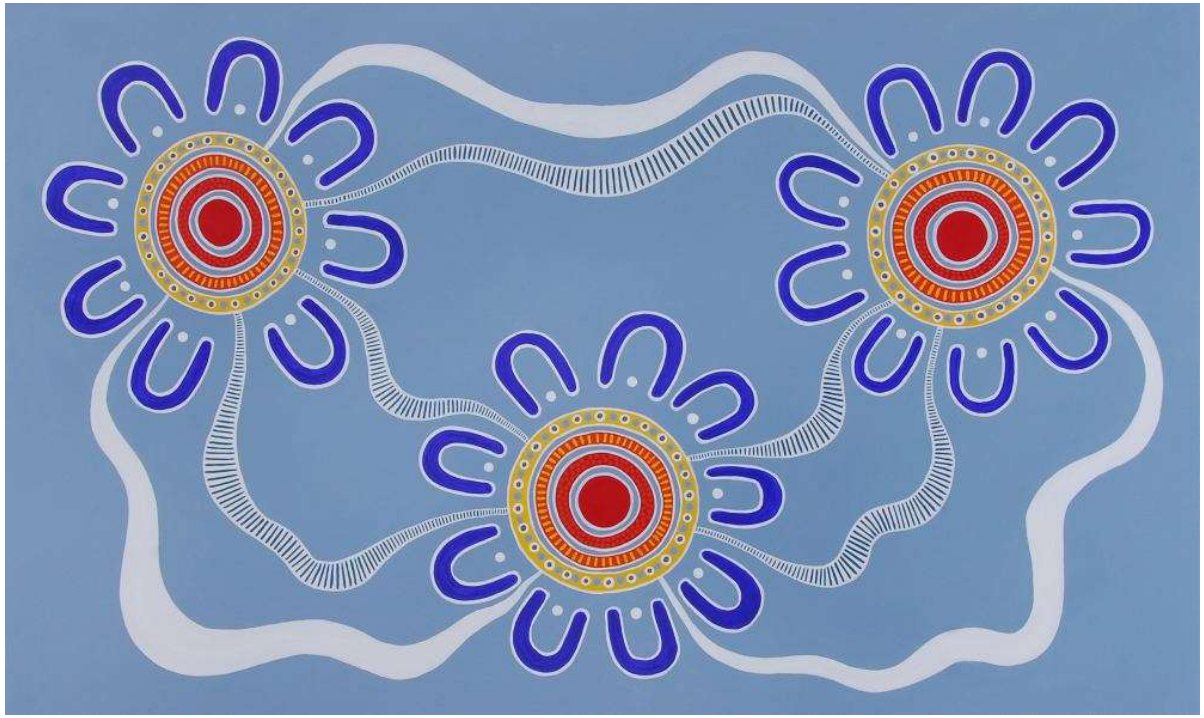
Independent
Review Office

IRO Personal Injury Seminar

IRO Annual Seminar 2024 | 12 June 2024 | Aerial UTS Function Centre

Acknowledgement of country



I acknowledge the Gadigal people of the Eora Nation, the Boorooberongal people of the Dharug Nation, the Bidiagal people and the Gamaygal people upon whose ancestral lands UTS stands. I pay respect to the Elders both past and present, acknowledging them as the custodians of knowledge for these lands.

Connecting Communities, artwork by Alison Williams, proud Gumbaynggirr woman.

Independent Review Office

Personal Injury Seminar

MORNING

Welcome - Jeffrey Gabriel, A/Independent Review Officer

Welcome - **Minister Chanthivong** - (video)

PIC Update - Pathway deployment in workers compensation and the 500 page rule how it will work in practice - **Judge Phillips,** President, Personal Injury Commission

CTP Update: Threshold injury issues; focusing on skin, consequential surgery and artificial members - **Peter Hunt,** Principal McCabes, Lawyers

Estoppel in a Nutshell – Michelle Riordan, Manager, Legal Education, IRO

Psychological Injuries and Section 11A - **Belinda Walsh,** Special Counsel, Hall & Wilcox

Independent
Review Office

Personal Injury Seminar

Independent Review Office

Personal Injury Seminar

Personal Injury Commission Update: Pathway deployment in workers compensation and the 500 page rule – how it will work in practice

Judge Gerard Phillips

President, Personal Injury Commission

All learning materials can be found on the Commission's website
www.pi.nsw.gov.au/pathway

If you require assistance, please contact our Digital Support Team:

Email: wcsupport@pi.nsw.gov.au

Phone: 1800 PIC NSW (or 1800 742 679) and select option 2

Independent Review Office

Personal Injury Seminar

CTP Update: Threshold injury issues; focusing on skin, consequential surgery and artificial members

Peter Hunt

Principal, McCabes

THRESHOLD INJURY ISSUES
Artificial Members, Skin & Consequential Surgery

Peter Hunt

Glossary

- **MAIA** – *Motor Accident Injuries Act 2017*
- **MAIR –** *Motor Accident Injuries Regulation 2017*
- **MAGs** – *Motor Accident Guidelines*
- **Threshold Injury** - previously known as *minor injury*

Some Overarching Principles

Why is Threshold Injury Important?

- **Relevant to all CTP claims:**
  - No entitlement to statutory benefits beyond 52 weeks – ss 3.11 and 3.28 of MAIA
  - No entitlement to common law damages – s 4.4 of MAIA

Lynch v AAMI [2022] NSWPICMP 6 – Harris | Parsonage | Hong

- **Onus of Proof:**
  - Section 4.4 of MAIA makes it clear that the Claimant must demonstrate above threshold injury to be entitled to damages.
  - Only one test for threshold injury.
  - Follows that the Claimant bears the onus of proving above-threshold injury in the context of both statutory benefits and common law damages claims.

David v Allianz [2021] NSWPICMP 227 – Harris | Stubbs | Moloney

- **Recovery by Day of Assessment:**
  - Evidence of an above-threshold injury does not need to be present on the day of assessment.
  - Reliable evidence of an above-threshold injury at some point between the date of the accident and the date of assessment is sufficient.

Psychiatric Injuries

What is NOT a Threshold Psych Injury?

- Any recognised psychiatric illness other than:
  - An Acute Stress Disorder, OR
  - An Adjustment Disorder.

(s 1.6(1)(a) of MAIA & cl 4.2 of MAIR.)

Physical Injuries – Definition

What is An Injury?

- *Injury means personal or bodily injury and includes –*
  - *Pre-natal injury, and*
  - *Psychological or psychiatric injury, and*
  - *Damage to artificial members, eyes, or teeth, crutches or other aides or spectacle glasses*

(Section 1.4(1) of MAIA)

What is a Threshold Physical Injury?

- *A soft tissue injury – s 1.6(1)(a) MAIA.*
- *A soft tissue is an injury to tissue that connects, supports or surrounds other structures or organs of the body (such as muscles, tendons, ligaments, menisci, cartilage, fascia, fibrous tissues, fat, blood vessels and synovial membranes), but not an injury to nerves or a complete or partial rupture of tendons, ligaments, menisci or cartilage – s 1.6(2) MAIA*
- *An injury to a spinal nerve root that manifests in neurological signs (other than radiculopathy) is included as a soft tissue injury for the purposes of the Act – cl 4(1) MAIR*

Breaking Down the Definition of Soft Tissue Injury

- **Broad Definition of "Soft Tissue Injury":**
  "*A soft tissue injury is an injury to tissue that connects, supports or surrounds other structures or organs of the body…*"

- **Exemplars of "Soft Tissue":**
  "**…***such as muscles, tendons, ligaments, menisci, cartilage, fascia, fibrous tissues, fat, blood vessels and synovial membranes…*"

- **Exceptions to "Soft Tissue Injury":**
  "**….***but not an injury to nerves or a complete or partial rupture of tendons, ligaments, menisci or cartilage.*"

What is NOT a Threshold Physical Injury?

- An injury to nerves – s 1.6(2) of MAIA
- A complete or partial rupture of tendons, ligaments, menisci or cartilage – s 1.6(2) of MAIA
- An injury to a spinal nerve root manifesting in two signs of radiculopathy – cl 4.1 of MAIR and para 5.8 of the MAGs

What About?

- Injury to artificial members?
- Injury to aides and equipment?
- Injury to the skin?
- Injury caused by consequential surgery?

Physical Injuries – Artificial Members

Lucanovic v QBE [2023] NSWPICMP 38 – McTegg | Curtin | Rosenthal

- **Injury** – ruptured breast implant rupture.
- **Finding** – rupture of artificial member an above-threshold injury.
- **Reasoning:**
  - Definition of injury includes "*damage to artificial members, eyes or teeth, crutches or other aids or spectacle glasses*" – s 1.4(1) MAIA
  - Artificial members not included in definition of "*threshold injury*" – 1.6 MAIA

A Possible Solution

- **Regulation Power** – the Regulations may define what is included and what is excluded from the definition of "threshold injury" – s 1.6(4) MAIA.
- **Proposed New Regulation:**

  "An injury to crutches or other aids or spectacle glasses are included as a threshold injury for the purposes of the Act."

  "An injury to an artificial member is <u>not</u> included as a threshold injury unless…"

Physical Injuries – Skin Injuries

Abawi v Allianz [2024] NSWPICMP 158 – Nolan | Moloney | Couch

- **Injury** – superficial laceration to the left wrist (3cm).
- **Finding** – the laceration is an above-threshold injury.
- **Reasoning:**
  - "*…injury to…muscles, tendons, ligaments, menisci, cartilage, fascia, fibrous tissue, fat, blood vessels and synovial membranes*" → connective tissue → below-threshold injury.
  - The skin has functions beyond that of connective tissue, including regulating temperature, protecting from ultraviolet radiation and retaining water.

Abawi v Allianz [2024] NSWPICMP 158 – Nolan | Moloney | Couch

- **Reasoning (con't):**
  - Injuries which are not capable of involving "…*an injury to nerves or a complete or partial rupture of tendons, ligaments, menisci or cartilage*" fall outside the definition of "*soft tissue injury*" and are above-threshold injuries.

    Examples – fractured bones or internal injuries to an organ.
  - A mere injury to the skin is not capable of involving "…*an injury to nerves or a complete or partial rupture of tendons, ligaments, menisci or cartilage*".

Abawi v Allianz [2024] NSWPICMP 158 – Nolan | Moloney | Couch

- **My Queries**
  - Does it matter that the skin has functions beyond connective tissue?
    - Blood vessels have functions beyond connective tissue.
    - Fat has functions beyond connective tissue
  - Is a skin injury capable of involving "…*an injury to nerves or a complete or partial rupture of tendons, ligaments, menisci or cartilage…"* given that a deep laceration could injure nerves?

Nazari v AAI [2023] NSWPICMP 62 – Bolton | Maloney | Dixon

- **Injury** – laceration to right eyebrow requiring sutures.
- **Finding** – laceration is a below-threshold injury.
- **Reasoning** – "*In medical terms, skin is an organ and, by way of strict definition, is not a soft tissue. However, if the skin were not included as coming within the definition of soft tissue injury, then the merest cut or abrasion would render it a non-minor injury. Such an interpretation would potentially lead to increased claims and defeat the intended purpose of the MAI Act.*"

Objects of the Act - Section 1.3 of MAIA

- **Generally** – consistent theme that the objects of the Act include keeping premiums affordable whilst ensuring that a premium pool is preserved to promote early treatment and return to work.

  (See 1.3(2)(a), 1.3(2)(b), 1.3(2)(d), s 1.3(a) and s 1.3(c))

- **My Comment** – the objects of the Act cannot be used to re-write the words in a section but where the words are ambiguous, the benefit of the doubt should favour a construction consistent with the objects.

Dhupar v AAI [2023] NSWPICMP 99 – Harris | Cameron | Curtin

- **Injury** – multiple lacerations to various parts of the body resulting in scarring.
- **Finding** – the lacerations are below-threshold injuries.
- **Reasons:**
  - Skin "*supports or surrounds other structures or [other] organs of the body*".
  - A skin injury may involve injury to "*fibrous tissue, fat and blood vessels".*
  - Whether an injury to the skin is a below-threshold injury turns on whether the skin injury involves injury to the nerves.

A Possible Solution

- **Regulation Power** – the Regulations may define what is included and what is excluded from the definition of "threshold injury" – s 1.6(4) MAIA.
- **Proposed New Regulation:**

  "An injury to the skin is included as a soft tissue injury for the purposes of the Act unless…"
- **Proposed Dividing Line:**
  - By reference to injury to nerves, OR
  - By reference to "Table for Evaluation of Minor Skin Injury" (TEMSKI) – Table 6.18 of the MAGs.
  - TEMSKI looks at factors such as type of scar, position of scar, impact on ADLs and adherence.

Physical Injuries – Consequential Surgery

Mandoukos v Allianz [2023] NSWSC 1023 – Chen J

- **Injury***:*
  - Soft Tissue Injury to the cervical spine (below-threshold).
  - Consequential C5/6 foraminotomy which involves removing a segment of bone
- **Finding:**
  - Left open whether surgery transformed below-threshold neck injury into an above threshold-injury.

Mandoukos v Allianz [2023] NSWSC 1023 – Chen J

- **Reasoning:**
  - *[110] The first argument for the plaintiff appears to be that the surgery necessarily involved a further, and non-minor, injury: the argument, so far as I understood it, appeared to be that surgery meant that the injury was transformed into a "non-minor-injury" or capable to being held to be so. I do not accept this submission, and how that argument fits within s 1.6(2) was not developed. Whether, in a given case, that could be so would, at least initially, be a question of fact. There is not, as seems to be suggested, a presumption of sorts that a minor injury becomes a non-minor injury merely because there is some form of surgery.*
- .

Mandoukos v Allianz [2024] NSWCA 71 – Lemming, Kirk and Stern JJA

- **Court of Appeal Reasoning:**
  - *[99] "….In any event, even on the assumption that the removal of bone during the foraminotomy procedure could be a personal or bodily injury as defined in the Act… my provisional view is that that would be a "different" injury from the injury to Mr Mandoukos' cervical spine sustained at the time of the motor accident. The foraminotomy procedure occurred some 18 months after the motor accident. It involved a mechanism, consensual surgical removal of bone, entirely separate from the impact of the motor accident. That is so even though it was performed by reason of Mr Mandoukos' symptoms resulting from the motor accident. It is also of a different character from an assault or impact upon the body consequent upon the forces of the motor accident."*

Mandoukos v Allianz [2024] NSWCA 71 – Lemming, Kirk and Stern JJA

- **Reasoning (con't):**
  - *[99] "…Ultimately, however, if Mr Mandoukos seeks referral of a medical dispute as to whether the foraminotomy procedure has the consequence that the cervical spine injury he sustained in the motor accident is a minor injury, that question can be assessed by a medical assessor."*
- .

A Possible Solution

- **Regulation Power** – the Regulations may define what is included and what is excluded from the definition of "threshold injury" – s 1.6(4) MAIA.
- **Proposed New Regulation:**

  "Bodily injury caused by reasonable and necessary surgery (or other medical treatment) which results from an injury sustained in a motor accident and which meets the definition of a threshold injury is included / is not included as a threshold injury for the purpose of the Act."

Defining Medical Disputes

Mandoukos v Allianz [2024] NSWCA 71 – Lemming, Kirk and Stern JJA

- **Scope of Medical Dispute**
- "*A medical dispute is a dispute between a claimant and an insurer about a medical assessment matter*" – s 7.17 MAIA

Mandoukos v Allianz [2024] NSWCA 71 – Lemming, Kirk and Stern JJA

- **Scope of Medical Dispute**
  - Medical dispute **not defined** by the Act.
  - Medical dispute **not defined** by the bundle of documents.
  - Medical dispute **is defined** by the submissions made by the parties.
  - In this case, the parties **did not** specially place in issue whether the foraminotomy procedure represented an above-threshold injury because it involved the removal of bone.

Elammar v AAMI [2024] NSWPICMP 280 – Patterson | Baker | Hong

- **Scope of Medical Dispute**
  - Medical Assessor found Adjustment Disorder.
  - Review Panel found Adjustment Disorder plus Opioid Abuse Disorder.
  - Review Panel declined to certify above-threshold injury because Opioid Abuse Disorder not listed in injuries to be assessed.

Take Home Message – Medical Disputes

- **Put your full case before the primary Medical Assessor**

mccabes.com.au

t +61 2 9261 1211
f +61 2 9261 2336

SYDNEY
MELBOURNE
BRISBANE
PERTH

McCabes Lawyers
ABN 89 626 085 685
Liability limited by a scheme approved under Professional Standards Legislation

Independent Review Office

Personal Injury Seminar

Estoppel in a Nutshell

Michelle Riordan

Manager, Legal, IRO

What is meant by:

Issue Estoppel	Anshun Estoppel
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.	An estoppel that prevents a party from making a claim which should have been pursued by that party in earlier proceedings: *See:* ***Port of Melbourne Authority v Anshun Pty Ltd*** (1981) 147 CLR 589

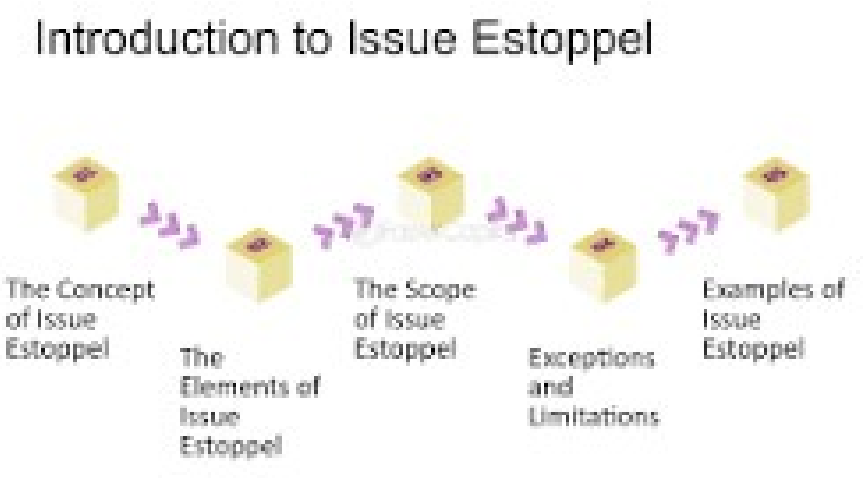
Relevant

Issue Estoppel	
Inner West Council v BFZ	[2023] NSWPICPD 62
Wright v State of New South Wales	[2024] NSWCA 77
Anshun Estoppel	
OneSteel Reinforcing Pty Ltd t/as Liberty OneSteel Reinforcing v Dang	[2022] NSWPICPD 32
Racing NSW v Goode	[2023] NSWPICPD 43

Independent Review Office

Personal Injury Seminar

Issue Estoppel



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.

Inner West Council v BFZ

- The worker suffered a psychological injury.
- On 27/05/2020, Consent Orders were issued. The appellant agreed to pay the worker:
  1. A closed period of weekly benefits (18/03/2020 to 26/05/2020), with an award for the respondent thereafter; and
  2. Section 60 expenses up to $2,000, with an award for the respondent thereafter.
- 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 because of the 2020 Consent Orders.

BFZ

Principal Member Bamber found that there was an estoppel, and she remitted the dispute to the President for referral to an AMS.

On appeal, the appellant alleged that the Principal Member erred as follows:

1. In determining that it was estopped from disputing liability; and
2. In referring the s66 dispute to the President for referral to an AMS.

Acting Deputy President Nomchong SC granted leave to appeal. She allowed the appeal and remitted the matter to another member for re-determination.

BFZ

- The relevant principles are:
  - 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 for an issue estoppel to apply are:
  1. The first decision was final;
  2. The same question has been decided, and
  3. The matter involves the same parties, or at least parties with the same legal interest.
- 1 and 3 were satisfied and the Principal Member needed to identify what issues were determined in 2020, which required examination of the evidence to ascertain what matters were in dispute and what matters were necessarily resolved: see Roche DP in *Bouchmouni* and McColl JA in *Habib*.
- The Principal Member recognised this and referred to these authorities.

BFZ

- However, she held that the only relevant characteristic to determine 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.

- The fact that the Principal Member found that there was "*an evolution over time into a different type of psychopathology*" necessarily meant that there can be no issue estoppel.

- Therefore, it is a matter for a merits consideration as to whether there were other causative incidents or events in the worker's life since the 2020 Determination.

Wright v State of New South Wales

- The appellant alleged that he suffered a psychological injury due to harassment, bullying and other forms of mistreatment, mostly by his supervisor, due to an incident at work on 5/12/2018. The insurer disputed liability.
- On 6/11/2020, Consent Orders were issued, which included the following orders:
  - Order 1 - amended the ARD to allege an aggravation/exacerbation of the psychological condition as a result of interactions at work and his perceptions that he was bullied after 5/12/2018 ("*further injury*"); and
  - Order 5 – which provided for an award for the respondent in respect the further injury.
- In 2022, the appellant claimed compensation under s 66 WCA.

Wright

- The PIC referred the dispute to an AMS to assess the degree of WPI resulting from the injury on 5/12/2018.
- The AMS issued a MAC that assessed 19% WPI.
- The insurer appealed against the MAC and asserted that the AMS erred by including impairment that resulted from the further injury described in the COD in his WPI assessment, when there was an award for the respondent for that injury.
- ***The MAP confirmed the MAC.***

Wright

- The appellant applied to the Supreme Court of NSW for judicial review of the MAP's decision.

- ***Basten AJ*** held that:
  - The AMS exceeded his statutory jurisdiction by considering matters that he was required not to consider; and
  - The MAP erred in failing to identify this error.

- The appellant sought leave to appeal to the Court of Appeal.

Wright

The Court of Appeal (Stern JA (Gleeson & Mitchelmore agreeing)) dismissed the appeal

- The natural meaning of the language the parties used in orders 1 and 5 of the COD is that they agreed that the appellant was not entitled to payments for the aggravation/exacerbation of his psychological injury by reason of the further injury.

- The MAP erred in construing the COD and the ambit of the resulting estoppel.

- Based on the proper construction of the consent orders, it was not open to the AMS to find that any aggravation/exacerbation of the injury due to the further injury was caused by, or contributed to, the injury on 5/12/2018.

Wright

- If the AMS excluded the aggravation/exacerbation from the further injury from his WPI assessment, there would have been no demonstrable error. As he did not do so, the MAC must be set aside.
- The Court remitted the matter to the President of the PIC, to either:
  1. Refer the dispute for a further medical assessment under s 329 WIMA; or
  2. Refer the insurer's appeal against the AMS' decision to a differently constituted MAP under s 328 WIMA.
- If option 2 was adopted, it would be incumbent upon any freshly constituted MAP to revoke the AMS' MAC, conduct its own assessment of WPI, and reflect that assessment in a new MAC.

Independent Review Office

Personal Injury Seminar

Anshun Estoppel

"An estoppel that prevents a party from making a claim which should have been pursued by that party in earlier proceedings".

Port of Melbourne Authority v Anshun Pty Ltd

(1981) 147 CLR 589

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

- On 24/07/2019, Consent Orders were issued, which relevantly:

1. Amended the ARD to claim weekly benefits from 2/11/2016;

2. Awarded the worker a closed period of weekly payments from 25/11/2016 to 2/05/2019 with an award for the respondent thereafter; and

3. Awarded some s 60 expenses, with an award for the respondent thereafter.

Dang

- On 1/12/2020, the worker sought approval from the appellant for an MRI scan.
- The appellant refused and decided that because of the Consent Orders, the worker had no further entitlement under s 60 WCA.
- The worker then claimed compensation for 12% WPI under s 66 WCA.
- The appellant disputed that claim and decided 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*".

Dang

- The appellant argued that it was prejudiced and that that "*the full extent of the claim brought in 2019*" had resolved.

- The worker then filed an ARD that claimed s 60 expenses (including costs of the MRI scan) and compensation under s 66 WCA.

Senior Member Capel held that:

1. The worker was not estopped from bringing this claim; and
2. The appellant was liable for the compensation claimed.

Dang

On appeal, the appellant alleged that the Senior Member erred as follows:

1. In law, as to the nature of an *Anshun* estoppel;

2. In law, by failing to exercise his discretion to apply the *Anshun* principles to the case;

3. In fact, by accepting that the worker only decided not to proceed with surgery in 2021; and

4. In law, by taking into account an irrelevant consideration.

Dang

Deputy President Wood dismissed the appeal.

She rejected ground 1.

- The appellant argued that relevant medical report was available to the worker in the 2019 proceedings. It relied on the High Court's decision in *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28 (*Tomlinson*), but that decision concerned "*abuse of process*".
- 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

- Before the Senior Member, the appellant did not argue abuse of process or that the worker's action was unjustly oppressive or had brought the administration of justice into disrepute. Rather, it relied on an *Anshun* estoppel.
- Abuse of process and *Anshun* estoppel are 2 distinct concepts, although they may have overlapping features.

She rejected ground (2).

- The worker could only make one claim under s 66 and in 2019 and the evidence indicated that he had not made a final decision about possible surgery.
- The Senior Member addressed the relevant factors that the appellant relied upon to argue that the worker's failure to make the claim earlier was unreasonable.

Dang

- The appellant's case substantially rested on an assertion that because the worker ***could have brought his case in the earlier proceedings, he should have***. This is contrary to the observations made by Allsop P in *Champerslife Pty Ltd v Manojlovski*.
- The Senior Member did not fail to apply the *Anshun* principles.

She rejected ground (3).

- The Senior Member held that the worker only decided against having surgery in 2021 and this was consistent with the evidence.

She also rejected ground (4), as the grounds of appeal did not identify an error in the Senior Member determining the s 66 claim.

Racing NSW v Goode

- The worker suffered paraplegia at the T4 level, and multiple other injuries from a fall. He is permanently wheelchair-bound and requires ongoing medical care and assistance with ADLs.

- On 21/10/2010, a Complying Agreement provided for compensation under s 66 WCA for 85% WPI + $50,000 for pain and suffering.

- In June 2012, the worker returned to the UK to live. He submitted numerous further claims under s 60 WCA for treatment, medication, rehabilitation, housing modifications and maintenance. Some claims were accepted, and others were disputed.

Goode

- On 18/02/2020, the worker 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.

Goode

- The appellant disputed that the claims were "*allowable*" based on definitions in s 59 WCA and argued that they were not reasonably necessary under s 60 WCA.
- It also sought to rely upon an *Anshun* estoppel. However, it had not previously raised this ground, and it required leave to rely upon it under s 289A WIMA.

- ***Member Wynyard*** :

1. Refused to grant leave to rely upon Anshun estoppel under s 289A WIMA; and
2. Awarded the worker compensation under s 60 WCA.

Goode

- ***On appeal***, the appellant argued that an *Anshun* estoppel applied as:
  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.

- The Member correctly held he needed to be satisfied that it was in the interests of justice to allow the appellant to rely on an *Anshun* estoppel. He quoted from his decision in *Geary*.

- The correct authority was *Mateus*, which was brought to the Member's attention.

- However, the Member 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.

Goode

- Accordingly, his Honour re-determined the application under s 289A WIMA. He held:

1. *Anshun* applies to statutory compensation schemes.

2. Consideration of the s 289A application required 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 s 289A 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.

Goode

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."

7. In *Thomas,* the worker was a paraplegic, and the decision had "*considerable reson*ance" with this matter.

Goode

- In relation to *Mateus* factors, his Honour held that:
  - The s 289A application was made at the commencement of the hearing and the appellant failed to act promptly to bring it to the notice of the PIC or the worker;
  - The appellant's counsel referred to a "*pleading oversight*", but gave no explanation;
  - The worker had no opportunity to consider what evidence may be required to answer the defence and it was unreasonable to expect him to meet it without notice;
  - The s 60 claim was based on "*poikilothermia*" and the appellant failed to properly respond to it:

Goode

- 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.***

- 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)

Goode

- ***The claims were not such that they had to 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 referrable to the proper conduct of modern litigation***. (emphasis added)

Goode

- 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*".

- His Honour declined to infer that the worker had behaved unreasonably.

Goode

- His Honour concluded 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.

In a Nutshell

- When faced with issues of a possible issue estoppel, please refer to ADP Nomchong's decision in ***BFZ.***

- This provides an excellent summary of the relevant principles to be applied in determining whether an issue estoppel arises from previous litigation between the parties.

- In ***Wright***, the Court of Appeal determined that issue estoppel applies to PIC proceedings.

In a Nutshell

- In ***Wright***, the Consent Orders were issued at a time when issue estoppel was less frequently argued. However, the fact that the legal landscape had changed did not save the worker from the effects of an issue estoppel arising from terms previous Consent Orders.

- However, the decisions in ***Dang*** and ***Goode*** are authority for the proposition that where the dispute relates to s 60 expenses, an *Anshun* estoppel will only be found if it was unreasonable that the disputed claim was not made at an earlier time.

- In other words, the mere fact that a claim could have been made at an earlier time does not mean that it should have been made at an earlier time.

Independent Review Office

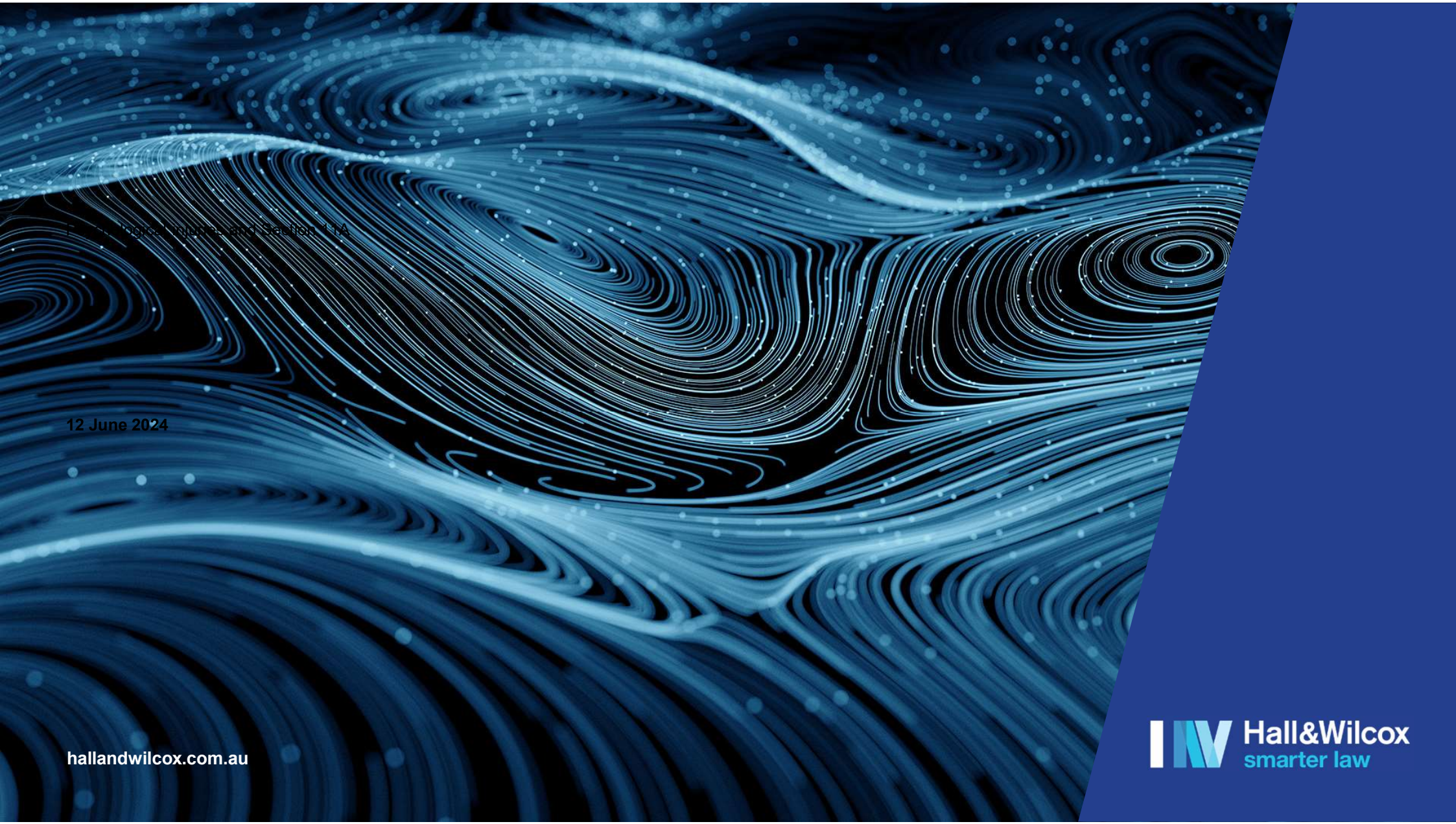
Personal Injury Seminar

Psychological Injuries and Section 11A

Belinda Walsh

Special Counsel, Hall & Wilcox

NOTE: Please see separate presentation with pie charts in full



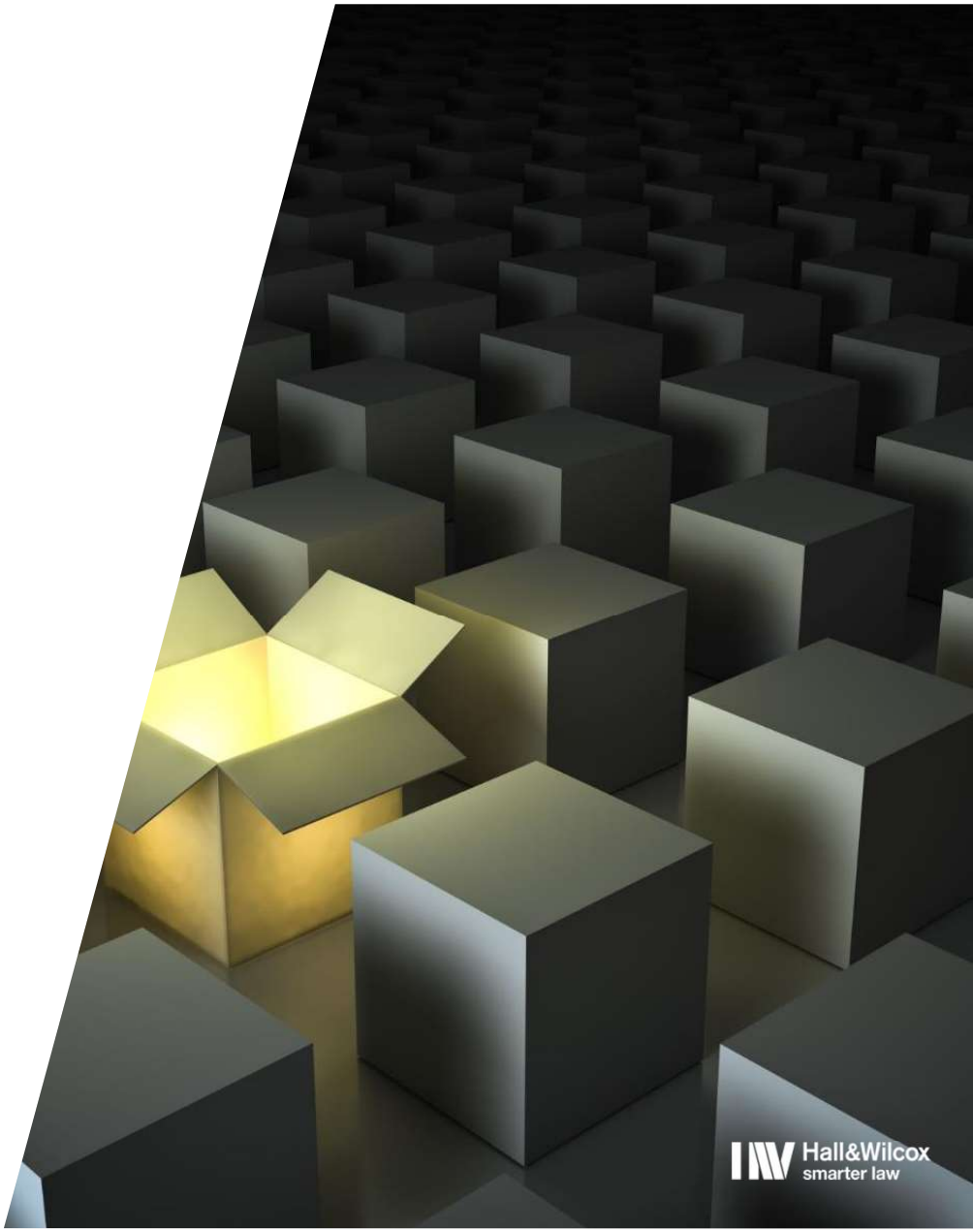
Psychological Injuries and Section 11A

12 June 2024

hallandwilcox.com.au

Hall&Wilcox
smarter law

Contents



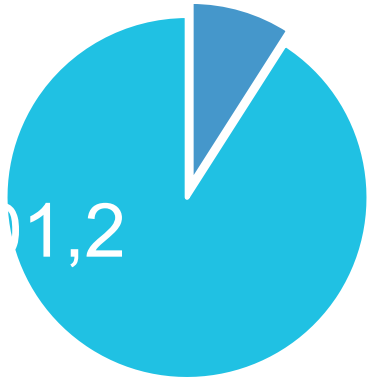
Onus on employer to establish:

- cause of injury involved action with respect to

transfer	promotion	discipline	dismissal
demotion	performance appraisal	retrenchment	provision of employment benefits

- the action was the whole or predominant cause of the injury
- the action taken or proposed to be taken was reasonable

Claims for the 2023 calendar year



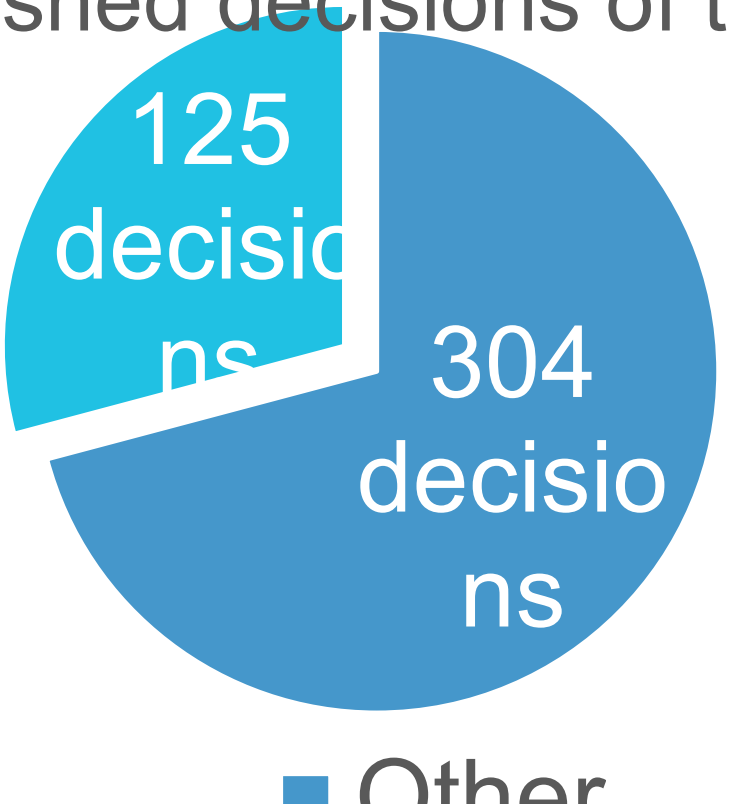
- Mental stress claims
- Other claims

Based upon SIRA claims data

Hall&Wilcox smarter law

Stats

ısation published decisions of the PIC in 202

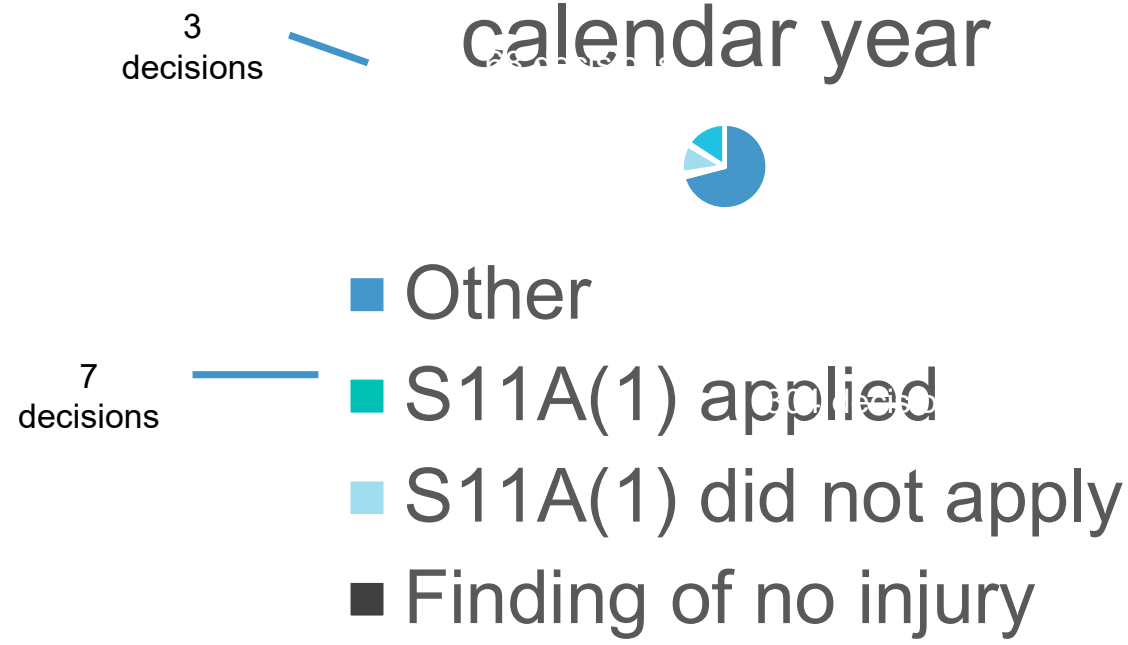


Workers compensation published decisions of the PIC in 2023 calendar year

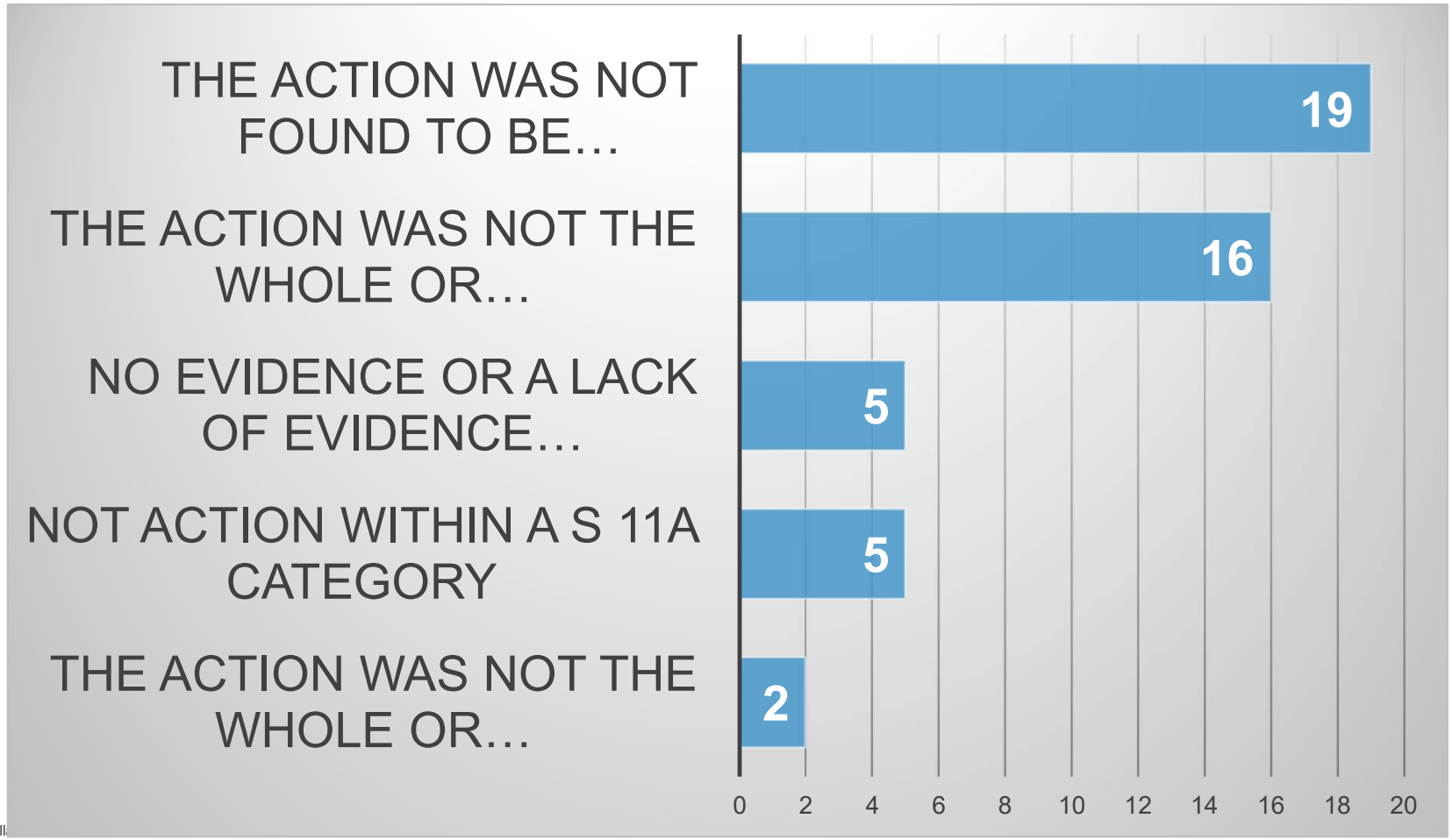
- Other
- Psychological injuries in which a s 11A defence was raised

* Based upon decisions published on austlii

Workers compensation published decisions of the PIC in 2023 calendar year

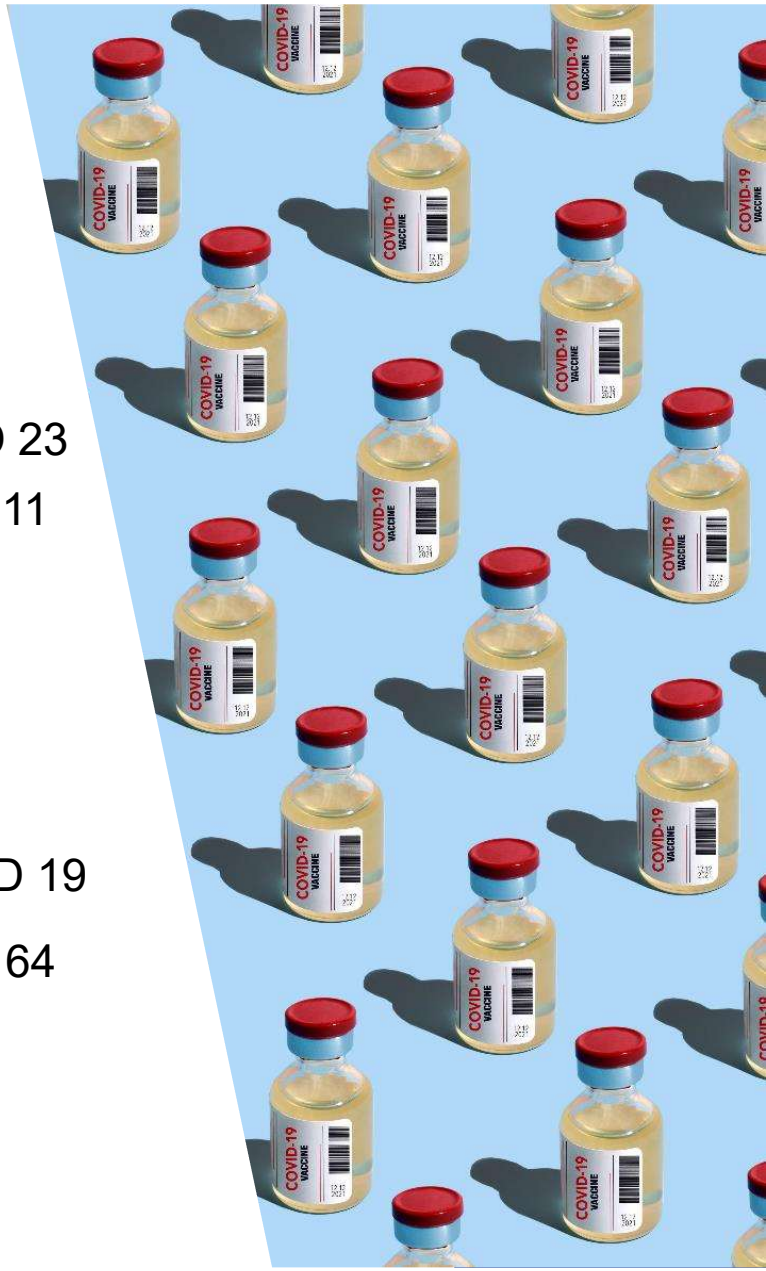


Reasons why 11A(1)(d) not apply



Hall&Wilcox smarter law

- *Secretary, Department of Education v Dawking* [2024] NSWCA 4
  - *Secretary, Department of Education v Dawking* [2023] NSWPICPD 23
  - *Dawking v Secretary (Department of Education)* [2022] NSWPIC 611
- *Secretary, Department of Education v Davis* [2024] NSWPICPD
  - *Davis v Secretary, Department of Education* [2022] NSWPIC 715
- *Secretary, Department of Education v Uzunovska* [2024] NSWPICPD 19
  - *Uzunovska v Secretary, Department of Education* [2023] NSWPIC 64



- *Kanajenahalli v State of New South Wales (Western New South Wales Local Health District)* [2023] NSWCA 202
- *H J Heinz Company Australia Limited v Tagudin* [2023] NSWPICPD 82
- *BFN v Australian Unity Home Care Service Pty Limited* [2023] NSWPIC 156
- *State of New South Wales (NSW Police Force) v Plant* [2024] NSWPICPD 11
- *BHK v Secretary, Department of Education* [2024] NSWPICPD 10

Contact

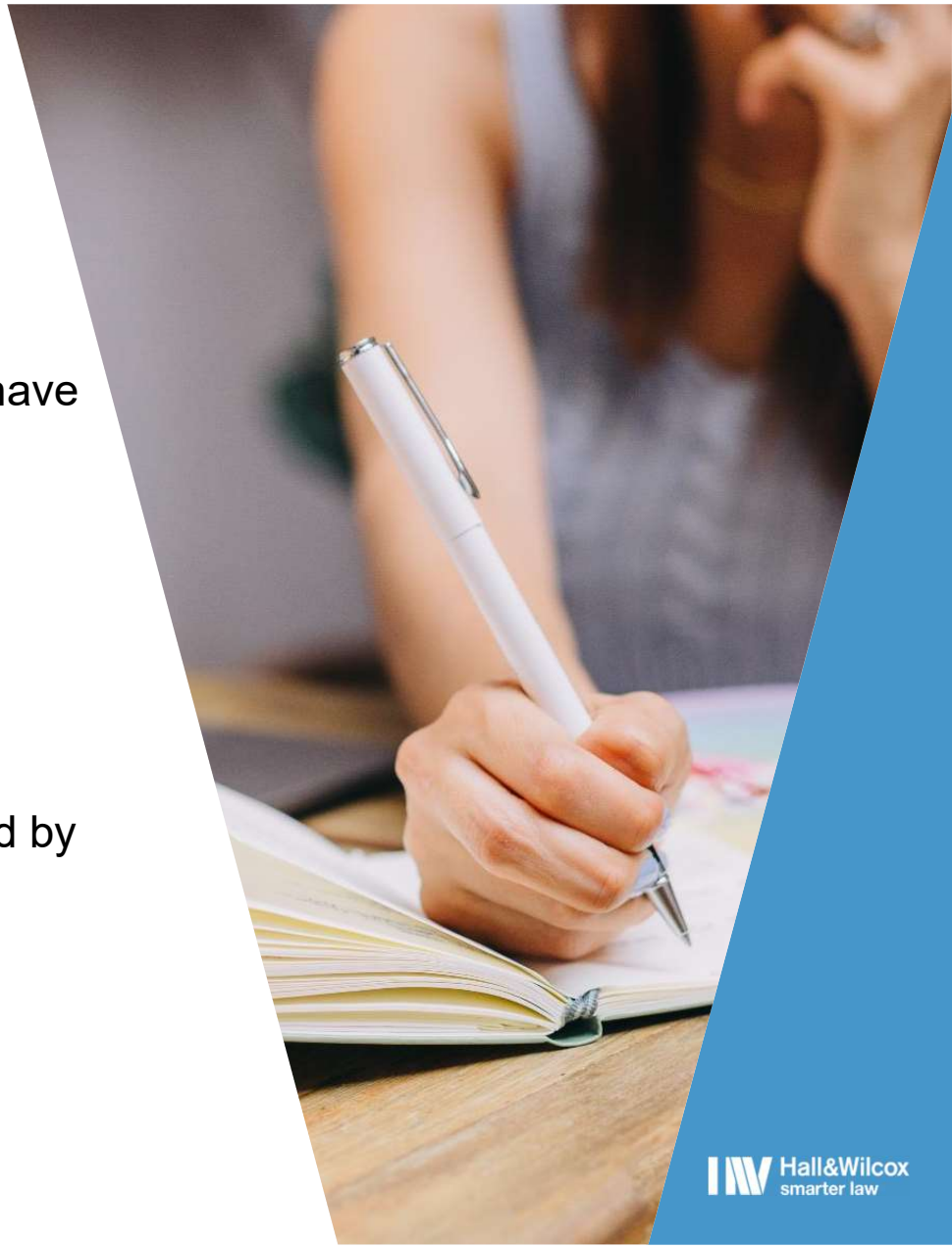
Belinda Walsh
Special Counsel
Tel: +61 2 8267 3236
Mob: +61 416 129 059
Email: belinda.walsh@hallandwilcox.com.au

Connect with Belinda on LinkedIn

Hall&Wilcox smarter law

Takeaway points

- Findings of fact rest with decision maker at first instance (Member) and unlikely to be disturbed on appeal if they have rational support in the evidence
- Requirement for evidence of the whole process (note incoming 500 page limit by PIC)
- Requirement for medical evidence if there are multiple factors giving rise to the injury
- Is it really the case that only 7 in some 10,000 claims for psychological injuries are wholly or predominantly caused by reasonable actions of an employer?



Thank you!

Hall&Wilcox
smarter law

Independent Review Office

Personal Injury Seminar

CLOSING COMMENTS

Jeffrey Gabriel

Lunch Break: 12.20pm – 1.20pm

We ask that you be seated for the afternoon session promptly at 1.20 – thank you

Independent Review Office

Personal Injury Seminar

Lunch break

12.20pm – 1.20pm

Independent Review Office

Personal Injury Seminar

Afternoon

- **IRO Solutions Update** – A/Troy McNaughton, Director Solutions, IRO
- **Reconsiderations in the Personal Injury Commission**

  Sarah Warren Barrister, 9th Floor Windeyer Chambers
- **State Insurance Regulatory Authority - Customer experience to inform regulatory action**

  Tom Green, Director, Delivery and Insights, SIRA

  Lauren Sayer, A/Executive Director, Motor Accidents Insurance Regulation, SIRA
- **ILARS Update** – Phil Jedlin, Director ILARS, IRO
- **Closing Comments** – Jeffrey Gabriel– A/Independent Review Officer

Independent Review Office

Personal Injury Seminar

IRO Solutions Update

Troy McNaughton

A/Director Solutions

IRO Solutions Jurisdiction

Schedule 5 of the *Personal Injury Commission Act 2020* (the PIC Act) sets out our functions to deal with workers and motor accidents complaints, and to find solutions for disputes between workers and insurers.

Note:

- It is a condition of an insurer's licence to provide information reasonably required by IRO to exercise our functions (Schedule 5, Clause 7).
- A claimant may complain to IRO about any act or omission (including any decision or failure to decide) of an insurer that affects the entitlements, rights or obligations of the claimant under the enabling legislation (Schedule 5, Clause 8).
- IRO can aid in finding solutions for disputes between workers and insurers (Schedule 5, Clause 9).

Independent Review Office

Operationalising our complaint function

The IRO Complaint Handling Protocol was developed in consultation with stakeholders. It explains what matters we can and cannot deal with and provides guidance on what “fair and reasonable” means in terms of complaint outcomes.

Early solutions function

Our early solutions function is specifically called out in Schedule 5, Clause 9 of the PIC Act. We have operationalised this via:

- 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

Our reach in 2023-24

Between 1 July 2023 to 31 May 2024, IRO's Solutions team handled:

- **7,646** workers compensation complaints, **6,344** enquiries, and **578** NRTC matters, and
- **712** motor accidents CTP complaints.

Independent Review Office

Personal Injury Seminar

The Australian/New Zealand Standard, **Guidelines for complaint management in organizations** outlines that a best practice complaint management system consists of three levels.

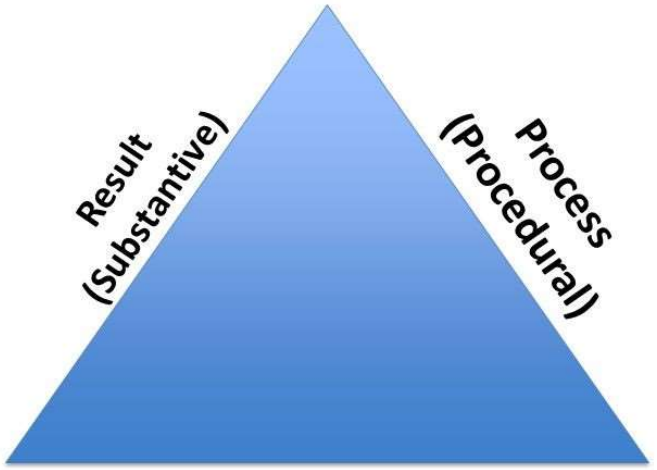
Level 1	Case manager • Frontline complaint handling – early resolution
Level 2	Customer care team • Internal assessment, investigation, facilitated resolution or review
Level 3	Independent Review Office • External complaint assessment and investigation

Independent Review Office

Personal Injury Seminar

Complaint system design is the creation of rules and procedures setting out the end-to-end framework for the resolution/investigation of complaints, in a way that is procedurally, psychologically, and substantively satisfying.

THE TRIANGLE OF SATISFACTION



Source: Furlong(2005)

Systemic Issues Management

The best practice model sets out that *"systemic issues should be identified, reported and managed"* within the second level of complaint handling.

Independent Review Office

Personal Injury Seminar

The case of the missing payments

How an insurer's failure to identify and manage a systemic issue led IRO to commence an investigation into the administration of weekly payments.

Independent Review Office

Personal Injury Seminar

Accepting responsibility

A nuanced approach to dealing with concerns raised on behalf of a claimant who has died.

Continued…

The impact of an insurer acknowledging when harm is experienced by a complainant and being accountable for continuous improvement.

Providing a response to an IRO complaint

- File notes, correspondence, etc
- Reports (internal or independent)
- Policies and procedures
- Feedback from the claimant/complainant
- Evidence you have acknowledged the complaint
- Evidence you have implemented agreed actions

Independent Review Office

Personal Injury Seminar

Your impact on an injured person's overall claim experience

Recognise and understand the impact of your engagement, advocacy and support on the overall experience of claimants within the personal injury schemes.

Independent Review Office

Personal Injury Seminar

Reconsiderations in the Personal Injury Commission

Sarah Warren

Barrister, 9th Floor Windeyer Chambers

Reconsiderations in the Personal Injury Commission

Sarah Warren

Barrister

9 Windeyer Chambers

Reconsiderations in the PIC

This presentation will deal with reconsideration applications in the Personal Injury Commission.

The focus will be on the jurisdictional limitations of the Personal Injury Commission to interfere with decisions made by the Workers Compensation Commission prior to the establishment of the Personal Injury Commission.

Rather than reviewing reconsiderations generally.

First steps…

- The first step is determining what type of decision it is that you need to have reconsidered and who made the decision
- Was it made by the Workers Compensation Commission or the Personal Injury Commission?
- Is it a:
  - Certificate of Determination
  - Medical Assessment Certificate
  - Decision of Medical Appeal Panel

Reconsideration of MAC

Important sections to look to are:

- Section 327 of the 1998 Act – appeal against a medical assessment
- Section 329 of the 1998 Act – referral of a matter for further medical assessment or reconsideration
- Procedural Direction 7 – procedures for appeals and reconsiderations of medical assessments
- Bearing in mind the operation of section 66 of the 1987 Act (only one claim) and section 322A of the 1998 Act (one assessment only of the degree of permanent impairment)

Section 327 of the 1998 Act

327 Appeal against medical assessment

(3) The grounds for appeal under this section are any of the following grounds—

(a) deterioration of the worker's condition that results in an increase in the degree of permanent impairment,

(b) availability of additional relevant information (but only if the additional information was not available to, and could not reasonably have been obtained by, the appellant before the medical assessment appealed against),

(c) the assessment was made on the basis of incorrect criteria,

(d) the medical assessment certificate contains a demonstrable error.

Section 327 of the 1998 Act (continued)

(6) The President may refer a medical assessment for further assessment under section 329 as an alternative to an appeal against the assessment (but only if the matter could otherwise have proceeded on appeal under this section).

Note—

Section 329 also allows the President to refer a medical assessment back to the medical assessor for reconsideration (whether or not the medical assessment could be appealed under this section).

(7) There is to be no appeal against a medical assessment once the dispute concerned has been the subject of determination by a court or the Commission or agreement registered under section 66A of the 1987 Act.

Section 329 of the 1998 Act

329 Referral of matter for further medical assessment or reconsideration

(1) A matter referred for assessment under this Part may be referred again on one or more further occasions for assessment in accordance with this Part, but only by—

(a) the President as an alternative to an appeal against the assessment as provided by section 327, or

(b) a court or the Commission.

(1A) A matter referred for assessment under this Part may be referred again on one or more further occasions by the President to the medical assessor for reconsideration.

(2) A certificate as to a matter referred again for further assessment or reconsideration prevails over any previous certificate as to the matter to the extent of any inconsistency.

What about a decision of the Commission?

It depends on when/who made the decision

Was it the Workers Compensation Commission or the Personal Injury Commission?

Personal Injury Commission

- The Personal Injury Commission was established by the *Personal Injury Commission Act* 2020 (section 6).

- Under subsection 6(3) the establishment day for the Personal Injury Commission was 1 March 2021.

Workers Compensation Commission

The Workers Compensation Commission (established under the 1998 Act) was abolished by the *Personal Injury Commission Act* 2020 on 1 March 2021 (Schedule 1, Div 2, clause 3(d)).

Reconsideration of PIC decisions

If the decision was made by the Personal Injury Commission, then the power/jurisdiction for reconsideration is under section 57 of the *Personal Injury Commission Act 2020*

Procedural Direction WC7 – reconsiderations of decisions of the Commission – sets out the procedural requirements including how the application may be lodged and what should be included in the submissions supporting the application

57 Reconsideration of decisions of Commission

(1) The Commission may reconsider any matter that has been dealt with by the Commission in the Workers Compensation Division and rescind, alter or amend any decision previously made or given by the Commission in that Division.

Section 57 *Personal Injury Commission Act* 2020

(2) If after the making of a decision by the Commission (and without limiting subsection (1)), the President is satisfied that the decision contains an obvious error, the President may—

(a) alter the decision to correct the error, or

(b) direct a registrar to alter the decision to correct the error.

(3) Without limiting subsection (2), if the decision is contained in a certificate, the President may—

(a) issue a replacement certificate with the error corrected, or

(b) direct a registrar to issue a replacement certificate with the error corrected.

(4) If a decision is altered, the altered decision is taken to be the decision and notice of the alteration is to be given to the parties in the proceedings in the manner directed by the President.

(5) If a replacement certificate is issued, the certificate prevails over any previous certificate.

Section 57 *Personal Injury Commission Act* 2020

(6) Examples of obvious errors in a decision are where—

(a) there is an obvious clerical or typographical error in the text of the notice or statement, or

(b) there is an error arising from an accidental slip or omission, or

(c) there is a defect of form, or

(d) there is an inconsistency between the stated decision and the stated reasons.

Section 57 *Personal Injury Commission Act* 2020

It ought to be noted that subsection 57(1) utilises the same wording as the repealed section 350 of the 1998 Act.

Section 5 of the PIC Act defines "Commission" to "mean the Personal Injury Commission of New South Wales established by the Act".

Therefore, the power under section 57 can only be utilised in relation to matters dealt with by the Personal Injury Commission.

The power under this section cannot be used to reconsider any prior decisions of the Workers Compensation Commission.

Section 57 *Personal Injury Commission Act* 2020

Workers Compensation Commission decisions

Section 350(3) of the 1998 Act provided the Commission with the power to reconsider any matter dealt with by the Commission

Reference to “Commission” in section 350 of the 1998 Act refers to the then Workers Compensation Commission prior to the establishment of the Personal Injury Commission.

Section 378 of the 1998 Act provided the Registrar or an Appeal Panel the power to reconsider any matter dealt with by the Registrar or an Appeal Panel

Workers Compensation Commission

Sections 350 and 378 of the 1998 Act were repealed on 1 March 2021 by operation of Schedule 6 of the *Personal Injury Commission Act* 2020 [70].

Meaning the power to reconsider decisions of the WCC and Appeal Panel was revoked

It was replaced with the power under s.57 of the PIC Act which cannot be used for WCC decisions

Reconsideration of WCC decisions

For decisions made by the Workers Compensation Commission you need to turn to Schedule 1 *Savings, Transitional and Other Provisions* of the *Personal Injury Act* 2020.

Unexercised rights to commence proceedings

14D Unexercised rights to commence non-court proceedings

(1) This clause applies in relation to an unexercised right to commence pre-establishment proceedings before an original decision-maker other than a court.

(2) A person who has the unexercised right to commence proceedings may commence the proceedings with the new decision-maker for the exercise of the same functions that could have been exercised by the original decision-maker to which the right relates.

Unexercised rights to commence proceedings

(3) The following provisions apply to the commencement of proceedings under this clause—

(a) the new decision-maker has and may exercise all the functions that the original decision-maker would have had in relation to the proceedings if they had been commenced before the establishment day, including any functions relating to the granting of leave or other permission to commence proceedings,

(b) the provisions of any Act, statutory rule or other law, including provisions concerning the time within which to commence the proceedings, that would have applied to or in respect of the determination of the proceedings had this Act not been enacted continue to apply,

Definitions – Schedule 1, Div 4A, clause 14A of the PIC Act

‘Pre-establishment proceedings’ are defined as proceedings that were dealt with by DRS, MAS or CARS when looking at CTP claims or the WCC including medical assessors and mediators.

‘Proceedings’ are defined to include “an application for, or an appeal against, the exercise of a function”

Unexercised Right – Schedule 1, Division 4A, Subdivision 1, Clause 14A

"Unexercised right" means a right, including a right exercisable only with leave or other permission, that:

(a) Was available to be exercised immediately before the establishment date, and

(b) Had not yet been exercised before that date.

Decisions dealing with unexercised right

- Some recent relevant decisions dealing with clause 14D include:
  - *Dimos v Gordian Runoff Ltd* [2023] NSWSC 1151
  - *Baker v Southern Metropolitan Cemeteries Trust* [2023] NSWPIC 593
  - *Kapp v St Joseph's Village Limited* [2023] NSWPIC 685
  - *Barnett v Ingenia Communities Holdings Ltd* [2024] NSWPIC 72

Dimos v Gordian Runoff Ltd [2023] NSWSC 1151

- Dealt with unexercised right for the insurer to make an application for further medical assessment under s.62 of the *Motor Accidents Compensation Act 1999* based on 'additional relevant information'
- The insurer asserted that the additional relevant information was relevant to the reassessment of the claimant's degree of permanent impairment and that in light of the material, the WPI would be lower
- Prior to the PIC Act, the delegate was required to provide reasons when determining an application for further medical assessment under the 1999 Act

Dimos v Gordian Runoff Ltd [2023] NSWSC 1151

- The obligation to give reasons did not apply after 1 March 2021
- The question was whether the unexercised right was available and required reasons to be given
- A question was in relation to what documents could be considered when determining whether there was an unexercised right under cl 14D
- The reasoning Schmidt AJ sets out that an unexercised right is only available when the facts underlying an application existed prior to 1 March 2021 and those facts were available to the party.

At [81] Schmidt AJ stated:

"Had the information contained in the 2014 records only come into existence after the establishment date, as the insurer's s 62 application incorrectly conveyed when it described them to be 2022 documents, its right to make the s 62 application would not have been an "unexercised right". That is because no basis for making that application in respect of such additional information could then have existed before the establishment date."

Baker v Southern Metropolitan Cemeteries Trust [2023] NSWPIC 593

- MAC dated 12 March 2016 assessed 9% WPI for psychological injury (deemed DOI
- Medical Appeal Decision dated 13 July 2016 dismissed the appeal
- Proceedings in 2016 had been discontinued with no orders in relation to the s.66 claim (orders made by consent in relation to weekly benefits for a closed period)
- Applicant sought reconsideration of the MAP by the Appeal Panel under s.378 of the 1998 Act
- The applicant sought the 2016 proceedings to be re-instituted – by way of reconsideration of the discontinuance to enable the applicant for reconsideration to be heard by the Appeal Panel

Baker v Southern Metropolitan Cemeteries Trust [2023] NSWPIC 593

- The applicant submitted that a reconsideration was sought on the basis that there had been a "significant deterioration in the worker".
- Relied on the decision of *Dimos* and the principle that "the only documentation relevant to the determination of whether the applicant had an unexercised right was that material available to the parties prior to 1 March 2021" (*Baker* at [21])

Baker v Southern Metropolitan Cemeteries Trust [2023] NSWPIC 593

- The matter proceeded on the basis that the applicant had to show that he had the right to seek a reconsideration of the MAP based on deterioration as at the establishment date (at [32])
- The applicant accepted that he could only rely on the material available at the establishment date – 1 March 2021 (at [37]) consistent with the principles in *Dimos*
- Referred to *Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission of New South Wales* [2007] NSWCA 149 at [94]

Baker v Southern Metropolitan Cemeteries Trust [2023] NSWPIC 593

Member Harris stated at [49]:

"…The issue is whether he has a right to set aside the discontinuance and request the Appeal Panel to reconsider his impairment for deterioration. In my view that right requires an opinion from an appropriate medical practitioner that there has been a deterioration in the degree of impairment as a result of the injury. Absent that evidence, I do not accept that there is a basis to assert that there has been deterioration, as it is understood, and discussed in Riverina Wines."

Baker v Southern Metropolitan Cemeteries Trust [2023] NSWPIC 593

Member Harris stated at [51]:

"Based on the material at hand as of 1 March 2021, any application to rescind the discontinuance of the proceedings and refer the matter to an Appeal Panel was without foundation. For these reasons I am not satisfied that the applicant had an unexercised right as of 1 March 2021."

Kapp v St Joseph's Village Limited [2023] NSWPIC 685

- MAC dated 18 March 2016 assessed 6% WPI for psychological injury (deemed DOI 25 October 2013)
- Appeal Panel revoked the MAC and assessed 7% WPI in MAP dated 22 June 2016
- COD issued by WCC on 27 July 2016 consistent with MAP
- Attempted to appeal of MAP in 2019 but did not pursue it
- Requested Appeal Panel to reconsider decision under 3.378 of 1998 Act on 31 May 2022

Kapp v St Joseph's Village Limited [2023] NSWPIC 685

- President's delegate rejected application for reconsideration on the basis that the power had been repealed and no pending pre-establishment proceedings
- Applicant commenced Supreme Court proceedings seeking judicial review of decision of President's delegate
- Consent orders entered in SCT quashing President delegate's decision
- No application was made to set aside the COD

Kapp v St Joseph's Village Limited [2023] NSWPIC 685

- Member Harris accepted the applicant's submission that there was no gatekeeper role exercisable by the delegate in relation to s.378 of the 1998 Act as asserted by the respondent
- The applicant submitted that the COD did not need to be rescinded for the Appeal Panel to reconsider the MAP under section 378
- The respondent submitted that Appeal Panel could not proceed with a reconsideration when the COD relying on the MAP was in place

Kapp v St Joseph's Village Limited [2023] NSWPIC 685

Member Harris determined at [76]:

"My view is that the Appeal Panel cannot reconsider its decision under s 378 of the 1998 Act because there is a decision of the Commission which is final and binding and is based on the findings of the MAP. If the Panel reconsidered and altered its decision, then that determination would be inconsistent with a binding decision of the Commission. This conclusion is consistent with s 350(3) of the 1998 Act which allows a decision to be rescinded, and the matter to be reconsidered."

Barnett v Ingenia Communities Holdings Ltd [2024] NSWPIC 72

- MAC dated 27 September 2015 assessed 8% WPI for psychological injury (deemed DOI 27 September 2015)
- MAC confirmed by MAP dated 22 December 2016
- COD dated 25 January 2017 issued giving effect to the MAC and MAP
- Applicant asserted that the evidence prior to 1 March 2021 established that she had a deterioration of her degree of permanent impairment previously assessed in 2015

Barnett v Ingenia Communities Holdings Ltd [2024] NSWPIC 72

- Ms Barnett sought to rescind the WCC Certificate of Determination dated 25 January 2017
- This was to enable the MAP to reconsider its decision dated 22 December 2016
- The applicant was seeking to rely on repealed section 378 of the 1998 Act that enabled the Appeal Panel to reconsider its decision
- It was accepted by the parties that cl 14D applied and the applicant bore the onus to establish that she had an unexercised right and to establish that the discretion should be exercised to rescind the COD

Barnett v Ingenia Communities Holdings Ltd [2024] NSWPIC 72

- Reliance was placed on the decisions of *Dimos*, *Riverina Wines*, *Baker* in relation to the applicable principles
- Member Harris closely examined the available evidence as to the applicant's condition as at 1 March 2021 including the PIRS categories
- Member Harris was "*not persuaded, on a prima facie level, that as at 1 March 2021 the applicant's then impairment assessed under the PIRS categories was permanent*" (at [92]).

Barnett v Ingenia Communities Holdings Ltd [2024] NSWPIC 72

From [96] Member Harris stated:

"96. The applicant has not established that she has an unexercised right, because I am not satisfied on a prima facie level that the impairment was permanent as at the establishment date.

97. The absence of such evidence, as the present case illustrates, shows that an applicant will have difficulty establishing a prima facie case on deterioration of permanent impairment."

The Member was not satisfied that the applicant had an unexercised right within the meaning of cl 14D

Key takeaways

- Who made the decision?
  - If WCC, then look at schedule 1 of PIC Act and unexercised rights to commence non-Court proceedings.
  - If the PIC, look to section 57 of PIC Act

Key takeaways

WCC decision that you are seeking reconsideration of, the key components to bear in mind - was there an unexercised right to commence the reconsideration application prior to 1 March 2021

This involves examining what evidence was available prior to 1 March 2021

Key takeaways

According to the decisions of the Commission, and the interpretation of the legislation to date, if there was insufficient evidence/material to support a reconsideration application being made prior to 1 March 2021, then it is unlikely that it will be established that there was an unexercised right to commence reestablishment proceedings

Key takeaways

If there is no unexercised right to commence proceedings, there is no jurisdiction of the Commission to utilise the repealed sections of sections 350 and 378 to reconsider prior decisions of the WCC.

The only jurisdiction that the PIC has been invested is under section 57 of the PIC Act for reconsideration of decisions and that is limited to decisions made by the PIC and not the WCC.

Sarah Warren
Barrister

www.9windeyer.com.au

swarren@windeyerchambers.com.au

Independent Review Office

Personal Injury Seminar

State Insurance Regulatory Authority – Customer experience to inform and regulatory action

Tom Green, Director, Delivery and Insights, SIRA

Lauren Sayer, A/Executive Director, Motor Accidents Insurance Regulation, SIRA

State Insurance
Regulatory Authority

IRO Seminar 12
June 2024

SIRA

Customer experience to inform regulatory action

Tom Green, Director Delivery and Insights

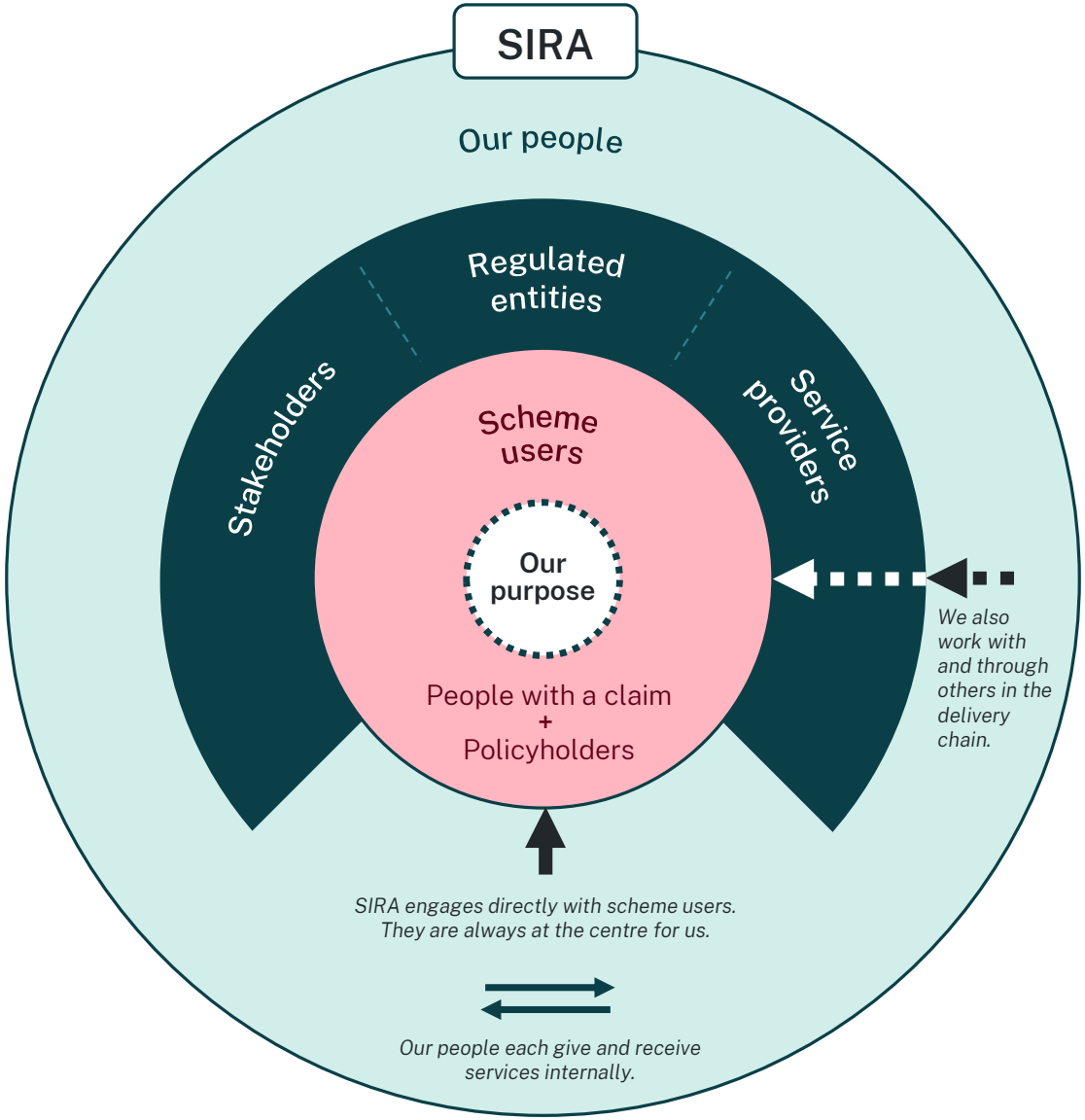
Lauren Sayer, Director Insurer Supervision

NSW GOVERNMENT

Scheme users at the centre

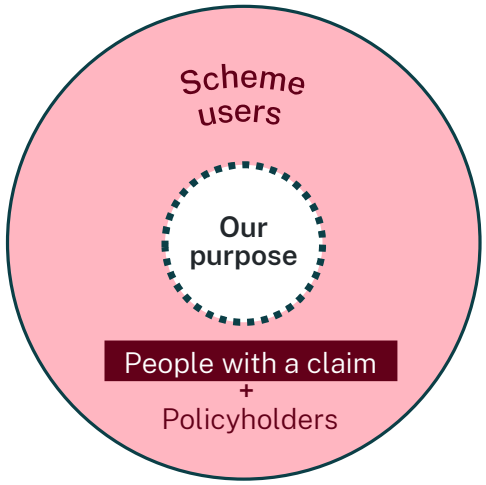
SIRA's purpose:

To make sure the NSW insurance schemes protect and support the people who need them, now and in the future



Core CX insights program

2 monthly surveys across each personal injury scheme



Survey 1

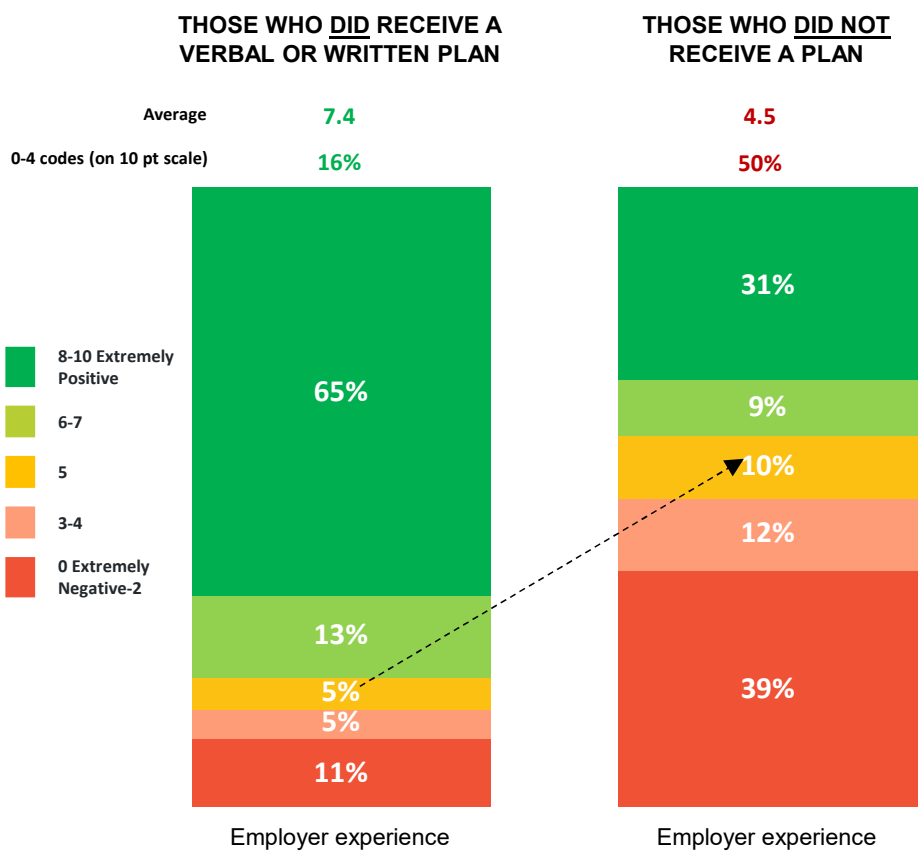
- Everyone with an open claim at 90-120 days
- Comparable data on 1st 3 months

Survey 2

- Everyone who has exited the scheme
- Insights into end-to-end experience and outcomes

Exploring things deeply

Example finding: Having a RTW plan

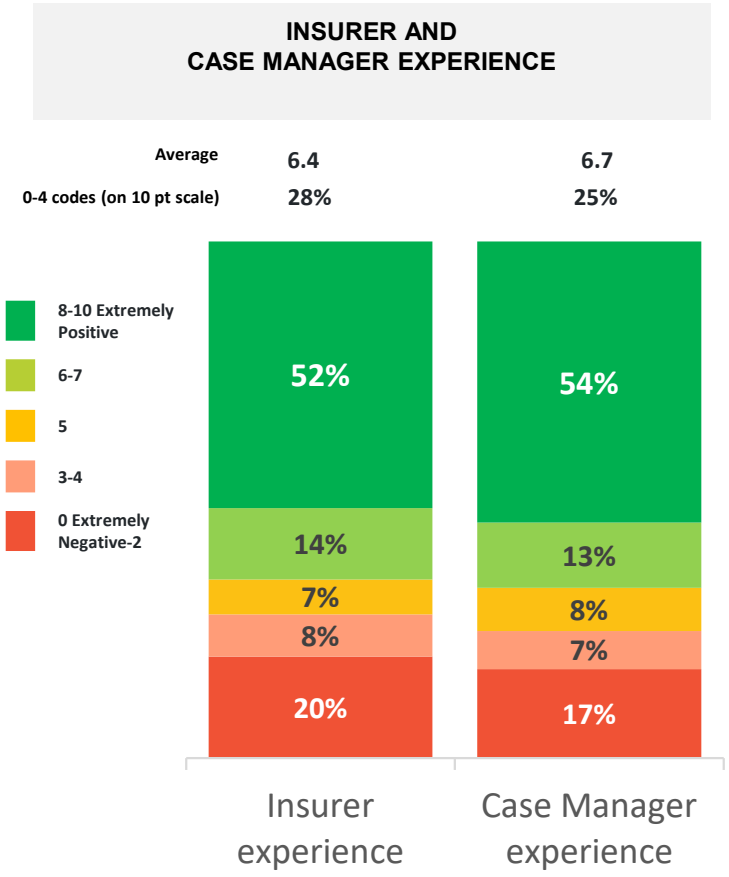


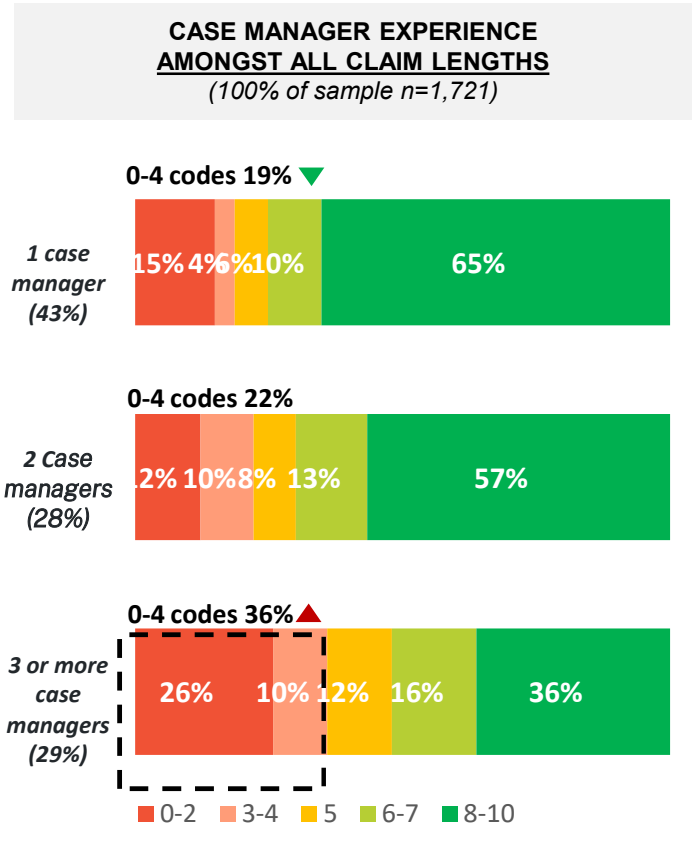
People who did receive a verbal or written plan are significantly more likely than those who didn't receive a plan to …

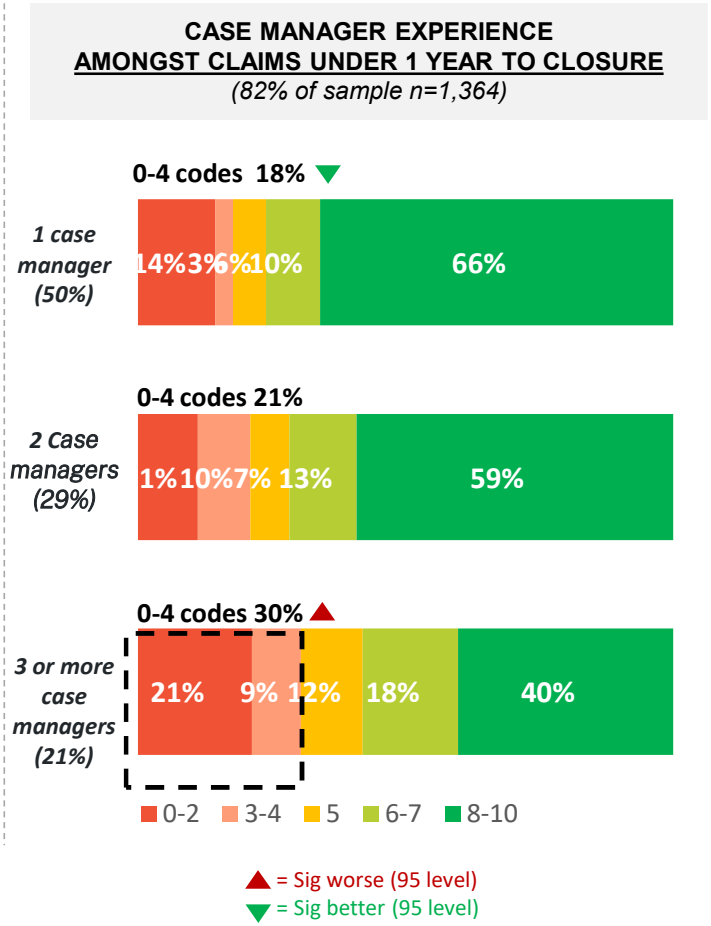
- ✓ have returned to work (**96%** vs **86%**)
- ✓ say they're 'completely back on track' (**62%** vs **43%**)
- ✓ believe they've made a complete/nearly complete recovery (**77%** vs **62%**)
- ✓ be financially comfortable (**63%** vs **46%**)
- ✓ report less anxiety and/or depression (**51%** vs **36%**)
- ✓ report less problems with conducting usual activities (**60%** vs **46%**)

Workers compensation scheme examples

Example finding: Having 3+ case managers

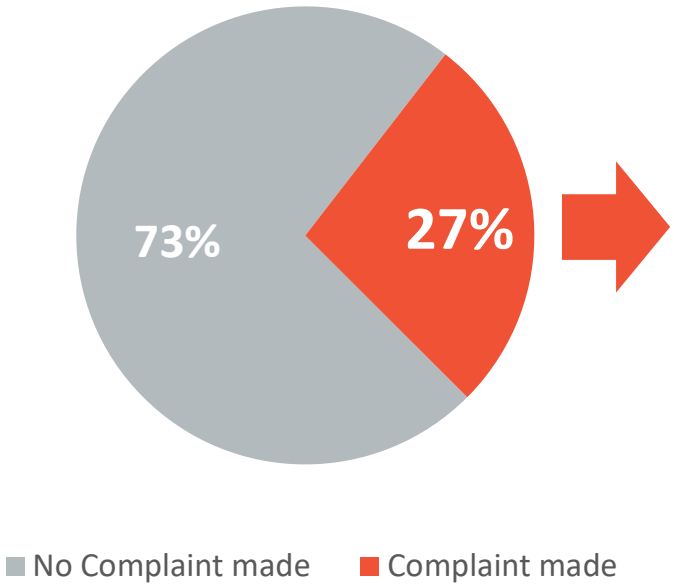




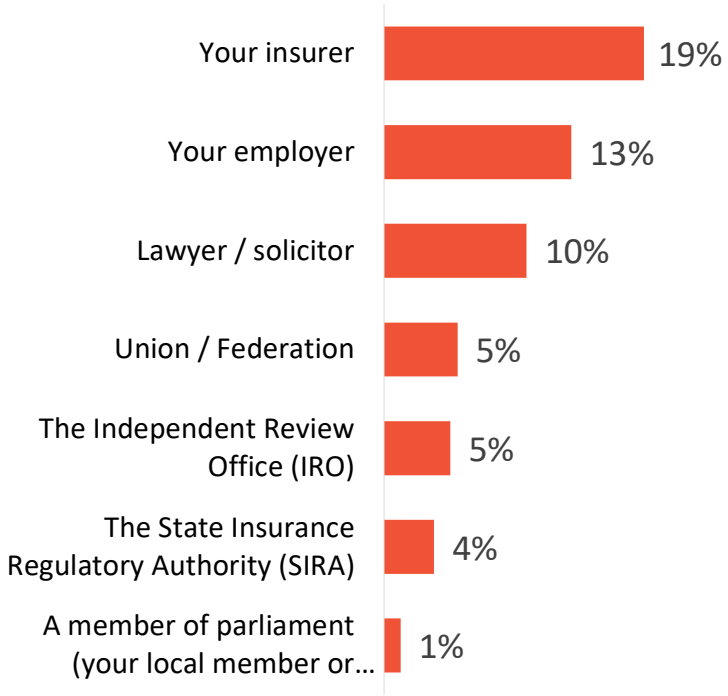


Example finding: 1 in 4 people complain to someone

COMPLAINTS INCIDENCE



WHO COMPLAINED TO



NUMBER OF COMPLAINTS IN SAMPLE

459

COMPLAINTS MADE

COMPLAINED TO MORE THAN 1 PARTY

11%

SIRA CX Program

HOME | Resources | Key Metrics (WC) | Insurer (WC) | Healthcare (WC) | Health Outcomes (WC) | Employer (WC) | Trend (WC) | Key Metrics (CTP) | Insurer (CTP) | Healt ›

NSW GOVERNMENT | State Insurance Regulatory Authority

Welcome to the SIRA CX Program Dashboard. Click below to navigate to the relevant dashboard.

SIRA 2025

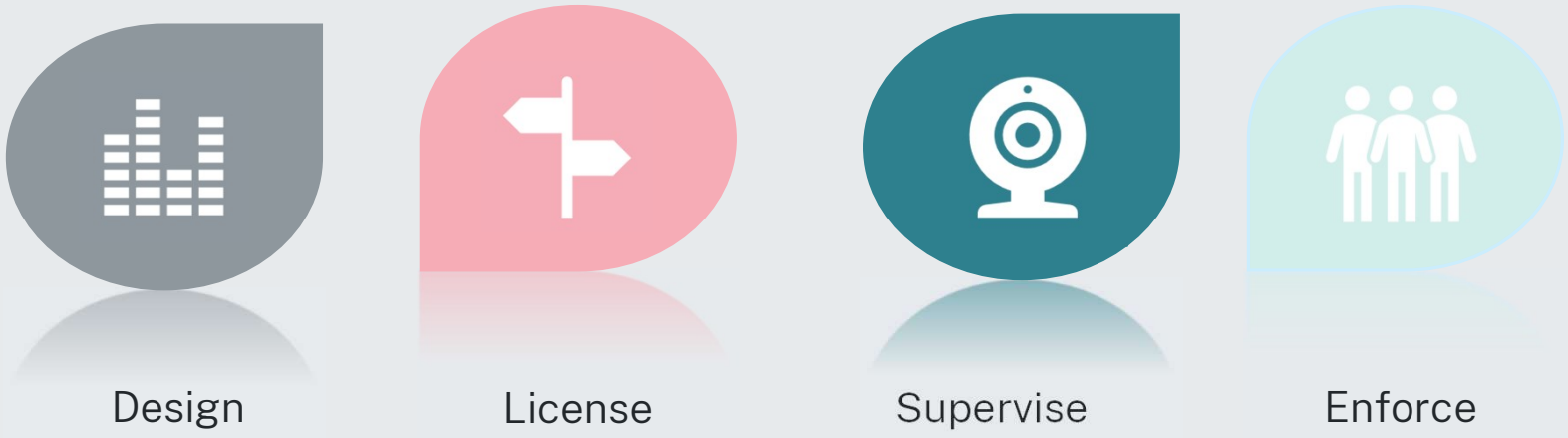
Risk based

Intelligence led

Customer-centric

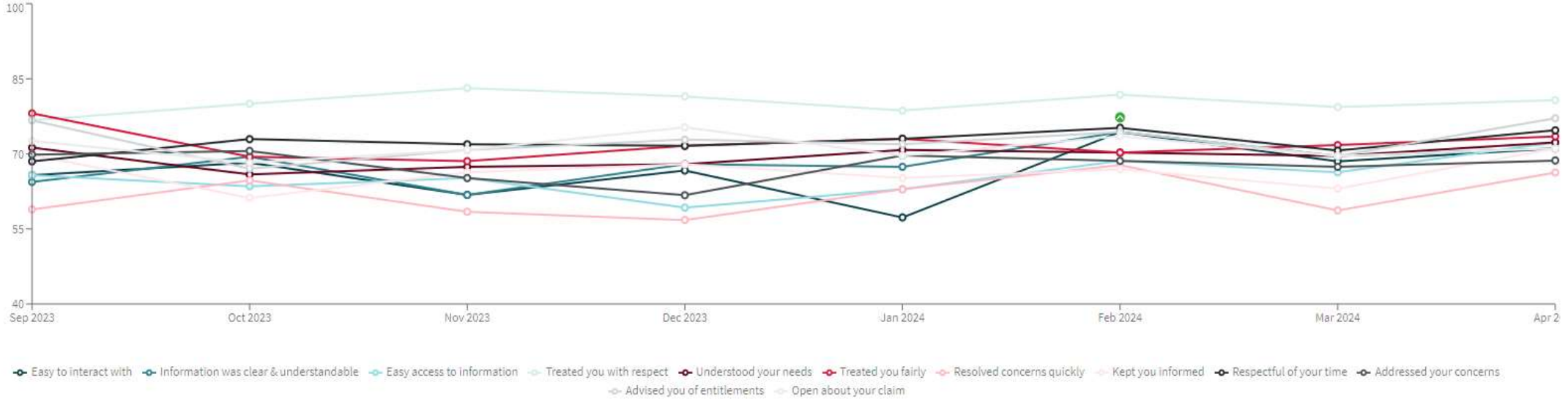
OUTCOMES

Regulatory framework: pillars

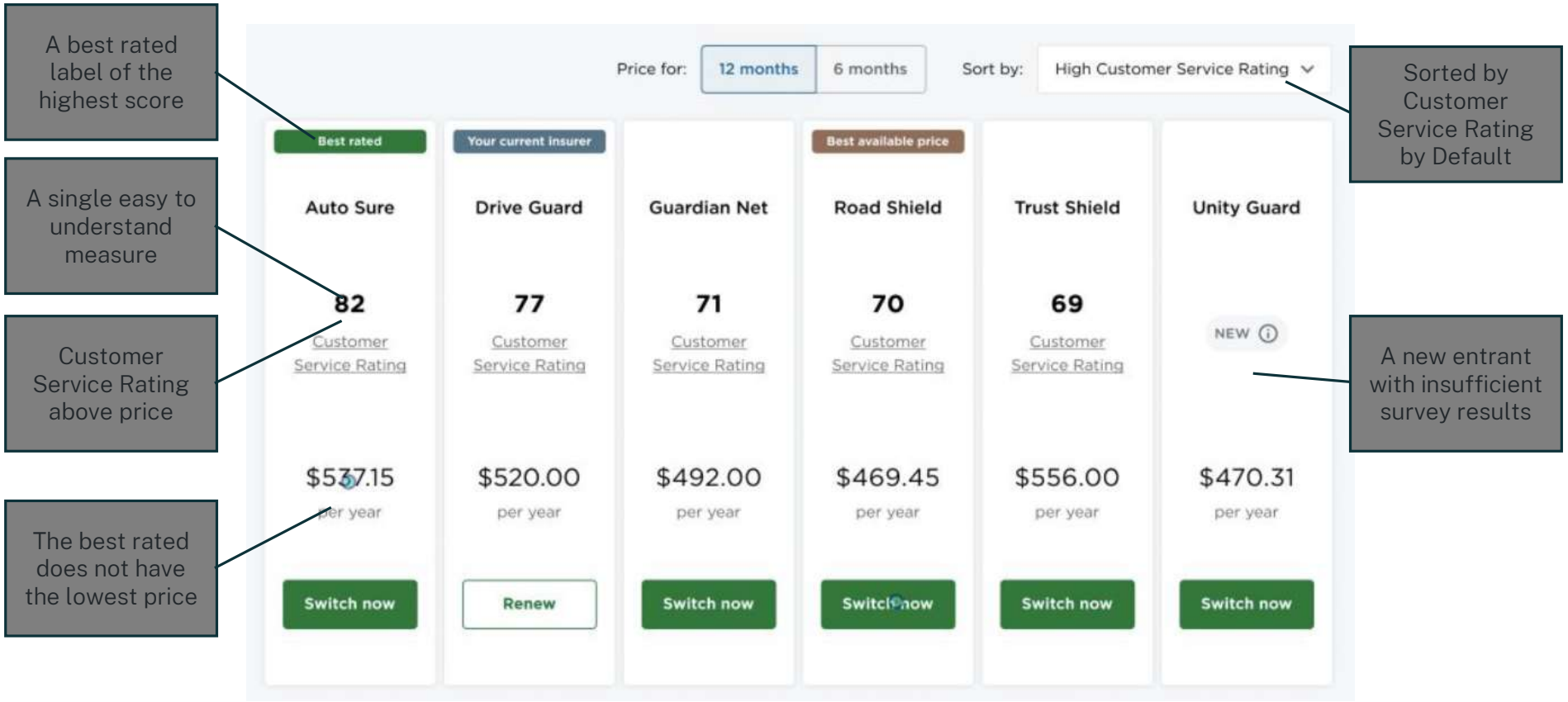


Customer service conduct principles

Insurer performance



Informing customers



Independent Review Office

Personal Injury Seminar

ILARS Update

Philip Jedlin
Director ILARS

Independent Review Office

Personal Injury Seminar

ILARS Update

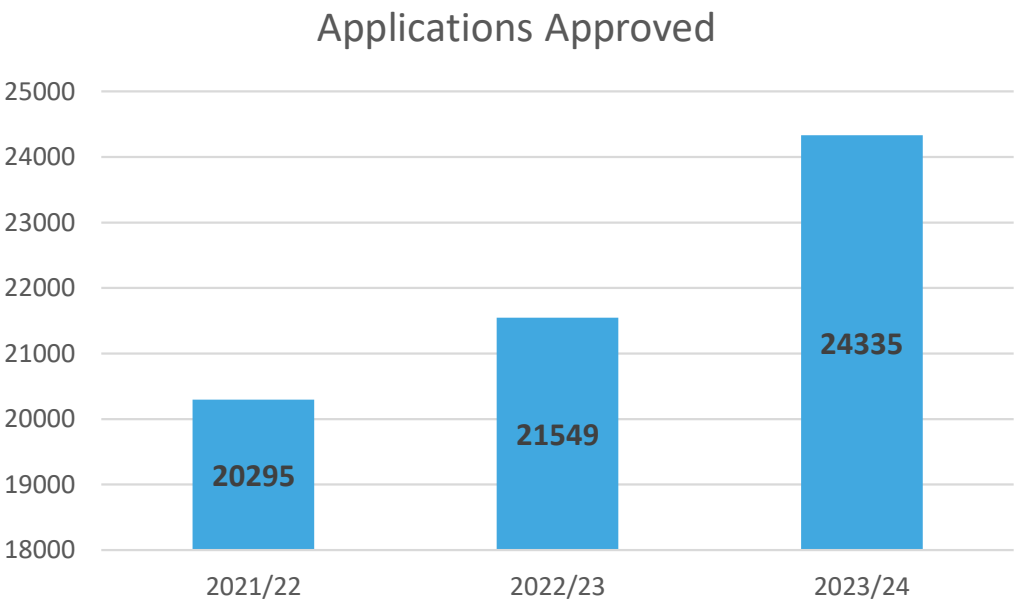
- ILARS – key statistics
- Applications and invoices – how to improve efficiency
- Right to reviews under the ILARS Funding Guidelines
- ILARS Practice Notes
- IRO Alerts
- Upcoming changes to ILARS Case Management System
- Additional messages for Approved Lawyers

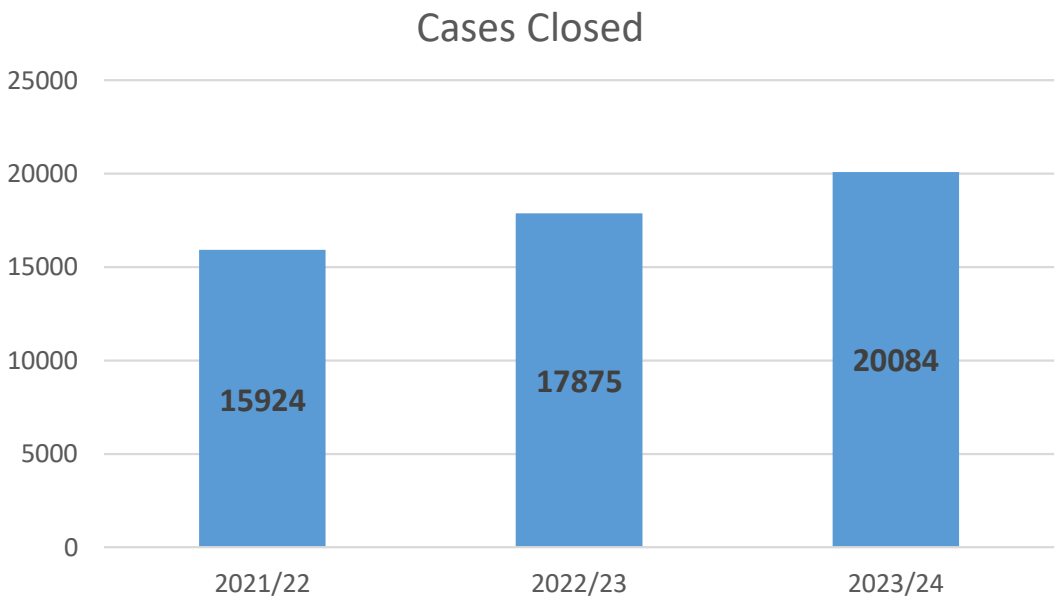
Independent Review Office

Personal Injury Seminar

Our volumes keep on growing –

All data is from 1 April 2021 to 30 March 2024





Open cases

Stages	Number of cases	Percentage
Stage 1	10243	30%
Stage 2	16704	50%
Stage 3	6220	18%
Stage 4	185	1%
Stage 4 Conditional	342	1%
Grand Total	**33694**	**100%**

Outcomes from 1/4/2023 to 31/3/2024

Summary Outcome	Final Outcome		No Final Outcome		Total	
All Firms	**Number**	**%**	**Number**	**%**	**Number**	**%**
Advice only	0	0%	4364	40%	4364	21%
Pre-Proceedings	5621	54%	13	0%	5634	27%
Commission or Court	4714	46%	241	2%	4955	23%
Other Outcome	10	0%	6248	58%	6258	30%
Grand Total	**10345**	**100%**	**10866**	**100%**	**21211**	**100%**
Percentage	49%		51%			

Request for further information

Issue	All Regions	
	Number	%
Request for further information	8103	9%
Remind Request for further information	919	11%
Average time to approve application - All accepted applications (Days)	5.2	
Where NO request made for further information (Days)	3.8	
Where a request is made for further information (Days)	25.8	

Invoice errors

Issue	All Regions	
	Number	%
Invoices processed from law firms	54773	
Number of cases with invoice errors	13270	24%
An invoice may have more than one issue and may be returned more than once		
Grant related issues	11908	22%
Invoice related issues	5776	11%
Issues with MRP invoices	2818	3%

Invoice errors - 2

Invoice Issue	2021	2022	2023	Grand Total
Ask for Amended Invoice - Grant Issue	3296	4407	4205	11908
Ask for Amended Invoice - Invoice Issue	1277	2081	2418	5776
MRP Invoice -Waiting for PL Approval	1041	1112	665	2818
Grand Total	**5614**	**7600**	**7288**	**20502**
Percentage				
Law Firm Invoice	28%	35%	32%	32%
Medical Report provider invoice	4%	4%	2%	3%

Independent Review Office

Personal Injury Seminar

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

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

ILARS Practice notes

The 2022 Review of ILARS recommended

- supplementing the ILARS Guidelines with Practice Notes and
- establishing an Approved Lawyer (AL) User Group (UG).

The UG meets quarterly to provide feedback to ILARS on draft practice notes prior to publication.

The first meeting was in November 2023.

ILARS has now published 3 Practice Notes

1. Interim Billing for Non-Flight Associated Travel
2. Counsel at Teleconference
3. Complexity Increases

IRO Alerts

IRO Alerts are sent to

- The email address provided by Approved Lawyers
- To Approved Lawyers and other staff in law firms who have signed up for Alerts on our website

It is important that Approved Lawyers share IRO Alerts with all colleagues who work in their Workers Compensation teams including Finance staff.

Upcoming changes to ILARS Case Management System

- ILARS will be enhancing its case management system in mid-July
- Improved internal decision-making processes to help provide a more consistent approach
- Introduce a triage system to:
  - allocate work to Grant Managers in a more efficient manner
  - Transfer early resolution and no response to claim matters in a more timely manner to the Solutions team

Independent Review Office

Personal Injury Seminar

Additional messages for Approved Lawyers and their teams

Contact the Grant Manager by telephone if you have any concerns:

- Whether the IRO will meet the costs of a disbursement **before** incurring the fee
- The appropriate event number under Professional Fees Schedule before issuing your tax invoice

Request for complexity:

- Submissions before issuing your tax invoice
- Copies of all relevant supporting documentation

Requests for counsel at teleconference - refer to the new Practice Note before making the request

Independent Review Office

Personal Injury Seminar

CLOSING COMMENTS

Jeffrey Gabriel