Independent
Review Office

IRO Regional Seminars

Penrith

March 2023

IRO acknowledges traditional owners

We acknowledge the Darug Nation 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 – Simon Cohen, Independent Review Officer
- Pre-injury Average Weekly Earnings; Fundamentals And Recent Cases

  Kevin Sawers, Senior Associate, Walker Law Group
- ILARS Update – Michael Vella, Manager, IRO
- CTP/Solutions - Jeffrey Gabriel, Director, IRO
- Substantive Law Update
  - Federal Jurisdiction... The Story so Far – Michelle Riordan, Manager Legal Education
- Questions

PIAWE fundamentals and recent PIC decisions/insights

Walker

LAW GROUP

Agenda

- Why is PIAWE important to review?
- The PIAWE we are looking at today
- PIAWE fundamentals
- An example
- Recent PIC decisions/insights
- Questions

Walker

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Why is PIAWE important to review?

It could be wrong!

Errors in workers comp victims payments for six years with 25 per cent underpaid by icare

Michael Evans
March 9, 2020 — 12.00am

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A review of payments to 3000 workers compensation claimants from the state-government owned insurer icare has revealed half contained errors, with a quarter of recipients underpaid over a six-year period.

There are concerns the true figure may be higher and cost the agency millions.

In the latest controversy surrounding icare, a review conducted last year and revealed by the regulator last week identified errors in around half of the 3000 reviewed claims from 2012-18.

One quarter "were potentially underpaid, at least initially, and a similar proportion were potentially overpaid".

Errors have been made in icare's workers compensation payments.

Why is PIAWE important to review?

Sometimes PIAWE definitely is wrong

SIRA's claims management guide:

Interim PIAWE

If an insurer is not able to either approve, or refuse to approve, an application for agreement by day seven from initial notification of injury, then they may give effect to the agreed amount as the PIAWE. This is an interim payment decision and allows the insurer to make weekly payments based on the agreed amount of PIAWE until the application for approval of the agreement has been determined.

Why is PIAWE important to review?

PIAWE is itself a work capacity decision

It is a reviewable decision

Workers Compensation Act NSW 1987

43 Work capacity decisions by insurers

(1)The following decisions of an insurer are
"work capacity decisions" --
(d) a decision about the amount of an injured worker's **pre-injury average weekly earnings** or current weekly earnings,

The PIAWE we are considering today

- **Current PIAWE**

- Applied in full to workers injured on or after 21 October 2019
- Schedule 3 of the Workers Compensation Act NSW 1987 including a PIAWE agreement
- Workers Compensation Regulation 2016
- Sections 79-82D Workers Compensation Act NSW 1987
- Personal Injury Commission has jurisdiction over PIAWE

The PIAWE we are considering today

- **Current PIAWE**

- Clause 8EA of the Workers Compensation Regulation 2016 introduced to allow for **Adjustment for prescribed periods relating to COVID-19**

PIAWE fundamentals

Schedule 3 of the Workers Compensation Act NSW 1987

Fundamentally PIAWE then is a maths equation that can be expressed like this:

Gross pre-injury earnings

÷ **=** **Pre-injury average weekly earnings**

Relevant earning period

PIAWE fundamentals (relevant earning period / time)

1 February 2019

Commencement of employment

PIAWE fundamentals (relevant earning period / time)

- **Schedule 3 of the Workers Compensation Act NSW 1987**
- **A closer look at the Relevant earning period (time)**
- **Defined in Schedule 3(2)(2)**

PIAWE fundamentals

Schedule 3 of the Workers Compensation Act NSW 1987

Fundamentally PIAWE then is a maths equation that can be expressed like this:

Gross pre-injury earnings (dollars)

÷

Relevant earning period (time)

=

Pre-injury average weekly earnings (PIAWE)

PIAWE fundamentals (relevant earning period / time)

- **Workers Compensation Regulation 2016**
- **8D Alignment of relevant earning period with pay period**

- (1) The relevant earning period for a worker in employment may be adjusted to align the relevant earning period with any regular interval at which the worker is entitled to receive payment of earnings for work performed in the employment.

PIAWE fundamentals

- **Schedule 3 of the Workers Compensation Act NSW 1987**
- **2 Meaning of "pre-injury average weekly earnings“**
- (2) Except as provided by this clause (or by regulations made under this clause), in calculating the "pre-injury earnings" received by **a worker in employment** for the purposes of subclause (1), no regard is to be had to earnings in the employment paid or payable to the worker for work performed before or after the period of 52 weeks ending immediately before the date of the injury ("the relevant earning period").

PIAWE fundamentals (relevant earning period / time)

PIAWE fundamentals (relevant earning period / time)

- **Schedule 3 of the Workers Compensation Act NSW 1987**

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ILARS Update

Michael Vella
Manager ILARS

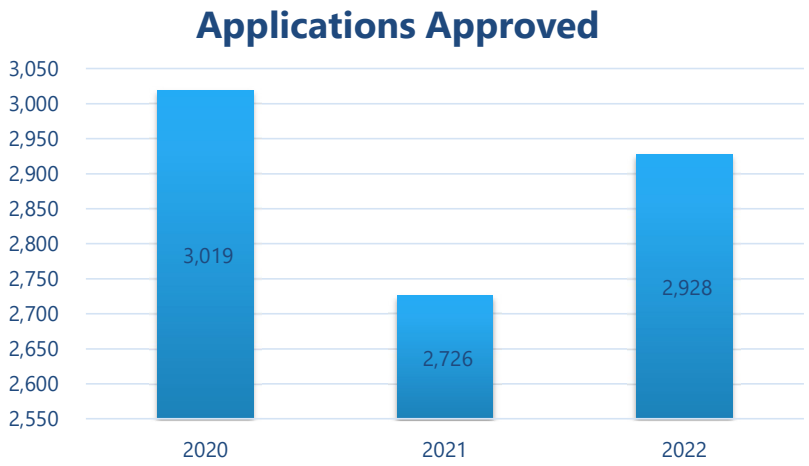
ILARS Update

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

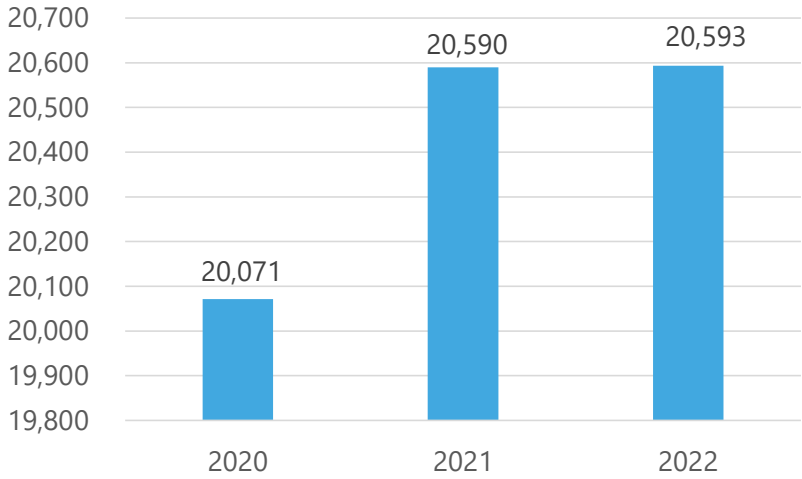
Applications Approved

Your region includes Western Sydney, Blue Mountains, Hawkesbury, Liverpool/Fairfield and Macarthur/Camden.

Your Region

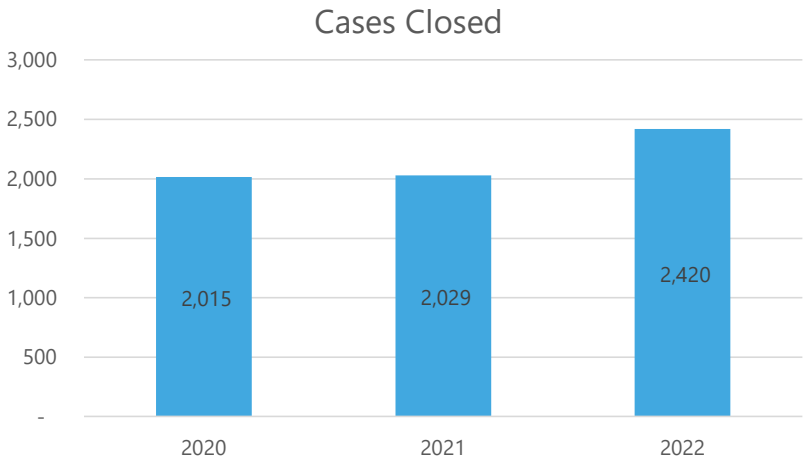


All Firms



Closed Cases

Your Region



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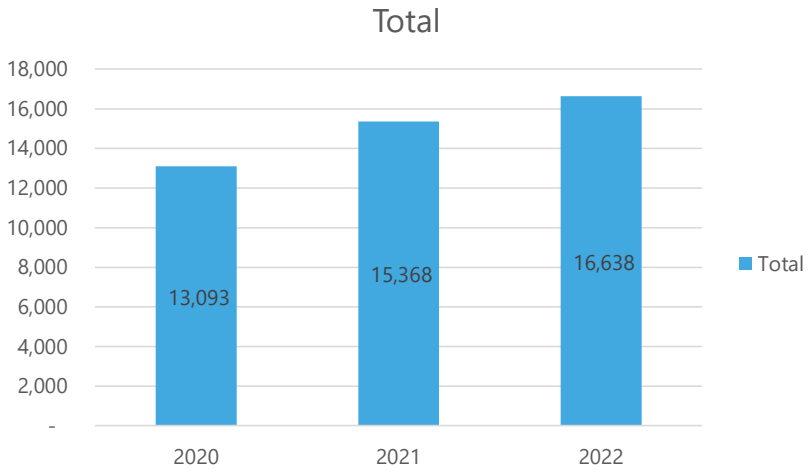

Injured persons in your Region

Table shows the number of cases for injured workers in your region the region and where their law firm is located

	Top 5 body systems for injuries					
Top 10 Regions for law firms	**Hearing**	**Lower extremity**	**Psychiatric and psychological disorders**	**The spine**	**Upper extremity**	**Grand Total**
Your Regions	179	772	747	1367	1487	4552
All other Regions	1538	1355	1602	2242	2563	9300
Total	**1717**	**2127**	**2349**	**3609**	**4050**	**13852**
Percent of matters managed by AL's in your region	10%	36%	32%	38%	37%	33%
-Excluding Hearing loss						36%

Application for Grants issues - 2020-22

Issue	All Regions		Your Region	
	Number	%	Number	%
Duplicate Applications	787		145	
Applications Consolidated with other grant	808		131	
Request for further information	4552	8	718	8
Remind Request for further information	683	15	104	14
Average time to approve application - All accepted applications	3.8 days		4.0 days	
Where NO request made for further information	2.5 days		2.6 days	
Where a request is made for further information	23.6 days		26.5 days	

Applications

- Supporting material –request for funding this includes detailed submissions
- 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 - 2020-22

Issue	All Regions		Your Region	
	Number	%	Number	%
Invoices processed from law firms	46,924		6,605	14
Total number of invoices with errors *-an invoice may have more than one error or is returned more than once*	10,907	23	1,597	24
-Grant related issues	7,791	17	1,138	19
-Invoice related issues	4,333	9	646	10
Issues with MRP invoices	1,978	3	344	3

Recurring Themes

- Date Missing or incorrect
- ILARS reference incorrect or missing
- GST added to disbursements
- Incorrect amounts
- Copies of medico-legal reports
- EFT details
- Format –PDF is required
- Invoices do not tally

Invoices in Your Region - Requests for amendment

Grant related errors

- Disbursements exceed approved funding – 22%
- Legal cost exceed approved funding -27%
- Supporting documents not supplied -49%

Invoice related errors

- Incorrect bank details -4%
- Wrong amount -59%
- Wrong GST -11%

Impact of Invoice errors

Extended response times

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
  - IP still receiving treatment from various providers.
  - IP unable to work.
  - The injuries are affecting the IP's concentration, and social and recreational activities.
- Funding Request is refused by IRO and further information is sought.
- AL seeks review and provides additional information with submissions

Examples of reviews - Request for Stage 2 funding cont

- On Review additional submissions were sought
  - A medical report which provides a diagnosis of the IP's condition.
  - Another medical report that indicates that there is severe psychological trauma.
- 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.

Example of review - Request for Gastrointestinal Assessment

1. AL obtains a second medical report without prior approval.
2. The Orthopaedic assessment (the first assessment) noted the absence of gastroscopy and endoscopy or, at the very least, physical examination.
3. PL noted non compliance with the guidelines for the evaluation of permanent impairment.

Example of review - Request for Gastrointestinal Assessment cont.

- On review
  - AL submissions provided on review noted that the IP had undergone a gastroscopy and endoscopy as a result of the complaints made to the NTD.
- Learnings
  - The IRO Guidelines and SIRA guidelines inform the information sought from AL's
  - It is crucial that all available information sought by the PL be provided to ensure that the correct decision is made the first time.

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

Recent Changes

- Automated Updates

What has changed

- Increased frequency in update requests

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
- 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.

Changes to how we send and process emails

- On 24 March IRO will introduce changes to how we manage received emails and how we send emails to Approved Lawyers
- The change is designed to help us improve our productivity in responding to and managing emails
- Currently received emails are managed from and individual PL/paralegal's inbox
- The Centralised Email Management System will send all emails to you from a new mail box - ILARSALmail@iro.nsw.gov.au

What impact will the email changes have upon you?

There is no change to how you send new applications to ILARS	• Please continue to use ILARScontact@iro.nsw.gov.au
When sending emails to ILARS or responding to ILARS emails in the "To" field	• Please use ILARSALmail@iro.nsw.gov.au in the "To" field.

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IRO Solutions and Observations from Motor Accident Compensation Complaints

Jeffrey Gabriel
A/Director Strategy, Policy and Support

IRO Solutions Jurisdiction

Complaints

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

Early Solutions

- Schedule 5, Clause 9 (2)

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

Workers Compensation Enquiries

Operationalising the Complaint Function

- **The IRO Complaint Handling Protocol**
  - Defines how and which matters we deal with
  - Consultation with industry participants
  - Complaints outcome seeking response 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

IRO Early Solutions

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

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

- Case Study
- Other early solutions

What IRO Values in a Complaint

- A good chronology
- Evidence of trying to resolve things with the insurer
- A paper trail. E.g. the email evidencing a request was made
- A suggested solution or solutions that you seek
  - (Remember - IRO cannot adjudicate disputes)

IRO Complaints Overview

- 1 July – 31 December 2022
  3766 WC complaints (up 10% on H1 2021-22)
  408 CTP complaints (like for like up 18%* on H1 2021-22)

- Main drivers
  - Increased economic activity year on year due to COVID-19 restrictions ending
  - Increased TMF complaints (up 36%)**
  - Increased awareness of IRO CTP function

Common Workers Compensation Matters

Percentage of all workers compensation complaints for H1 2022-23

- Delay in determining liability 26.3%
- Delay in payment 19.7%
- General Case Management 13.0%
- Request for documents 10.3%

Common Motor Accident Complaint Matters

Percentage of all motor accident complaints for H1 2022-23

Subjects

- Income support/weekly payments 22.3%
- Case Manager 16.4%
- Treatment and Care 15.9%

Issues

- Timeliness 34.1%
- Service/Communication 27.0%
- Decisions 23.0%

Motor Accidents Focus

Income Support/Weekly Payments

- Biggest driver of IRO CTP complaints in 2022-23
- Time taken to commence weekly payments.
- Time taken to confirm PAWE, meaning extended periods on interim rate
- Case studies

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 injuries
- Case studies

CTP Focus

Case Manager

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

CTP Focus

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

CTP Focus

Motor Accident Injuries Amendment Act 2022

- Removal of the ‘minor’ injury terminology, now be known as a ‘threshold injury’
- Extension of the entitlement of statutory benefits for claimants wholly or mostly at fault, for a period of up to 52 weeks
  - Problems with 26 weeks were highlighted by IRO
- Claims made after 28 days – weeklies payable for earlier periods.
  - Something highlighted in IRO submissions
- Removal of the waiting period of 20 months before an injured person can lodge a claim for modified common law damages

CTP Focus

Motor Accident Injuries Amendment Act 2022

- Removal of s6.23(1), enabling parties to resolve damages claims at any time.
- Removal of the requirement to seek internal review prior to lodging a medical dispute to determine the degree of whole person impairment
- SIRA's (State Insurance Regulatory Authority, NSW) ability to enact guidelines which specify what treatment and care will be considered necessary for treatment of certain injuries

Key Lessons from our Experience in Complaints

Service

- Unreturned phone calls + emails are behind a lot of complaints
- 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

CTP Focus

IRO Solutions Priority

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

Questions?

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Substantive Law Update

Federal Diversity Jurisdiction – The Story So Far

Michelle Riordan

Manager Legal Education

Relevant decisions

- Burns v Corbett [2018] HCA 15
- Johnson v Dibbin; Gatsby v Gatsby [2018] NSWCATAP 45
- Attorney General for New South Wales v Gatsby [2018] NSWCA 254
- Citta Hobart Pty Ltd v Cawthorn [2022] HCA 16
- Ritson v State of New South Wales [2021] NSWPIC 409
- Ritson v State of New South Wales [2022] NSWDC 133
- Ritson v State of New South Wales (No 1) [2022] NSWDC 345
- Ritson v State of New South Wales (No 2) [2022] NSWDC 347
- Lee v Fletcher International Exports Pty Ltd [2022] NSWPIC 271
- Fletcher International Exports Pty Ltd v Lee [2022] NSWPICPD 39
- Watts v BKFY Pty Ltd [2022] NSWPIC 700
- State of New South Wales v Kanajenahalli [2023] NSWPICPD 1
- Mizzi v State of New South Wales (New South Wales Police Force) [2023] NSWPIC 53

Burns v Corbett [2018] HCA 15

- The High Court held that a State tribunal, which is not a "court of a State", is unable to exercise judicial power to determine matters between residents of different states.

Johnson v Dibbin; Gatsby v Gatsby [2018] NSWCATAP 45

- NCAT determined 3 residential tenancy disputes where a party lived outside NSW.
- The NSW Attorney General intervened in the appeal.
- The Appeal Panel held that it had authority at first instance to hear and determine the application ***because it was exercising judicial power and it is a court of a state*** for the purposes of Ch III of *the Constitution* and s 39 of the *Judiciary Act 1903 (Cth)*
- The NSW Attorney General appealed to the Court of Appeal and applied for judicial review and the Commonwealth Attorney General intervened.

Attorney General for New South Wales v Gatsby (Gatsby) [2018] NSWCA 254

The Court of Appeal found that NCAT is not a court of a State and it could not exercise judicial power to determine the dispute.

Bathurst CJ held:

> Judicial power *means "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action"*: *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 per Griffith CJ at 357.

Gatsby

***Bathurst CJ (with Beazley P, McColl and Leeming JJA* agreeing**) found that NCAT was not a court.

Basten JA *also* held that NCAT is not a court of a State

Gatsby

Leeming JA cited the decision of Brennan J in *Re Adams and the Tax Agents' Board* (1976) 12 ALR 239 at 242:

> "An administrative body with limited authority is bound, of course, to observe those limits. Although it cannot judicially pronounce upon the limits, its duty not to exceed the authority conferred by law upon it implies a competence to consider the legal limits of that authority, in order that it may appropriately mould its conduct. In discharging its duty, the administrative body will, as part of its function, form an opinion as to the limits of its own authority. The function of forming such an opinion for the purpose of moulding its conduct is not denied to it merely because the opinion produces no legal effect."

NCAT erred as its orders *"conveyed concluded determination"* and *"formally recorded a concluded determination on two legal issues."*

Citta Hobart Pty Ltd v Cawthorn (Cawthorn) [2022] NSWCA 16

- The ***Tasmanian Anti-Discrimination Tribunal*** dismissed a complaint for lack of jurisdiction when a constitutional defence was raised.
- The ***Full Tasmanian Supreme Court*** held that the defence was "misconceived," but did not clearly identify an appealable error.
- The ***High Court allowed the appeal.***
- As the defence was genuinely raised and "*it was not incapable on its face of legal argument*", there was "*a single justiciable controversy*" (of a matter described in ss 76(i) and (ii) of *the Constitution*) and the Tribunal was correct to dismiss it for want of jurisdiction.
- A Tribunal has power to determine the limits of its State jurisdiction.

Cawthorn

- The starting point is the principle that "*all power of government is limited by law*" and that within the limits of its jurisdiction, "*the function of the judicial branch of government is to declare and enforce the law that limits its own power and the power of other branches of government through the application of judicial process and through the grant, where appropriate, of judicial remedies*".
- A Tribunal must have power to take the steps needed to ensure its compliance with that duty and this power is not inherently judicial, because its exercise is incapable of quelling a controversy between parties about existing legal rights.
- A Tribunal, which is invested with non-judicial power, "*has authority to make up its mind*" or "*decide in the sense of forming an opinion*" about the limits of its own jurisdiction "*for the purpose of determining its own action*".

Cawthorn

- A State Tribunal exercises judicial power when it decides that a claim or complaint is or is not a matter described in ss 75 or 76.
- If jurisdiction is wrongly found to exist, the order made in its purported exercise is wholly lacking in legal force.
- The Tribunal's decision the complaint was beyond its jurisdiction was a judicial opinion and the order dismissing it for want of jurisdiction was made in the exercise of its State judicial power. The question for the Full Court and in this appeal was whether that order was correct.
- The existence and scope of a matter described in ss 75 or 76 must be determined by *"objective assessment"* of the existence and scope of the matter
- An examination of its prospects of success, were it to be judicially determined on its merits, forms no part of the required assessment.

Ritson v State of New South Wales [2021] NSWPIC 409 (Ritson)

- In 2011, the worker received damages and signed a deed of release.
- In 2021, after moving to Queensland, the worker claimed $825 under s 60 *WCA*.
- The respondent relied upon s 151A WCA and also disputed jurisdiction.
- ***Member Harris*** stated that:
  - The relevant time to determine residency is when the ARD is filed;
  - The insurer (SiCorp) was a State for the purposes of s 75(iv) of *the Constitution;* and
  - As the matter was between a State and a resident of another State, the PIC lacked jurisdiction to determine it.

Ritson v State of New South Wales [2022] NSWDC 133

Judge Dicker SC held that Principal Member Harris' analysis was correct and that the court is bound by the High Court's decisions in:

- *Foxe v Brown* [1984] HCA 69; 59 ALJR 186 at [14] per Mason J;
- *Watson v Marshall & Cade* [1971] HCA 33; 124 CLR 621 at [2] per Walsh J; and
- *Momcilovic v The Queen* [2011] HCA 34; 245 CLR 1 at [134] per Gummow J.

- He granted the plaintiff leave and reserved the question of costs pending determination of the substantive dispute or the defendant's Notice of Motion filed 2/02/2022 seeking summary dismissal.

Ritson v State of New South Wales (No 1) [2022] NSWDC 345
Ritson v State of New South Wales (No 2) [2022] NSWDC 347

- In *Ritson (No 1)*, ***Judge Neilson*** entered an award for the defendant. He found that the deed that the parties signed in 2011 included the 2006 thumb injury.

- In *Ritson (No 2)*, His Honour held that based upon a proper construction of the PIC Act, neither the PIC nor the District Court could order the plaintiff to pay the defendant's costs.

Lee v Fletcher International Exports Pty Ltd **[2022] NSWPIC 271**

- The worker lived in QLD, but the employer's registered office was in NSW.
- The employer disputed jurisdiction.
- ***Member Whiffin*** held that the PIC would not be exercising federal jurisdiction because the employer was a corporation and it was "*not a resident of a State*" within the meaning of s 75(iv) of *the Constitution*.

Fletcher International Exports Pty Ltd v- Lee **[2022] NSWPICPD 39**

- ***Deputy President Snell*** revoked the COD.
- The appellant relied on 2 PIC decisions regarding damages claims under the motor accidents legislation, but these did not bind him as the relevant rule does not apply to a workers compensation application.
- The Member purported to determine the ***substantive dispute on its merits***, rather than considering the arguability of the defence: *Cawthorn*.

Watts v BKFY Pty Ltd [2022] NSWPIC 700 (Watts)

- The worker lived in Victoria at time ARD filed. The employer was a private company insured in NSW by Icare.
- The worker claimed compensation under s 66 *WCA*. The respondent disputed agreeability jurisdiction and argued that as it was insured by Icare (incorporated by s 4 of the *State Insurance Care Governance Act 2015),* it was "*a government agency*" and therefore "*a State*".
- ***Member Harris*** noted State Tribunals are not forbidden from taking steps or resolving issues that do not involve the exercise of judicial power, even if the dispute might otherwise be seen to fall within the scope of federal jurisdiction, such as attempts at conciliation: *Searle* at [20]. This is arguable until a Court definitively rules on the issue.

Watts

High Court (in *Crouch)* and the Federal Court (in *Deputy Federal Commissioner of Taxation v State Bank of New South Wales)* held that a reference in *the Constitution* to the Commonwealth or States includes *"a corporation which is an agency or instrumentality of the Commonwealth or the State as the case may be"*.

In this matter:

- The claim was made against the employer and not the insurer;
- the action was brought against a private company and not the insurer;
- While the insurer exercises a statutory right of subrogation, this does not alter the identity of the parties to the proceedings; and
- There was no arguable defence that the employer was a *"State"* for the purposes of *the Constitution*.

Watts

- The parties relied upon decision in *Ritson,* but the State of NSW was the employer in that matter and *Ritson* is not authority for the proposition that all self-insurers are statutory bodies representing the Crown.
- A private corporation that has a right to a self-insurer license because private funds are secured against potential claims, in circumstances where it is operating a private business, does not suggest that it is a "S*tate*".
- Bare suggestion – without more evidence – does not form an arguable basis that a private company is a State.

State of New South Wales v Kanajenahalli (Kanajenahalli) [2023] NSWPICPD 1

The worker left NSW before commencing PIC proceedings. The employer disputed the claim under s 11A *WCA*, but it did not object to jurisdiction.

Member Burge rejected the s 11A defence and awarded compensation to the worker.

Deputy President Wood identified a jurisdiction issue and held that for the PIC to have jurisdiction it must be either a court of a State (and thus invested with relevant federal jurisdiction) or be exercising administrative power.

- Both parties agreed that the PIC is not a court of a State.
- Wood DP rejected both parties' arguments that the Member was exercising administrative power and that determining the appeal would also involve an exercise of administrative power. The issue was whether the constitutional defence was "*colourable*" or "*arguable*"?: *Cawthorn*.

Kanajenahalli

Wood DP:

- Cited the decision in *Orellana-Fuentes*, in which Ipp JA (Spigelman CJ and Handley JA agreeing) held:

  > *Undoubtedly, the Commission does exercise judicial powers, but this does not necessarily make it a court. There are many institutions that exercise judicial powers but are well recognised not to be courts.*

- Held that the fact that the PIC is not a court does not necessarily mean that all its decisions are administrative in nature: see in *Tasmanian Breweries per* Kitto J.
- Held that the Court of Appeal's decision in *Searle* does not assist the parties, as the Court did not consider the nature of the power exercised in the Workers Compensation Division and/or at Presidential level.

Kanajenahalli

- In ***Rafiqul Islam v Transport Accident Commission of Victoria and Heather Worldon v Transport Accident Commission of Victoria*** *[2022] NSWDC 582 (**Islam**),* Weber SC DCJ held that **judicial power**:
  (a) Is exercised independently of the person against whom the proceedings are brought;
  (b) Is binding and authoritative, whether or not it is subject to appeal;
  (c) Determines existing rights and obligations according to law, thus quelling the controversy between the parties, and
  (d) Must be exercised judicially by way of an "open and public enquiry (unless the subject matter necessitates an exception)" and the "observance of the rules of procedural fairness".

Mizzi v State of New South Wales (New South Wales Police Force) [2023] NSWPIC 53

Member Capel held that the COD ***merely formalises*** the WPI, quantifies an amount of compensation that is payable, and orders that it be paid.

As there is ***no determination per se***, it is not arguable that the MA's assessment, and PIC's issue of the MAC and the COD, involve the exercise of federal jurisdiction: see Kirk JA in *Searle v McGregor*.

Final points

- *Cawthorn* is authority for the proposition that where a constitutional defence is raised and it is not incapable on its face of legal argument, the matter is potentially federally impacted.
- However, the PIC has State power to determine the limits of its own jurisdiction – appropriately mould its conduct - and failure to exercise or observe the jurisdictional limits can be rectified by the Supreme Court.
- In *Fletcher,* the Member erred by undertaking a merits assessment of the jurisdictional dispute rather than considering whether the constitutional defence was arguable.
- In *Watts, the PIC* set out the criteria relevant to whether a matter is potentially federally impacted and confirmed that references to a "State" in *the Constitution* include references to a corporation which is an agency or instrumentality of a State.

Final points

- In *Kanajenahalli,* the Member wrongly exercised judicial power and determined the substantive dispute and his decision operated to quell the dispute about the reasonableness of the appellant's conduct and the worker's entitlement to compensation.
- Therefore, determining the appeal would also involve an impermissible exercise of judicial power.

Note: Kanajenahalli is currently on appeal to the Court of Appeal.

- Member Capel's decision in *Mizzi* is to the effect that a COD issued after a MAC to determine WPI is not an exercise of judicial power.

Various decisions suggest uncertainty about which actions/decisions of PIC are judicial (rather than administrative) in nature.

ILARS funding of federal jurisdiction matters

- Legal advice and assistance at no cost to worker
- Fund federal jurisdiction matters on a 'best equivalence' basis
- Additional work funded as complexity increase at Attorney General's rates
- Separate funding for Counsel

Federal jurisdiction funding policy.pdf (nsw.gov.au)

Questions?