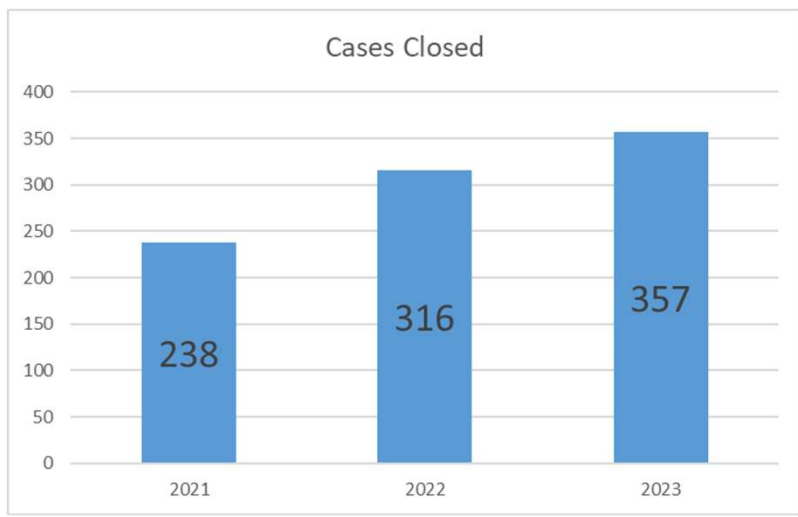


All Firms

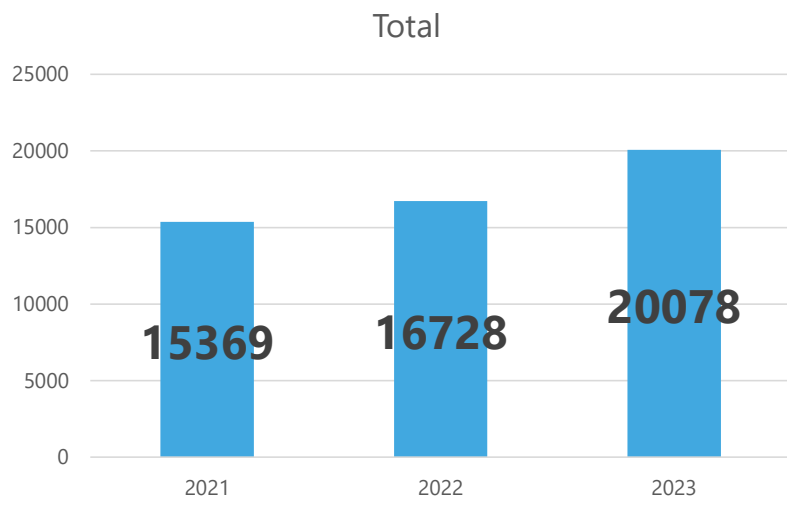


Closed Cases


Your Region



All Firms



Stages of Cases

Stages	 Number of cases	Percentage	% all Firms
Stage 1	220	26%	30%
Stage 2	397	47%	50%
Stage 3	215	25%	19%
Stage 4	4	0%	1%
Stage 4 Conditional	11	1%	1%
Grand Total	847	100%	100%

Injured persons in your Region



	Hearing	Lower extremity	Psychiatric and psychological disorders	The spine	Upper extremity	Grand Total
Your Regions	5	128	119	145	175	572
All other Regions	385	248	319	332	400	1684
Total	390	376	438	477	575	2256
AL's in your region	1%	34%	27%	30%	30%	25%
-Excluding Hearing loss						30%



Where do your injured workers come from



Injured Person Region	Hearing	Lower extremity	Psychiatric and psychological disorders	The spine	Upper extremity	Grand Total
Riverina	4	80	80	90	126	380
South Coast	1	20	34	27	51	133
ACT	0	22	26	25	27	100
Murray	1	22	10	21	19	73
Central Coast	0	8	20	5	13	46
Other Regions	3	59	177	78	87	404
Total	9	211	347	246	323	1136



Application for Grants issues - 2021-23



Issue	All Regions		Your Region	
	Number	%	Number	%
Request for further information	4977	8%	123	9%
Remind Request for further information	900	18%	25	20%
Average time to approve application - All accepted applications (Days)	4.5		4.9	
Where NO request made for further information (Days)	3.0		3.1	
Where a request is made for further information (Days)	24.9		30.5	



Applications



Supporting material

Explanation of the merit/arguable case of a request for funding

Details of insurer's response to claims. Be Mindful of the timeframes for responses to claims by Insurers.

Requests for Updates

Correct ILARS reference in the subject line in correspondence

Accurate details in application for funding

Attaching PDF's, not links



Invoices - 2021-23



Issue	All Regions		Your Region	
	Number	%	Number	%
Invoices processed from law firms	53237		664	1%
Number of cases with invoice errors	12797	24%	198	30%
An invoice may have more than one issue and may be returned more than once				
Grant related issues	11453	22%	256	39%
Invoice related issues	5395	10%	164	25%
Issues with MRP invoices	2674	3%	28	3%





Recurring Themes

Unique tax invoice number

Only one event number for costs per Tax invoice can be used (except for appeals)

Date Missing or incorrect

ILARS reference incorrect or missing

GST added to disbursements



Recurring Themes continued

Incorrect amounts

Copies of medico-legal reports

Specify the Doctor, date of examination and category of report

EFT details

Format –PDF is required

Invoices do not tally

Invoices in Your Region - Requests for amendment



Grant related errors

Disbursements exceed approved funding	23%
Legal cost exceed approved funding -	15%
Supporting documents not supplied	47%

Invoice related errors

No unique invoice number-	15%
Wrong amount -	42%
Wrong GST -	15%
Incorrect bank details -	6%



Impact of Invoice errors

Causes a failure in the payment system

Multiple interactions

Causes delay in the payment of the invoice

Reviews of Funding Decisions under the ILARS Guidelines

Clause 2.12 of the Funding Guidelines sets out the review process

- 2.12.1 When the IRO will review a funding decision
- 2.12.2 What a review will consider
- 2.12.3 How a review will be conducted
- 2.12.4 Possible outcomes of a review of a funding decision
- 2.12.5 Final Review

Example of review - Request for Stage 2 Funding

- AL submits the following to the PL
 - Certificate of Capacity
- Funding Request is refused by IRO and further information is sought
- AL seeks review and provides additional information with submissions
 - That the IP is MMI and that in their opinion the WPI > 10%

Examples of reviews - Request for Stage 2 Funding (cont)

- Learnings
 - Had the information provided to the reviewer been available to the PL stage 2 would have been provided
 - There would have been a far more timely funding of this matter
 - Far fewer interactions and emails



What have we learned from reviews?

- There is great benefit when the Approved Lawyer provides all relevant and up to date information to the Principal Lawyer when the request for funding is first made
 - You can always provide the additional information to the Principal Lawyer after they decline your request rather than asking for a Director Review
- If there is a difficulty with a request from a Principal Lawyer please call them to discuss the circumstances of the matter
 - Ask the Principal Lawyer what further information they need to approve your request



Changes to update requests

What has changed

- Requests are consistent – about 250-300 per day

What is expected of you

- Timely response to update requests

Where contact is unsuccessful

- After 12 months your grant maybe closed

Where contact is unsuccessful

Your attention is drawn to clause 2.14 of the ILARS Funding Guidelines

- Where a grant matter remains open for a period of twelve (12) months without any progress, the grant matter may be closed without payment of legal costs
- A fresh application maybe required to continue funding
- Submissions will be required to support the payment of any costs on the closed matter
- Please respond to our update requests to avoid closure of your grant



Key Messages

- Completion of all the fields in the Update form assists IRO
- Where information is received by you please advise IRO by forwarding the information to the ILARSALmail@iro.nsw.gov.au
- Please use the ILARS grant number for the live grant in the subject line
- Where extension requests are made please address the merit test and the arguable case test
- If there is a doubt please call the Grant Manager or an ILARS Manager
- When you call 13 94 76 the call is answered by our Solutions team who deal with Injured Persons and not ILARS cases. They often cannot assist you and will pass your message onto the Principal Lawyer or paralegal managing your matter
- Updates
 - Please respond to the update requests.
 - Please reply using the email option on the email rather than creating a new email.
 - Please use the templates provided in your response





Reminder on how we send and process emails

- The Centralised Email Management System will send all emails to you from a new mail box - ILARSALmail@iro.nsw.gov.au
- Please send New Funding applications to ILARSCONTACT@iro.nsw.gov.au
- Please ensure that you use only the current live grant number in the subject line of the email.
- If you have issued a tax invoice the matter is closed – please do not use that ILARS grant reference number – you need a fresh funding application.



What impact does the email changes have on you?

There is no change to how you send new applications to ILARS

- Please continue to use ILARScontact@iro.nsw.gov.au

For current ILARS matters, when sending emails to ILARS or responding to ILARS emails

- Please use ILARSALmail@iro.nsw.gov.au in the "To" field and include the ILARS case number – C/NN/YYYYYY or G/NN/YYYYYY in the subject line



Independent
Review Office

Estoppel in the Personal Injury Commission

Jeffrey Gabriel

Independent Review Officer



What is meant by:

Res Judicata	Issue Estoppel	Anshun Estoppel
<p>A thing, matter, or determination that is adjudged or final. i.e. a claim, issue, or cause of action that is settled by a judgment conclusive as to the rights, questions, and facts involved in the dispute.</p>	<p>A long-established principle that prevents a party to a proceeding denying to the contrary an issue of fact or law that was established in previous proceedings.</p>	<p>An estoppel that prevents a party from making a claim which should have been pursued by that party in earlier proceedings:</p> <p><i>See: Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589</i></p>





Relevant cases

Res Judicata & Issue Estoppel	
Etherton v ISS Property Services Pty Ltd	[2019] NSWCCPD 53
Anshun Estoppel	
Miller v Secretary, Department of Communities & Justice (No. 9)	[2021] NSWPICPD 29
Geary v UPS Pty Ltd	[2021] NSWPICPD 47
OneSteel Reinforcing Pty Ltd t/as Liberty OneSteel Reinforcing v Dang	[2022] NSWPICPD 32
Racing NSW v Goode	[2023] NSWPICPD 43
Inner West Council v BFZ	[2023] NSWPICPD 62



Res Judicata & Issue Estoppel





Etherton v ISS Property Services Pty Ltd

- In 2015, the worker injured his right leg. The Insurer disputed the claim under ss 4, 9A, 33 & 60 WCA.
- On 9/02/2016, he filed an ARD and claimed weekly payments & s 60 expenses for right TKR surgery.
- On 5/05/2016 an Amended COD – Consent Orders issued, which:
 - Added an allegation of injury due to the nature & conditions of employment until 15/04/2015.
 - Entered an award for the respondent for that alleged injury.
 - Awarded the appellant a closed period of weekly payments, with an award for the respondent thereafter.
 - Awarded the appellant s 60 expenses up to \$3,871.25.
 - Entered an award for the respondent with respect to a claim for right total knee replacement surgery.



Etherton

- The appellant later claim compensation under s 66 WCA for 18% WPI, based on an opinion from Dr Giblin, which was based on the right total knee replacement.
- The insurer disputed the claim and relied upon the Consent Orders.
- **Arbitrator Wynyard** entered an award for the respondent. He held that:
 1. Dr Giblin either ignored or was unaware of the Consent Orders; and
 2. The effect of the Consent Orders was that the appellant could not claim that the right TKR resulted from the injury on 15/04/2015.

Etherton

- **On appeal**, the appellant alleged that the Arbitrator erred:
 1. In finding that he was estopped from proceeding with the s 66 claim;
 2. In acting ultra vires to determine a medical dispute; and
 3. By construing the 2018 amending Act as having retrospective effect.
- **President Phillips** upheld the appeal. His reasons included:
 - In *Bouchmouni v Bakhos Matta t/as Western Red Services*, Roche DP held that Consent Orders can give rise to res judicata estoppel, but only to the extent of what was '*necessarily decided*': (*Habib* at [186] per McColl JA);
 - In deciding what was '*necessarily decided*', the Commission will closely examine the pleadings and particulars, the s 74 notice, and the legislation, because that forms part of the mutually known facts and assists in objectively determining the '*genesis*' and '*aim*' of the orders: (*Isaacs* at [75]; *Spencer Bower* at [39]; *DTR Nominees* at [429]);

Etherton

- Consent Orders should be construed by reference to what a reasonable person would understand by the language used in the orders, having regard to the context in which the words appear and the purpose and object of the transaction: (*Cordon Investments* at [52]);
- Where the words in the Consent Orders are ambiguous or susceptible of more than one meaning, extrinsic evidence is admissible to show the facts which the negotiating parties had in their minds: (*Codelfa* at 350).
- Prior negotiations that tend to establish objective background facts which were known to both parties and the subject matter of the consent orders will be admissible (*Codelfa* at 352).
- However, evidence of prior negotiations that are reflective of the parties' actual (subjective) intentions is not receivable: (*Codelfa* at 352).

Etherton

- His Honour found that:
 - When the Consent Orders issued, the pleading and body of evidence alleged a frank injury to the right knee on 15/04/2015.
 - The award for the respondent for the s 60 claim for the TKR with respect to that frank injury causes problems, as Dr Giblin was not instructed about it.
 - Based on *Habib*, the Consent Orders '*necessarily decided*' that there were awards for the respondent regarding the allegation of right knee injury due to the nature and conditions of employment until 15/04/2015 and s 60 expenses after 4/03/2016 (including that the right TKR surgery was not reasonably necessary as a result of the frank injury).
 - When the Consent Orders issued, the pleading and body of evidence alleged a frank injury to the right knee on 15/04/2015.
 - The award for the respondent for the s 60 claim for the TKR with respect to that frank injury causes problems, as Dr Giblin was not instructed about it.

Etherton

- Based on *Habib*, the Consent Orders '*necessarily decided*' that there were awards for the respondent regarding the allegation of right knee injury due to the nature and conditions of employment until 15/04/2015 and s 60 expenses after 4/03/2016 (including that the right TKR surgery was not reasonably necessary as a result of the frank injury).
- The Consent Orders *did not necessarily decide* whether the appellant suffered a frank injury to his right knee on 15/04/2015, although orders 4 and 5 could only apply to that injury.
- Therefore, the Arbitrator erred in finding that the appellant *was estopped* from seeking compensation under s 66 WCA and no relevant estoppel arose from the Consent Orders.
- ***His Honour rejected grounds (2) and (3).***
 - This was not a not a claim in relation to compensation paid or payable in respect of any period before 1/01/2019 (the appellant sought a referral to an AMS under s 66 WCA). Therefore, Part 19L(2) does not apply.
 - The effect of Pt 19L(1) is that the 2018 amendments apply, and the Arbitrator acted within power in determining the claim under s 66 WCA.
 - As the Arbitrator assessed 10% WPI, the appellant was not entitled to recover compensation under s 66 WCA.

Anshun Estoppel



Miller (No 9)

- This was a claim for death benefits, the worker died after suffering an Asthma attack whilst working in remote NSW. This appeal was against a decision by **Arbitrator Harris** dated 8/01/2021, which found an *Anshun* estoppel.
- The respondent argued that:
 - (1) These proceedings sought "*the same entitlement ... arising out of the same fact circumstance and relating to the same compensation*" and that the appellants made a conscious decision not to allege injury under s 4(a) WCA at first instance;
 - (2) This was unreasonable having regard to the benefits of finality of litigation and other matters identified by the President in *Miller No. 5*; and
 - (3) The appellants bore the onus of proving that it was not unreasonable to pursue the s 4(a) claim in these proceedings and they failed to adduce any evidence about why it was not claimed initially.

Miller (No 9)

- The appellants appealed on multiple grounds and alleged that the Arbitrator erred:
 - (1) In finding that they failed to provide evidence about why they chose to argue a particular injury in *Miller No 1* and to raise a different injury in *Miller No 4*;
 - (2) In finding that they failed to adduce evidence about why they chose not to allege a s 4(a) injury initially;
 - (3) In finding that their explanation, that they were not aware of a s 4(a) injury, did not stand up to any proper analysis;
 - (4) In finding that it was unreasonable for them to not file evidence about why they could not rely upon s 4(a) initially;
 - (5) In rejecting their submissions that the "*rules of evidence are not strictly applied in the PIC*" as being relevant to the consideration of the *Anshun* principle;

Miller (No 9)

6. In rejecting their argument that the “legislation is considered to be beneficial” when considering the Anshun principle;
7. In deciding that both proceedings relate to the same factual circumstances and involved similar causes of action;
8. In finding that at the time of Miller (No. 1), they knew that the deceased suffered both an asthma attack (a s 4(b)(ii) disease) and “*anoxia and cardiac arrest*” (a s 4(a) injury);
9. In finding that the factual matrix showed that the current subject matter was relevant to that in the previous proceedings; and
10. In failing to consider and refer to the obligation to conduct proceedings according to law, with due regard to equity, good conscience, and the substantial merits of the case.

Miller (No 9)

Deputy President Snell dismissed the appeal.

- He rejected grounds (1), (4), (7) and (9) as being without merit.
- He considered grounds (2), (3) and (8) together and rejected them.
- He considered grounds (5) and (10) together and rejected them.
- He held that in *Miller No. 5*, the President specifically held that the principles in *Anshun* apply in an appropriate case. His Honour accepted that "*whether the principle of estoppel is engaged must be considered in the rubric of the practices and procedure applicable to proceedings in the Commission*".
- He rejected ground (6) and found that the appellants had not demonstrated, based on any authority or reasoned argument, that finding that the legislation is "*beneficial in a general sense*" would change the result.

Geary v UPS Pty Ltd

- The appellant injured his neck and both shoulders at work and he claimed compensation under s 66 WCA for 37% WPI (cervical spine & both upper extremities) based on assessments from Dr Guirgis & s 60 expenses for proposed left shoulder surgery.
- On 29/11/2018, the WCC issued Consent Orders, which:
 - Amended the ARD to plead injuries to the cervical spine and right shoulder and consequential injuries to the left shoulder and neck;
 - Entered an award for the respondent for the alleged injury and the consequential injury to the neck;
 - Discontinued the claim under s 66 WCA; and
 - Noted that the respondent would pay s 60 expenses for left shoulder surgery.
- On 14/01/2021, he claimed compensation under s 66 WCA for 46% WPI (cervical spine + both upper extremities + scarring) for an injury deemed to have occurred on 1/02/2018.
- The respondent disputed the claim.

Geary

- On 9/02/2021, the appellant filed an amended ARD, which alleged injury to the neck as a result of the nature and conditions of employment until 12/12/ 2018 and, alternatively, a consequential injury to the neck due to *"overuse, overcompensation and overload following on from the right and left shoulder injuries and surgeries."*
- **Member Perry** found that there was an Anshun estoppel, based on the Presidential decisions in *Fourmeninapub Pty Ltd v Booth, Habib and Miller (No 9)*.
 - The relevant question is *"whether the claim made in the 2021 proceedings was so closely related to the 2019 proceedings that it would have been reasonably expected to have been raised at the time, having regard to the substance of the proceedings?"*
 - Disease was integral to the dispute (Dr Guirgis apportioned 90% of WPI to a disease, Dr Endrey-Walder provided a similiar opinion and all doctors diagnosed a disease in the shoulders).
 - Discontinuing the s 66 claim did not mean that an *Anshun* estoppel did not apply, as the doctrine is concerned with substance and not form: *Habib*;
 - The facts in both proceedings were essentially the same;

Geary

- Consent orders may create an estoppel and the parties clearly intended for an injury to the cervical spine to be pleaded, and for there to be an award for the respondent with respect that alleged injury and/or consequential injury; and
- The consent orders made it clear enough that the applicant '*could not succeed in gaining compensation for a consequential benefit*'.
- On appeal, the appellant argued that:
 1. The 2019 COD must be read in the light of the pleadings, which alleged a frank injury;
 2. The only claim determined in 2019 was the s 60 claim (left shoulder surgery) and it was not unreasonable that disease injuries to the shoulders and cervical spine were not pleaded then;
 3. The fact that the s 66 claim was discontinued meant that there was no *Anshun* estoppel, and it would not align with the PIC's practice to apply *Anshun* to "*mechanisms of injuries and body parts, the liability for which was only required to be determined in respect of a claim that was discontinued and hence not so determined*"; and
 4. "*A worker is entitled to pursue his rights independently*".

Geary

- **President Phillips DCJ** dismissed the appeal and he held that.
 - *Anshun* estoppel is available in PIC proceedings;
 - In *Israel v Catering Industries (NSW) Pty Ltd* [2017] NSWCCPD 53, Wood DP set out various authorities (at [114]–[119]) that dealt with the application of *Anshun* estoppel.
 - The mere fact that a party chooses to litigate a matter in other proceedings in and of itself is insufficient to ground an *Anshun* estoppel.
 - However, this does not mean that every decision to litigate separate claims will always be permissible from an *Anshun* point of view.
 - Rather, such a decision will only give rise to an *Anshun* estoppel if it was unreasonable not to have pleaded this cause in the earlier action.
 - The 2020 Act did not modify or derogate from the approach to *Anshun* estoppel by the WCC or Compensation Court.

Geary

- In *Bruce v Grocon Ltd* [1995] NSWCC 10, Neilson J summarised the relevant principles:
 - The principle in *Anshun* extends to claims and defences;
 - Estoppel will arise if in second or further proceedings there would be a judgment inconsistent with a judgment in the first proceedings, or the granting of remedies inconsistent with the remedy originally granted, or the declaration of rights of parties inconsistently with the determination of those rights made in the earlier proceedings;
 - the matter being agitated in the second or further proceedings must be relevant to the original proceeding; and
 - it was unreasonable not to rely on that matter in the original proceedings; such unreasonableness would depend on the facts of each particular case.

Geary

- His Honour dismissed ground (1). He held that:
 - The claim for disease injury to the neck was connected with the subject matter of the 2019 proceedings;
 - The Member exercised a discretion of the type in *House v The King* [1936] 55 CLR 499 at 504-505 (House) and the appellant must prove error in exercising that discretion:

"If a judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution, for his if it has the materials for doing so."

- The appellant did not challenge the finding that the facts pleaded in both proceedings were essentially the same;
- The Member found there was no explanation about any difficulties that existed, or might reasonably have been perceived, in raising a disease injury earlier. This pointed towards it being unreasonable to have not relied on a disease injury in 2019; and

Geary

- It is "*artificial in the extreme*" for the appellant to assert that the claim for the neck injury was not a claim or issue connected with the 2019 proceedings. It cannot be said that he or his solicitors were ignorant about the medical evidence regarding his condition before those proceedings were commenced.
- His Honour rejected ground (2).
 - He found that this was not argued before the Member and a Member cannot have erred in law in relation to an argument that was not put to him.
- His Honour also rejected ground (3).
 - Reading the decision as a whole, it is abundantly clear that the Member carefully considered the authorities and applied them in find that there was an Anshun estoppel regarding the disease injury to the neck in the 2021 proceedings.

Geary

- His Honour rejected ground (4).
 - The appellant effectively argued that different causes of action were pursued in the 2019 and 2021 proceedings, but in *Anshun*, the High Court stated:

"By 'conflicting' judgments we include judgments which are contradictory, though they may not be pronounced on the same cause of action. It is enough that they appear to declare rights which are inconsistent in respect of the same transaction".
 - The Court's finding in *Anshun* is entirely relevant to consideration of this ground and the Member found that the two sets of proceedings were *"essentially the same"*.
 - This is exactly what happened in *Anshun* and it was an approach that found no favour with the Court.

OneSteel Reinforcing Pty Ltd t/as Liberty OneSteel Reinforcing v Dang



- The worker claimed compensation for a back injury on 25/09/2016 (deemed).
- On 24/07/2019, Consent Orders were issued, which:
 - Amended the ARD to claim weekly benefits from 2/11/2016;
 - Awarded the worker weekly payments from 25/11/2016 to 2/05/2019 with an award for the respondent thereafter;
 - The respondent agreed to pay s 60 expenses up to \$5,500, with an award for the respondent thereafter; and
 - Noted that the worker acknowledged that as and from 2/05/2019, he was able to earn “as much or more than he would have earned had he remained in the employ of the respondent uninjured” in suitable employment.



Dang

- On 1/12/2020, the worker sought approval from the insurer for an MRI scan of his lumbar spine.
- The appellant asserted that there was no further entitlement under s 60 WCA by reason of the Consent Orders.
- He then claimed compensation under s 66 WCA for 12% WPI.
- The appellant disputed that claim and asserted that the worker was prevented from making this claim “as it was based on medical evidence that existed at the time of the prior proceedings and was not disclosed”. It alleged prejudice and that that “*the full extent of the claim brought in 2019*” had resolved.
- The worker then filed an ARD claiming s 60 expenses (including costs of the MRI scan) and compensation under s 66 for an injury on 25/09/2016.
- ***Senior Member Capel*** held that the worker was not estopped from bringing this claim and that the appellant was liable for the compensation claimed.

Dang

- On appeal, the appellant alleged that the Senior Member erred as follows:
 - in law, as to the nature of an Anshun estoppel;
 - In law, by failing to exercise his discretion to apply the Anshun principles to the case;
 - in fact, by accepting that the worker only decided not to proceed with surgery in 2021; and
 - in law, by taking into account an irrelevant consideration.

Dang

- ***Deputy President Wood*** dismissed the appeal.
- She rejected ground 1.
 - She noted that the appellant argued that the relevant medical report was available to the worker in the earlier proceedings.
 - It relied on the High Court's decision in *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28 (*Tomlinson*) and argued that the earlier authorities that were relied upon by the worker and cited by the Senior Member, were inconsistent.
 - In *Tomlinson*, the Court considered the concept of abuse of process, and found that this is inherently broader and more flexible than estoppel. This can be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel.
 - It has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel.

Dang

- In its submissions to the Senior Member, the appellant referred to an “*abuse of process*” but it did not actively argue that there was an abuse of process or that the worker’s action was unjustly oppressive or had brought the administration of justice into disrepute. Instead, it argued that an *Anshun* estoppel applied.
- Abuse of process and an *Anshun* estoppel are two distinct concepts, although may have overlapping features.
- She rejected ground (2).
 - The critical reasons given for not pursuing the claim in the earlier proceedings were that the worker only had an entitlement to make one claim under s 66 WCA and the surgery, if undertaken, might likely alter the assessment of his WPI and he was yet to make a final decision about the surgery. The evidence supported these matters.
 - The Senior Member addressed the relevant factors that the appellant relied upon to show that the failure to bring the claim was unreasonable.
 - The appellant’s case substantially rests on an assertion that because the worker could have brought his case in the earlier proceedings, he should have. That submission falls foul of the observations of Allsop P in *Manojlovski*.
 - The Senior Member did not fail to apply the *Anshun* principles.



Dang

- She rejected ground (3).
 - The Senior Member's conclusion that the worker only decided against surgery in 2021 was consistent with the evidence.
- She rejected ground (4).
 - She noted that the grounds of appeal did not point to any error by the Senior Member in proceeding to determine the s 66 claim.





Racing NSW v Goode

- The worker was a jockey.
- He suffered paraplegia at the T4 level, and multiple other injuries from a fall and was permanently wheelchair-bound. He required ongoing medical care and assistance with ADLs.
- On 21/10/2010, a Complying Agreement was signed, under which he received compensation under s 66 WCA for 85% WPI and \$50,000 for pain and suffering.
- In June 2012, the worker and his wife returned to their native UK, after which he submitted numerous claims to the insurer for treatment, medication, rehabilitation, housing modifications and maintenance. Some claims were paid, but some were disputed.
- On 18/02/2020, he filed an ARD claiming s 60 expenses for house repairs and hotel expenses.
- On 22/04/2020, Consent Orders were issued, under which the appellant agreed to pay some claims, it received an award for the respondent for some claims, and the worker discontinued some claims.
- On 10/12/2021, the worker filed a further ARD, which claimed s 60 expenses, but the appellant disputed those claims.



Goode

- **Member Wynyard** determined the dispute.
 - The appellant disputed that the claims were “allowable” based on definitions in s 59 WCA and/or that they were reasonably necessary under s 60 and sought argue *Anshun* estoppel.
 - As *Anshun* had not been raised, the appellant required leave under s 289A WIMA.
 - He refused to grant leave to rely upon *Anshun* estoppel under s 289A WIMA and awarded the worker compensation under s 60 WCA.
- **On appeal**, the appellant argued that:
 1. The parties were legally represented at all relevant times during the 2020 and 2021 proceedings.
 2. It accepted liability for the worker’s injuries;
 3. The WCC and the PIC, are the tribunals of competent jurisdiction to hear and determine both applications; and
 4. The parties to the 2020 and 2021 proceedings are the same and both proceedings involved a dispute regarding s 60 expenses.

Goode

- **President Judge Phillips** upheld the appeal.
 - He noted that the Member held that he needed to be satisfied that it was in the interests of justice to allow it to rely on *Anshun* estoppel and he quoted from his decision in *Geary*.
 - The correct authority – *Mateus* – was brought to the Member’s attention, but he failed to engage with the parties’ arguments and to grapple with the *Mateus* factors. This was a failure to exercise a discretion in accordance with the law.
- Accordingly, he redetermined the application under s 289A WIMA and he decided that:
 1. *Anshun* applies to statutory compensation schemes.
 2. Consideration of the s 289A application requires an assessment of the relative merits of the proposed *Anshun* defence in accordance with *Mateus*.
 3. The *Anshun* defence was only proposed to apply to claims that existed, but were not advanced, before the 2021 proceedings. There was no earlier decision on the merits of the matters in dispute that could possibly conflict with any decision in the current proceedings.

Goode

4. *Mateus* set out a number of non-exhaustive factors to be considered when dealing with a leave application and whether it is in the interests of justice to grant leave. The starting point is to undertake a broad review of all the circumstances surrounding the matter.
5. The worker's needs will change from time to time depending upon his condition, the advice given by his treating doctors and possible developments in medical science that may assist in the management of his condition.
6. As Hutley JA said in *Thomas v Ferguson Transformers Pty Ltd*, "*the process of dealing with an incapacitated person may involve a continual war with disease, atrophy of muscles by lack of use, and even psychological decay by reason of lack of something to do.*" In *Thomas*, the worker was a paraplegic, and the decision has "*considerable resonance*" with this matter.

Goode

- In relation *Mateus* factors, his Honour held that:
 - The application to rely upon *Anshun* was made at the commencement of the hearing and the appellant did not act promptly in bringing it to the notice of the PIC or the worker;
 - While the appellant's counsel referred to a "*pleading oversight*", there was no explanation of how that occurred;
 - The worker had no opportunity to consider what evidence may be required to answer the defence and it was unreasonable for the appellant to expect him to meet it without notice;
 - The s 60 claim was based on "*poikilothermia*" and the appellant did not properly respond to it; and
 - The defence was not articulated in a compelling manner.
 - A fundamental precept in establishing an *Anshun* defence is that the later claim was so relevant to the subject matter of the earlier dispute that it was unreasonable not to have advanced it in the earlier proceedings.

Goode

- In *Miller No 10*, Brereton JA held that *Anshun* “**is engaged only where the party has unreasonably failed to assert a right or defence in connection with or in the context of the earlier proceeding.**” (emphasis in original)
- Other than the fact that both sets of proceedings concerned s 60 WCA, the claims were not such that they had to be brought at once. The mere fact that a claim **could have been brought in earlier proceedings does not automatically mean that it should have been so brought** (emphasis added).
- What is required is the evaluative exercise spoken about by McColl JA in *Habib* (at [84]).
 - In *Champerslife Pty Ltd v Manojlovski*, the Court of Appeal said that deciding whether the matter in question was so relevant that it can be said to have been unreasonable not to rely upon it in the first proceedings involves a value judgment to be made referable to the proper conduct of modern litigation.
 - “*Unreasonableness*” is a key feature of *Anshun* estoppel – namely, was it unreasonable not to have advanced the claims in the earlier proceedings?

Goode

- *Anshun* is not an inflexible principle. As the High Court said, “there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings”. He considered this in *Miller No 5* at [194].
- His Honour declined to infer that the worker had behaved unreasonably.
- He held that the appellant effectively asked him to elevate the *Anshun* principle from “**what could have been brought in the earlier proceedings to a principle which requires that it should have been brought**” (emphasis added).
- The *Anshun* defence had little merit and the discontinuance of claims in the 2020 proceedings did not mean that the appellant was entitled to treat them as abandoned.



Inner West Council v BFZ

- The worker suffered a psychological injury.
- On 27/05/2020, Consent Orders were issued. The appellant agreed to pay:
 - A closed period of weekly benefits (18/03/2020 to 26/05/2020), with an award for the respondent thereafter; and
 - Section 60 expenses up to \$2,000, with an award for the respondent thereafter.
- The worker resigned effective from 26/05/2020 and the appellant agreed not seek credit for paid sick leave.
- In 2022, the worker claimed compensation under s 66 WCA, but the appellant disputed the claim.
- The worker argued that the appellant was estopped from denying liability under ss 4(a), 4(b), 9A and 11A WCA because of the 2020 Consent Orders.
- ***Principal Member Bamber*** determined that the appellant was estopped from disputing liability because of the Consent Orders, and she remitted the dispute to the President for referral to a Medical Assessor.





BFZ

- On appeal, the appellant alleged that the Principal Member erred:
 1. In determining that it was estopped from disputing liability; and
 2. In referring the s66 dispute to the President for referral to a MA.
- **Acting Deputy President Nomchong SC** granted leave to appeal and allowed it. She remitted the matter to another member for re-determination. Her reasons included:
 - Issue estoppel arises where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to re-open that issue.
 - Estoppel is to be applied strictly.
 - Issue estoppel will apply only to prevent the assertion in later proceedings of the precise matter of fact or law that has already been necessarily and directly decided in the earlier decision.



BFZ

- The 3 conditions that must exist for issue estoppel to apply are:
 1. the first decision was final;
 2. the same question has been decided, and
 3. the same parties, or at least parties with the same legal interest, are the same.
- In this matter, (1) and (3) were established and the issue for the Principal Member to determine was whether the same question or questions were decided in 2020?
- The Principal Member needed to identify precisely what issues were determined in 2020, as the COD did not refer to the nature or extent of the injury.
- There had been no arbitration on liability issues and consent orders were to resolve the dispute.
- The authorities referred to by Roche DP in *Bouchmouni* (including *Habib*) provide that in these circumstances there must be an examination of the evidence to ascertain what matters were in dispute and what matters were necessarily resolved in the actual decision assented to by the parties. The Principal Member recognised this and referred to these authorities.

BFZ

- However, the Principal Member concluded that the only relevant characteristic for determining the nature of the injury was whether it was work-related. This was an error of law.
- “*Injury*” refers to both the event that caused it and the pathology arising from it.
- In *Department of Juvenile Justice v Edmed*, Roche DP held that for the purposes of a determination of a s 66 entitlement, it is the pathology which must be determined.
- Specificity is required for the application of estoppel and the fact that the Principal Member found that there was “*an evolution over time into a different type of psychopathology*” necessarily means that there can be no issue estoppel.
- The injury that is the subject of the s 66 claim is different in kind to that which was the subject of the 2020 Consent Orders, and it is a matter for a merits consideration as to whether there had been other incidents or events (workplace or otherwise) in the worker’s life since the 2020 Determination.



Recommendation

- When faced with issues of a possible *Anshun estoppel*, I recommend that the Principal Lawyer refers to ADP Nomchong's decision in **BFZ**, as this provides an excellent summary of the principles that the PIC will apply in determining whether an *Anshun estoppel* arises from previous litigation between the parties.



QUESTIONS





Independent
Review Office

IRO Priorities 2024 and Closing Remarks

Jeffrey Gabriel

A/Independent Review Officer