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2 September 2020

The Hon Wes Fang MLC
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Fang

2020 Review of the Workers Compensation Scheme

I am writing in response to the email of Joseph Cho, Principal Policy Officer of the Upper House Committees of the NSW Legislative Council requesting a response to Questions on Notice by 2 September 2020.

Please find attached my response to each of the questions noted by Mr Cho for the information of the Standing Committee on Law and Justice.

I note I have no corrections to the transcript.

If there are any matters arising from my response where the Committee requires further information, please do not hesitate to contact me.

Yours sincerely

Simon Cohen
Workers Compensation Independent Review Officer

Attachment A - Questions on Notice Responses

STANDING COMMITTEE ON LAW AND JUSTICE

2020 REVIEW OF THE WORKERS COMPENSATION SCHEME

Answers to Questions on Notice from Simon Cohen, Workers Compensation Independent Review Officer

Transcript of evidence heard on Monday 3 August 2020

1. Page 24

Question

Mr DAVID SHOEBRIDGE: *Mr Cohen, you have some figures in your submission that I find a little difficult to understand, which are on page 14. You have the number of ILARS grant applications for the first three quarters. I assume that is to compare like to like because you only had the numbers up to 31 March 2020.*

Mr COHEN: *That is correct.*

Mr DAVID SHOEBRIDGE: *Do you now have the full year numbers?*

Mr COHEN: *I do. I would have to take that on notice, if I might, Mr Shoebridge.*

Answer

See Table 1 below for full year data.

Table 1: Number of new ILARS Grant applications 2017/18 – 2019/20

Financial Year	Number ILARS grant applications
2017/2018	13,367
2018/2019	11,667
2019/2020	17,545

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Question

Mr DAVID SHOEBRIDGE: *Alright. Can you give us your understanding of—you say one of the reasons the capacity to make the grant has been brought forward, so that might have brought some of next year's claims into this year.*

Mr COHEN: *Yes.*

Mr DAVID SHOEBRIDGE: *Are there any other reasons why you think we have seen that increase?*

Mr COHEN: *I think a second reason is because there are more applications being made—more claims being made. So, we have seen, for example—my understanding from information published by SIRA is that in 2016-17 there were 90,000 claims; in 2018-19 there were 110,000 claims. They are round figures and, again, we can give you the precise numbers that we understand, on notice.*

Answer

The number of ILARS applications is impacted directly by both the number of new claims each year and the number of open claims. Data from the SIRA Annual Reports shows a 10% increase in new claims from 2016/17 to 2018/19, and a 23% increase in open claims over the same period (see Table 2 below). The number of open claims is likely to have a greater impact on the number of injured workers seeking legal advice.

Table 2: Number of new and open NSW workers compensation claims 2016/17 – 2019/20

Financial year	New claims	Open claims
2016/17	91,031	84,282
2017/18	96,751	92,876
2018/19	100,267	104,010

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Question

Mr DAVID SHOEBRIDGE: *Can you give us your four-year data on notice?*

Mr COHEN: *Of course.*

Mr DAVID SHOEBRIDGE: *I am grateful for the three-quarter year data in your submission, because at least it allows you to compare like with like. Could you also, to the extent you can, break it down between the specialised insurers, the industry insurers, the Treasury Managed Fund and the nominal insurer?*

Mr COHEN: *Of course. We would be pleased to provide that. Can I ask, do you want that over a number of years?*

Mr DAVID SHOEBRIDGE: *If you could, so we could track changes—as best you can.*

The Hon. DANIEL MOOKHEY: Any additional analysis you wish to provide of that data would be most welcome, too.

Answer

Data for the past four years for relevant WIRO activities is set out in Table 3.

Table 3: Number of matters received by insurer type 2016/17 – 2019/20

WIRO Type	Other Insurer including 'Not Provided'		Scheme agent		Self-insured		Specialised insurer		TMF		Total
Complaints											
	No.	%	No.	%	No.	%	No.	%	No.	%	No.
2016/17	12	0%	1,885	68%	287	10%	111	4%	486	17%	2,781
2017/18	20	1%	2,151	69%	339	11%	147	5%	465	15%	3,122
2018/19	54	1%	3,089	65%	565	12%	268	6%	767	16%	4,743
2019/20	59	1%	5,438	69%	745	10%	424	5%	1,169	15%	7,835
ILARS											
2016/17	529	5%	8,255	72%	1,089	9%	388	3%	1,268	11%	11,529
2017/18	599	4%	9,409	70%	1,291	10%	499	4%	1,569	12%	13,367
2018/19	669	6%	8,202	70%	1,101	9%	494	4%	1,201	10%	11,667
2019/20	2,433	14%	11,509	66%	1,473	8%	648	4%	1,481	8%	17,544

4. Page 26

Question

The Hon. ANTHONY D'ADAM: That initial advice was not being funded by ILARS, is that what you are saying? It would only be funded if the application proceeded to the next stage. Is that correct?

Mr COHEN: That is not my understanding, that it would only be funded if the application proceeded to the next stage. I think that there have been some changes in terms of the makeup of the various funding amounts. But I would probably need to take on notice the detail around that and provide you with further information into the precise change pre and post September 2019 and how they impact on the funding amounts for approved lawyers.

Answer

A new WIRO Funding Policy for ILARS and Grant Amount Guide was introduced on 2 September 2019 after extensive internal and external consultation.

Under the previous Policy a WIRO Approved Lawyer could apply for funding to enable investigations (such as obtaining medical evidence) to pursue a claim or attempt to resolve a dispute on behalf of an injured worker. If after investigating the matter the Approved Lawyer determined that they could not provide further assistance they could invoice ILARS and would be entitled to the grant amount of \$1,500. This sum would encompass all work done including comprehensive legal advice provided to the worker. Smaller grant amounts were available for some work falling short of the work anticipated in this investigative work, for example \$400 to assist a worker make a claim.

Under the new Policy an Approved Lawyer is able to apply at an earlier stage for a grant to pursue preliminary investigations and provide the worker with comprehensive legal advice (Stage 1 funding). This funding does not extend to obtaining an independent medical examination report. If, at this stage, the Approved Lawyer is unable to assist the worker further or any additional investigation or claim would not proceed until a future time (for example, because the worker's medical condition has not stabilised) the Approved Lawyer is able to invoice ILARS and is entitled to a grant amount of \$800.

Alternatively (and most commonly), the Approved Lawyer will apply for an extension of funding to undertake further investigation (and where required commence proceedings before the Workers Compensation Commission). The final grant amount payable will incorporate any advice provided at Stage 1 and will depend primarily on the point at which the matter is resolved.

Importantly, if the matter that has previously been the subject of Stage 1 funding is reactivated by the Approved Lawyer, any additional grant amount payable will have the \$800 paid at Stage 1 deducted.

5. Page 26

Question

The Hon. ANTHONY D'ADAM: Can I ask about the statistics that you collect in terms of ILARS funded matters? Do you collect statistics that might indicate whether the dispute resolved in favour of the worker or in favour of the insurer?

Mr COHEN: We certainly collect information about whether as a result of the application for funding there was a change of decision which resulted in an improved outcome for the injured worker, and I am happy to provide information to the Committee about that if it is of assistance.

The Hon. ANTHONY D'ADAM: Are you able to indicate whether there is any discernible trend? Are there more applications that are resolving in favour or to the benefit of the worker than previously or is that relatively stable?

Mr COHEN: I would need to take that on notice. My understanding is that the substantial majority of matters that are the subject of an ILARS application result in an improved outcome to the worker. What that trend is over time I do not have information in relation to.

Answer

Table 4 sets out the results (outcomes) from funding applications for the past four years where there has been an ILARS grant of funding.

Table 4: Outcome type for all finalised ILARS grants 2016/17 – 2019/20

Outcome		2016/17	2017/18	2018/19	2019/20
Pre-proceedings	No.	4,395	5,704	6,224	6,283
	%	41%	49%	50%	50%
WCC or Court	No.	4,355	4,470	4,324	3,995
	%	41%	38%	35	32%
Other outcome	No.	1,857	1,581	1,798	2,196
	%	18%	13%	15	18%
Total of Grants		10,607	11,755	12,346	12,474

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

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

Table 5 shows the results where a grant has concluded with an outcome.

Table 5: Finalised ILARS grants by outcomes achieved 2016/17 – 2019/20

Year		2016/17			2017/18			2018/19			2019/20		
		Outcome Achieved	Outcome not achieved	Total	Outcome Achieved	Outcome not achieved	Total	Outcome Achieved	Outcome not achieved	Total	Outcome Achieved	Outcome not achieved	Total
Outcome Prior to WCC	No.	3,296	1,162	4,458	3,508	2,291	5,799	4,726	1,613	6,339	5,065	1,908	6,973
	%	74%	26%	100%	60%	40%	100%	75%	25%	100%	73%	27%	100%
Outcome in WCC/Court	No.	3,597	758	4,355	3,606	864	4,470	3,394	930	4,324	3,273	722	3,995
	%	83%	17%	100%	81%	19%	100%	78%	22%	100%	82%	18%	100%

‘Outcome achieved’ includes all grants where the worker has improved their position or fully succeeded in the claim or dispute.

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

6. Page 27

Question

The Hon. ANTHONY D'ADAM: *On matters relating to disputes over return to work, could you provide some information about the trend in relation to that?*

Mr COHEN: *We certainly can provide what information we have. Measuring return to work is not something that falls specifically within our role.*

Mr DAVID SHOEBRIDGE: *Which you must be grateful for at the moment.*

The Hon. ANTHONY D'ADAM: *My point is about disputes. If there is a dispute relating to return to work—I am assuming you categorise the disputes on the basis of the issue that is in dispute. One of those issues might be return to work and looking at those statistics whether there is a trend around more favourable outcomes for workers on the return to work disputes that are funded through ILARS.*

Mr COHEN: *Certainly some of those matters may come to the surface through work capacity decisions that are made by insurers and we keep data in relation to those. I am happy to see what information we can give the Committee in respect of those matters. The other area where we sometimes see issues around return to work emerges in relation to our solutions work and that might be where an injured worker has some concerns about suitable employment and where in that circumstance they have got a concern, for example, in relation to what it might mean in respect of their workers compensation entitlements and we assist in the resolution of those matters as well.*

Answer

The issue of return to work arises most commonly for WIRO in the context of 'work injury management disputes' which are generally disputes arising under Chapter 3 of the *Work Injury Management and Workers Compensation Act 1998*.

This includes work injury management complaints related to Injury Management Plans, rehabilitation and return to work.

In addition, ILARS grants of funding can relate specifically to return to work or work injury management issues.

Table 6 on the following page provides the number of complaints received in the 2019/2020 financial year and the solutions achieved.

Table 6: WIRO complaints received where an injured worker raised work injury management issue 2019/20

Insurer Type	Scheme agent		Self-insured		Specialised insurer		TMF		Other Insurer		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%		%
Total Workplace Injury Management complaints	152	60%	27	11%	16	6%	59	23%	1	0%	254	100%
Injury Management Plan (IMP)	13	9%	4	15%	-	-	4	7%	1	100%	22	9%
No current Injury IMP	5								1		6	
IMP amended after Preliminary Inquiry (PI)	2		1				3				6	
Injured worker (IW) not compliant	5		1				1				7	
Insurer not compliant	1		1								2	
Nominated Treating Doctor (NTD) changed			1								1	
Rehabilitation	75	49%	5	19%	5	31%	19	32%	0	0%	104	41%
Case conference cancelled	3						1				4	
Rehab provider changed	33		2		4		3				42	
Rehab not required	21						4				25	
Rehab provided s41A	4				1		4				9	
Referred to Injury Management Consultant (IMC)	1						3				4	
Case conference organised	13		3				4				20	
Return to Work (RTW)	64	42%	18	67%	9	56%	36	61%	0	0%	127	50%
Duties not suitable	7		2		1		8				18	
Workplace assessment required	8		1		1		1				11	
RTW plan amended	10		1				9				20	
Duties not provided by employer	23		5		2		9				39	

Insurer Type	Scheme agent		Self-insured		Specialised insurer		TMF		Other Insurer		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%		%
Vocational Program Approved	8		3		1		1				13	
Duties provided by employer after PI	1		3		2		6				12	
Rehabilitation Allocated	6		3		2		2				13	
Section 53 Vocational Program Declined	1										1	
Suitable Employment	0		0	0%	1	6%	0	0%	0	0%	1	0%
Suitable duties provided					1						1	

Table 7 below shows the four-year data from ILARS grant matters where the issue is a work injury management dispute.

Table 7: New ILARS Grant applications for Work Injury Management (WIM) Disputes 2016/2017 – 2019/2020

Year	2016/17			2017/18			2018/19			2019/20		
	Outcome not achieved	Outcome improved	Total	Outcome not achieved	Outcome improved	Total	Outcome not achieved	Outcome improved	Total	Outcome not achieved	Outcome improved	Total
No. ILARS grant for WIM Dispute	0	27	27	2	17	19	3	17	20	0	3	3

7. Page 27

Question

The Hon. ANTHONY D'ADAM: Do you collect any statistics in relation to the utilisation of section 248? This is the provision around dismissal of a worker after six months.

Mr COHEN: That is not something that we would generally have a role in relation to. My understanding is that those matters are dealt with by the Industrial Relations Commission not by the Workers Compensation Commission. Generally our role relates to matters that relate to those compensation elements.

The Hon. ANTHONY D'ADAM: Are you aware of anywhere in the system, whether it is icare or SIRA, that might collect those statistics?

Mr COHEN: I would need to take that on notice. I am not aware immediately, but I am certainly happy to take it on notice.

Answer

The Industrial Relations Commission of New South Wales Annual Report 2018 (Appendix 3- Matters filed in the Industrial Relations Commission 1 Jan 2018 – 31 December 2018) records 23 matters filed in 2018 under the classification of "protection of injured workers from dismissal – Workers Compensation Act". Part 8 of the *Workers Compensation Act 1987* relates to protection of injured workers from dismissal and includes sections dealing with applications for reinstatement of employment in addition to the offence provision in section 248.

I understand a similar question has been asked by the Committee of SIRA and its role in respect of compliance with Part 8. Carmel Donnelly, the Chief Executive Officer of SIRA has advised me that she will provide a full response about SIRA's role. Given this, I have not provided any response in respect of SIRA's role.

Simon Cohen

Workers Compensation Independent Review Officer