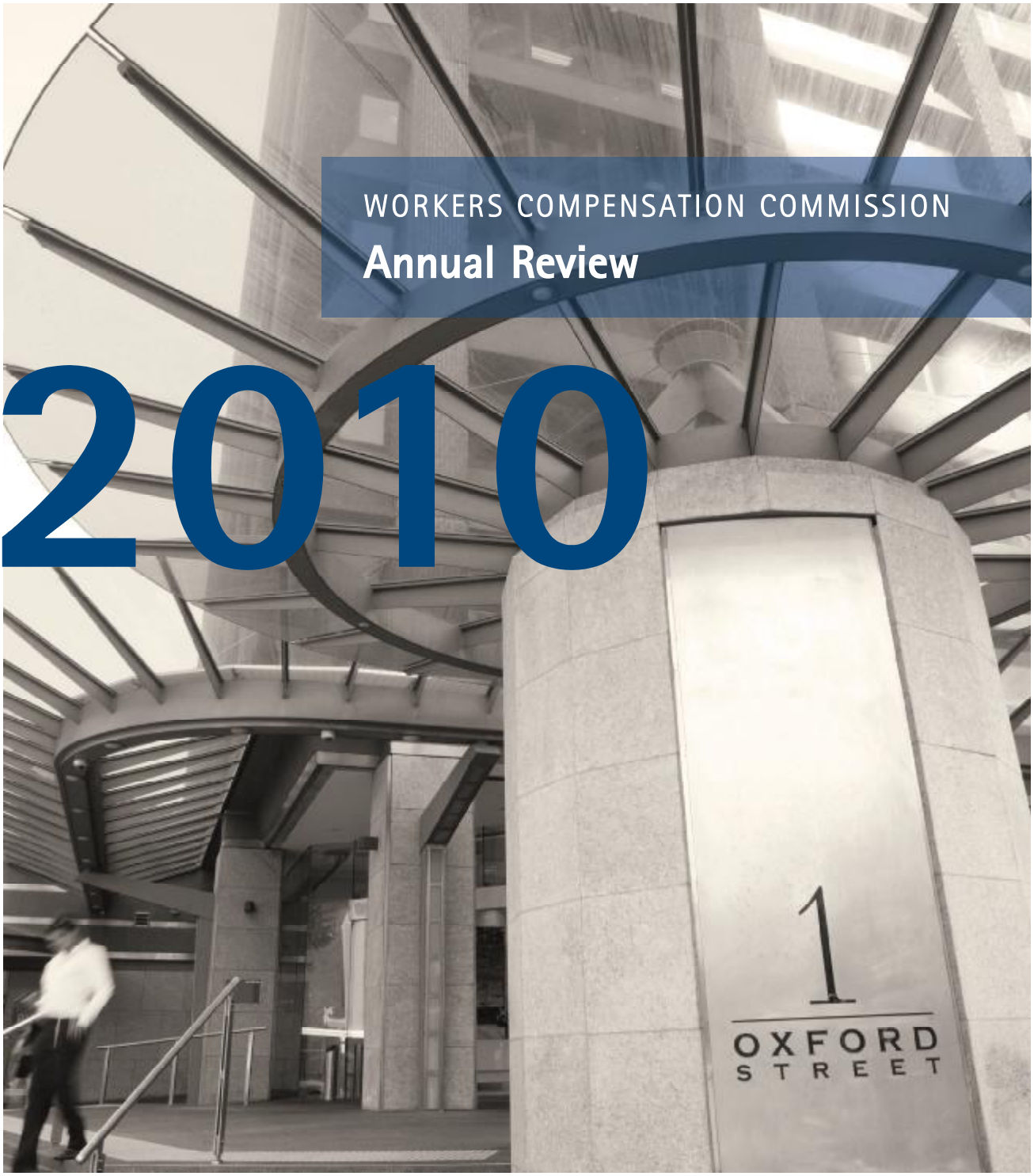
WORKERS COMPENSATION COMMISSION

Annual Review

2010



WORKERS
COMPENSATION
COMMISSION

April 2011

Table of Contents

President's Foreword 2

Registrar's Report 3

Developments in 2010 4

- HIGHLIGHTS FOR 2010 4
- PRIORITIES FOR 2011 4

The Commission

- WHO WE ARE 5
  - Legislation 5
  - Objectives of the Commission 5
- WHAT WE DO 6
- HOW WE DO IT 6
  - How the process works 6
  - Teleconference 8
  - Conciliation Conference 8
  - Arbitration Hearing 9
  - Arbitral Appeals 10
  - Pre-filing Strike Out Applications 10
  - Questions of Law 11
  - Common Law – Mediation 11
  - Medical Assessments 12
  - Appeals against Medical Assessments 12
  - Costs Assessments 14
  - Expedited Assessments 15
  - Interim Payment Directions 15
  - Small Claims 16
  - Workplace Injury Management Disputes 16
  - Internal Committees and Reference Groups 17
  - AMS and Mediator Reference Groups 18
  - User Groups 18
  - Decisions Evaluation Commitee 19
  - Access and Equity 19
  - Complaints Handling 20
  - Complaints Received in 2010 20

THE ORGANISATION

Members 21
President and Deputy Presidents 21
Registrar 21
Arbitrators 21
Service Partners 22
Staff 22

2010 WORKLOAD DISCUSSION

Registrations 26
Applications to Resolve a Dispute 26
Issues in Dispute 26
Other Applications 27
Mediations 28
Medical Appeals 28
Arbitral Appeals 28
Finalisations 28
Outcomes 29
Key Performance Indicators 31
Judicial Review of Registrar and Medical Appeal Panel Decisions 32

STRATEGIC PLAN 2008-2011

Achievements under the Corporate Plan 34
Focus: Excellence in Client Service 34
Focus: Skilled and Committed People 35
Focus: Engaged Service Partners 37
Focus: Streamlined Business Excellence 38

EDUCATION AND COLLABORATION

Inter-Jurisdictional Meeting 39
Council of Australasian Tribunals 39
Law Society's Government and Administrative Law Accreditation Working Group 40
Visiting Delegations 40

DEVELOPMENTS IN THE LAW

Workers Compensation Amendment (Commission Members) Act 2010 41
Workers Compensation Legislation Amendment Act 2010 41
Workers Compensation Commission Rules 2010 43
Workers Compensation Regulation 2010 43
Significant Decisions of Presidential Members 44
Djukic v Tactical Cargo Solutions Pty Ltd (under external administration) [2010] NSWWCCPD 123 44
Van Wessem v Entertainment Outlet Pty Ltd [2010] NSWWCCPD 97 46
Martin v R J Hibbens Pty Ltd [2010] NSWWCCPD 83 49
Attorney General's Department v K [2010] NSWWCCPD 76 52
Significant Supreme Court Decision 54
Cole v Wenaline Pty Ltd [2010] NSWSC 78 54

Appendices

APPENDIX 1 – MEMBERS OF THE COMMISSION 56
APPENDIX 2 – APPROVED MEDICAL SPECIALISTS 57
APPENDIX 3 – MEDIATORS 58
APPENDIX 4 – MEDICAL APPEAL PANEL APPOINTMENTS 58
APPENDIX 5 – WCC ORGANISATION CHART 59
APPENDIX 6 – PROGRESS OF A MATTER IN THE WCC 60

WORKERS COMPENSATION COMMISSION

President's Foreword

This year's annual review provides an overview of operations of the Commission in the past year in terms of its management of the 11,000 or so applications coming before it for resolution. It also identifies and evaluates a range of initiatives implemented during the year designed to enhance the fulfilment of our statutory objectives of providing a fair and cost effective system to resolve disputes under the Workers Compensation Acts.

As discussed in previous annual reviews, the Commission identified an opportunity to enhance the durability of arbitral decisions by the appointment of suitably qualified and experienced practitioners as full-time or substantially full-time Arbitrators. This was a deliberate shift from the appointment of a larger number of sessional Arbitrators, many of whom mixed their contribution to the work of the Commission with other professional commitments.

Consistent with this approach, in July this year the Attorney General, after receiving recommendations from an evaluation committee, appointed 14 full-time Arbitrators and four part-time Arbitrators for a term of three years. A number of sessional Arbitrators have also been appointed, substantially to hear cases listed in rural and regional areas and to assist in any peaks in metropolitan demand.

Following a recent legislative amendment allowing for the appointment of Senior Arbitrators, the Attorney has also appointed three Senior Arbitrators. They will have a role in assisting with the induction, mentoring and training of Arbitrators, and in contributing to general practice and procedure in the Commission.

Whilst it is still early days, in terms of evaluating the success of these initiatives, there has been an appreciable increase in the number of matters resolved at conciliation and a corresponding reduction in the number of appeals from the decisions of Arbitrators.

It is proposed that a formal review of the new arrangements will be undertaken in late 2011. The review will evaluate the effectiveness of the new measures in terms of operational efficiency, quality and durability of decisions, cost effectiveness, timeliness and client satisfaction.

Challenges in the year ahead will include adapting to recent legislative changes in a number of areas. These include the change of emphasis in the resolution of arbitral appeals from a merits review to the correction of identified legal, factual or discretionary errors and the expansion of the Commission's jurisdiction to determine disputes concerning future medical expenses.

Finally, I take this opportunity to express my thanks to the staff of the Commission, the Deputy Presidents, Acting Deputy Presidents, Arbitrators, Senior Arbitrators and the Approved Medical Specialists for their contributions throughout the year. I particularly express my thanks to the Registrar, Sian Leathem, for her continuing support and commitment.

His Honour Judge Greg Keating
President

Registrar's Report

During 2010, the Commission continued to implement a number of the recommendations emerging from the 2008 organisational review. Commencing in October 2009, the Commission transitioned into its new internal structure. During the reporting year, managers and staff worked hard to consolidate those structural changes and to improve our services and business processes. The Commission also formed a broadly representative Organisational Performance Reference Group to generate feedback and ideas on performance improvement initiatives at both the individual and organisational level.

In July 2010, we welcomed our first cohort of in-house Arbitrators to our Oxford Street premises. The Commission has also created a small Arbitral Support Unit aimed at providing dedicated administrative and research support to the in-house Arbitrators. The in-house Arbitrators in Sydney are complemented by a smaller group of Arbitrators in Newcastle. The Commission is also ably supported by a group of skilled and experienced sessional Arbitrators in Sydney and several regional areas.

Member, staff and service provider training and development continued to be a priority in 2010, with the holding of induction programs, forums, annual conferences and formal training seminars. The Commission once again offered relevant staff the opportunity to complete a Certificate III and IV in Government, with some 18 staff currently enrolled. I am also pleased to report that, in late 2010, the Commission engaged the University of New England to develop and deliver a Leadership Program for staff with management or supervisory responsibilities. That Program will continue during 2011.

Detailed information about the Commission's workload appears in Section 3 of this report. However, in broad terms, the workload remained stable in 2010, with one notable exception. Mediation applications continued to rise steadily, with over 800 being lodged during the reporting year. To assist in the management of these applications, the Commission conducted in 2010 a selection process for Mediators, with the President appointing a panel of 25 experienced dispute resolution practitioners for a period of three years.

On the service provision front, in October 2010 the Commission launched eScreens, a 24-hour electronic lodgment facility that is accessible to all members of the public via the Commission's website. This facility supplements our existing methods of lodgment including post, email and face-to-face via Registry. We expect that, over time and with the addition of future enhancements, there will be a greater uptake of this form of lodgment.

I would like to take the opportunity to thank the President, Deputy Presidents, Deputy Registrars, Members, staff and our service partners for their professionalism and commitment throughout what has been a challenging and rewarding year.

Sian Leathem
Registrar

Developments in 2010

HIGHLIGHTS FOR 2010

The overall number of applications received by the Commission during 2010 (11,592) was almost identical with the number received in 2009 (11,436).

While there was a modest decrease in the number of Applications to Resolve a Dispute (Form 2), this was offset by an increase in Applications to Mediate a Work Injury Damages Claim (Form 11) and Applications for Costs Assessment (Form 15). Further details about the number of lodgments and finalisations during 2010 appear in the Workload Discussion section in this report.

Following the organisational restructure of the Commission, costs assessments are now being performed in-house by Solicitors of the Legal Unit. In 2010, 240 costs assessment applications were determined by Solicitors in the Legal and Medical Services Branch's Legal Unit.

Further information about these initiatives is contained in later chapters of the Annual Review.

In addition to managing a range of applications during 2010, the Commission finalised a number of significant activities, including:

- **completion of the selection and appointment process for Senior Arbitrators and Arbitrators**
- **completion of the selection and appointment process for Mediators**
- **induction of new Arbitrators and Mediators**
- **launch of eScreens**
- **consolidation of our new organisational structure**
- enrolment of further staff in Certificate **III and IV in Government**
- **update our forms, Practice Directions and Guidelines** to reflect legislative changes.

PRIORITIES FOR 2011

The Commission's Corporate Plan identifies a number of priorities for 2011, including:

- **trial of new teleconference listing times**
- **program of metropolitan and regional information sessions for Commission users**
- **update of the Commission's website**
- **completion of the appointment process for Arbitrators**
- **commencement of a Practice Manual for Approved Medical Specialists**
- **development of a new Strategic Plan for 2011–2014.**

The Commission

WHO WE ARE

The Workers Compensation Commission (the Commission) is an independent statutory tribunal within the justice system of New South Wales. It was established under the *Workplace Injury Management and Workers Compensation Act* 1998 and commenced operation on 1 January 2002.

The Commission is part of a broader statutory scheme for dealing with workers compensation issues and claims. Within that broader scheme, the Commission's role is to resolve disputes between injured workers and employers over workers compensation claims.

The Commission's non-adversarial dispute resolution process is at the vanguard of dispute resolution in Australia. The parties are directly involved in an accessible and accountable process that ensures injured workers obtain a fair and quick resolution to disputes about workers compensation entitlements.

The Honourable Michael Daley (Minister for Finance, Minister for Police) is the Minister under whose auspices the Commission falls.

Under the Allocation of the Administration of Acts issued on 30 January 2009, the Attorney General is given responsibility for the administration of sections 368, 369 and 373 and Schedule 5 of the *Workplace Injury Management and Workers Compensation Act* 1998.

Section 373 brings into effect Schedule 5 of the Act. Schedule 5 contains provisions that relate to members of the Commission, including Arbitrators. Pursuant to clause 4(1) of Schedule 5, the remuneration of an Arbitrator (including travelling and subsistence allowances) in respect of work done as a member of the Commission is as the Minister determines.

Legislation

The legislation governing the Commission includes:

- *Workplace Injury Management and Workers Compensation Act* 1998
- *Workers Compensation Act* 1987
- *Workers Compensation Regulation* 2010
- *Workers Compensation Commission Rules* 2010.

Objectives of the Commission

Section 367 of the *Workplace Injury Management and Workers Compensation Act* 1998 charges the Commission with the following objectives:

- **To provide a fair and cost-effective system for the resolution of disputes**
- **To reduce administrative costs**
- **To provide a timely service**
- **To create a registry and dispute resolution service that meets expectations in relation to accessibility, approachability and professionalism**
- **To provide an independent dispute resolution service that is effective in settling disputes and leads to durable agreements**
- **To establish effective communication and liaison with interested parties.**

These objectives are both challenging and significant. Over the last eight years, the Commission has endeavoured to build a solid foundation of achievement aligned with these objectives.

WHAT WE DO

Simply put, the Commission resolves disputes between injured workers and their employers.

There are several different paths that applications can travel before they reach resolution eg arbitration, medical assessment, mediation and expedited assessment.The path selected depends on the issues in dispute and the steps involved vary according to the complexity of the matter.

The main areas of dispute between parties include claims relating to:

- **weekly compensation payments**
- **medical expenses compensation**
- **compensation to dependants of deceased workers**
- **injury management**
- **lump sum compensation for permanent impairment/ pain and suffering**
- **work injury damages**
- **costs.**

The Commission has an internal appellate jurisdiction that is a distinguishing feature of its operations.The Presidential Members of the Commission conduct appeals from the decisions of the Arbitrators.

Similarly, Medical Appeal Panels determine appeals against assessments by Approved Medical Specialists.

Further details about the people involved in resolving different types of disputes and the processes that are followed can be found in later sections of this Annual Review.

HOW WE DO IT

How the Process Works

The process for resolving a dispute depends on the type of claim that is in dispute.

Where the only issue in dispute is the degree of permanent impairment, the Registrar will refer those claims directly to an Approved Medical Specialist for medical assessment following the period for lodging any reply to the application.The parties will be notified of the details of the medical assessment appointment.

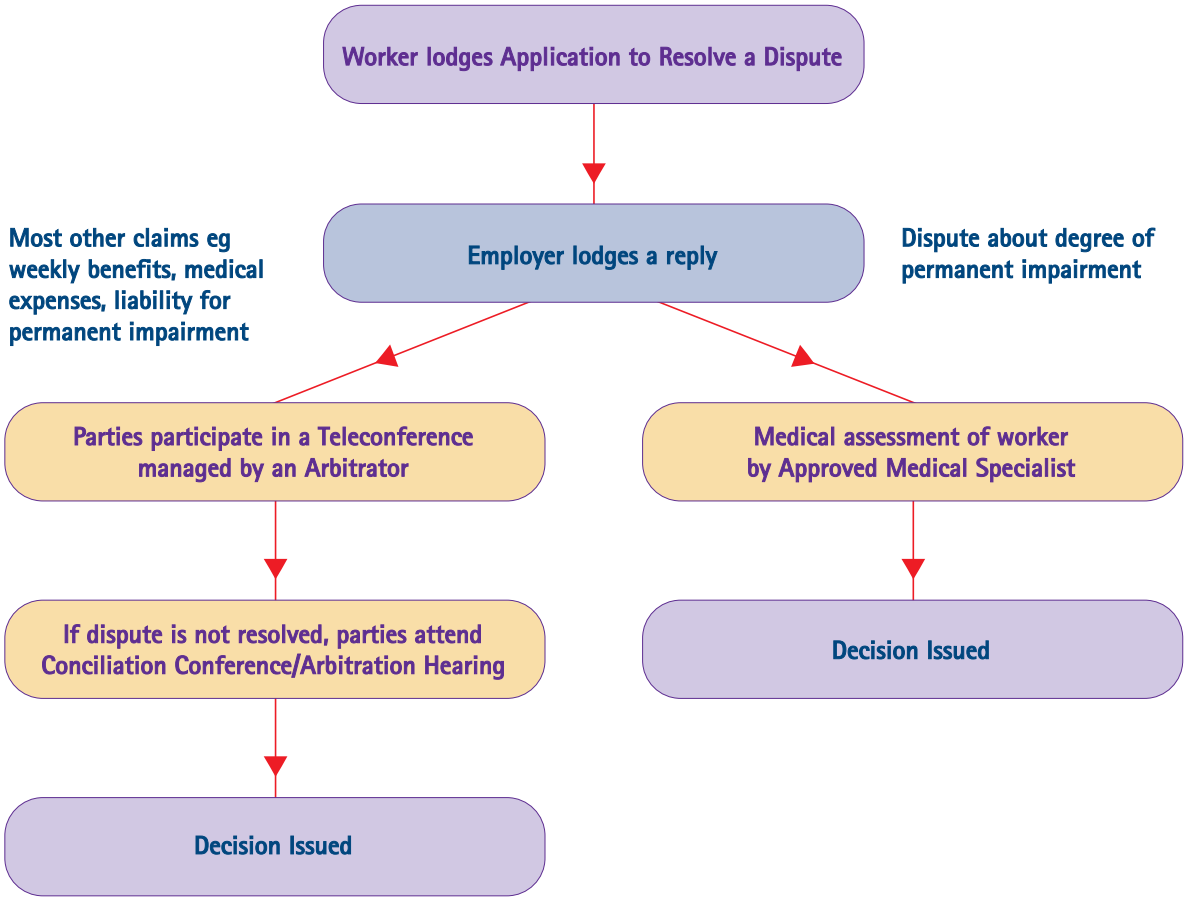
The Registrar will refer most other claims, such as weekly benefits compensation, medical expenses, or where liability is disputed in relation to a claim for permanent impairment, to an Arbitrator for determination.

If a dispute is referred to an Arbitrator, a telephone conference (teleconference) will initially be held. If the dispute does not resolve, or the parties do not settle at the teleconference, the Arbitrator may set the matter down for a face-to-face conference meeting called the conciliation conference/ arbitration hearing.

Arbitrators are trained to conduct Commission proceedings in a way that is fair to all the parties.At every stage of the process, Arbitrators encourage and assist the parties to resolve their dispute. However, if the parties fail to resolve it, the Arbitrator will determine the dispute.

Parties are encouraged to settle their dispute at any time during the process.

The following simple guide shows how the process works:



Teleconference

When an Application to Resolve a Dispute is registered by the Commission, a proceedings timetable is issued to the parties. (Note: Disputes regarding the degree of permanent impairment may be referred directly by theRegistrar to an Approved Medical Specialist.)

The timetable contains the teleconference date.The Commission schedules teleconferences approximately 35 days after the date of registration.

The Commission books the teleconference using the details provided by the parties in theApplication and the Reply. Written confirmation of the date and time for the teleconference is sent to all the parties.

A teleconference is conducted by an Arbitrator and involves the worker, his or her legal representative, the employer, the insurer and the insurer's legal representative.The worker can participate in the teleconference from home or from his or her legal representative's office.

The teleconference is the first opportunity for the Arbitrator to bring the parties together and initiate discussion of the dispute. The Arbitrator will ask the parties about the dispute, identify the relevant issues and encourage the parties to reach an agreement.

During the teleconference, the Arbitrator will confirm:

- **the willingness of all the parties to proceed**
- **the likelihood of settlement**
- **that all the parties understand the process**
- **whether everyone agrees on the statement of facts or issues**
- **any legal or threshold issues that must be decided**
- any recent developments that may not be reflected in **the documents.**

If the parties reach an agreement, theArbitrator will record the agreement in a Certificate of Determination. The Commission will then issue the Certificate of Determination to the parties.

If the Arbitrator cannot bring the parties to an agreement, the Arbitrator may decide that the dispute can be determined on the basis of the documents provided.This is called a 'Determination on the Papers' and can occur after the dispute has been discussed with all the parties, and after the parties' views have been noted at the teleconference.

If the parties do not reach an agreement and the dispute cannot be determined on the papers, the matter will be scheduled for a conciliation conference/arbitration hearing. At this stage, the Arbitrator will also consider submissions from the parties as to the need for issuing directions for the production of documents.

Conciliation Conference

If the dispute was not resolved at the teleconference, the Arbitrator will arrange a face-to-face meeting between the parties. The first part of this meeting is called a conciliation conference.

Conciliation conferences are typically scheduled to occur about 21 days from the date of the teleconference, unless the Arbitrator permits the issuing of directions to produce documents. If directions to produce documents are issued, the conciliation conference will be scheduled to occur after the directions have been dealt with and completed.

The Arbitrator will let the parties know whether to bring witnesses to the conciliation conference and what they need to do before and during the conference.

If the worker lives in Sydney, the meeting will be held in the metropolitan area. If the worker and/or his or her legal representative live in regional New South Wales, the Commission will arrange the conciliation conference according to its venue policy.

At the conciliation conference, the Arbitrator will explore the possibility of reaching an agreement on the dispute.The meeting could cover matters such as:

- **a summary of the dispute**
- further discussion about the issues identified
- **possible outcomes that can be achieved for and by each party**
- **negotiation of an outcome that is acceptable to all the parties.**

Every effort is made to have the parties settle by agreement.

If the parties reach an agreement during the conciliation conference, the Arbitrator will record the agreement in a Certificate of Determination, which the Commission will issue to the parties in due course.

If the parties are unable to reach an agreement about the dispute, the Arbitrator will terminate the conciliation conference and call for a short intermission. After the break, the Arbitrator will commence the arbitration hearing.

Generally, conciliation conferences will run for around 30 minutes. However, if the parties are engaged in beneficial and profitable discussions, they can continue with the conference until all the issues have been discussed.

Arbitration Hearing

If the dispute fails to settle at the face-to-face conciliation conference, then it moves into a more formal phase – the arbitration hearing.

This occurs on the same day, following the conciliation conference. The parties will be given a short break after the conciliation conference, after which the Arbitrator will commence the arbitration hearing. The proceedings are informal, but the hearing is recorded and is open to the public. (Parties may obtain a copy of the sound recording of the arbitration hearing by contacting the Registry.)

The Arbitrator will review what has occurred and get all parties to agree on a full and correct summary of the issues that are still in dispute.

If necessary, evidence can be taken under oath or affirmation either in person, by telephone conference or videoconference.

The parties can make an agreement to settle the matter at any time before the Arbitrator makes a decision. All the Commission's processes have been designed to allow the parties to reach a settlement at any stage of the proceedings.

If the parties are unable to come to an agreement, the Arbitrator will make a legally-binding decision about the dispute. The Arbitrator may advise the parties of the decision at the end of the hearing. More commonly, however, the Arbitrator will reserve his or her decision, and a Certificate of Determination and Statement of Reasons will be issued within 21 days of the hearing.

The arbitration hearing is generally scheduled for three hours, but it can exceed that period, depending on the complexity of the issues and the progress of settlement discussions.

All arbitration hearings are sound-recorded. A transcript of the proceedings is made available to the parties free of charge in the event of an appeal from the decision of the Arbitrator.

Case Study

Ms J lodged an Application to Resolve a Dispute in relation to a claim for lump sum compensation resulting from alleged hearing loss deemed to have occurred on 14 April 2009.

Ms J had been employed as a machinist in the textile industry for the past 35 years. She had previously been awarded compensation for hearing loss against a former employer. In 2002, she was awarded 6.8 per cent binaural loss of hearing.

The claim in dispute was for a further loss of hearing against a subsequent employer. Her employment was through a labour hire company at the time of her alleged injury. This involved periods of casual employment with various employers.

Liability for the claim was disputed by the labour hire company on the basis that their employment was not employment of a nature causing Ms J's hearing loss.

A teleconference was conducted where the Arbitrator was satisfied that efforts to resolve the dispute were exhausted, with the matter being listed for a conciliation/arbitration conference. A direction was issued, allowing the applicant to obtain a further medical report and the respondent to tender a supplementary acoustics report.

During the conciliation conference, the parties agreed the only issue in dispute was whether or not the premises to which the labour hire firm assigned her was a noisy employer. That is, whether the employment was the cause of Ms J's claimed hearing loss.

The parties were unable to reach agreement during the conciliation phase of the conference.

The Arbitrator formally heard the matter, where she considered the material attached to the Application and Reply, as well as the documents noted in the direction issued at the teleconference. Ms J did not seek leave to give any further oral evidence and the respondent did not seek leave to cross-examine Ms J. The Arbitrator reserved her decision.

In the written determination issued to the parties, the Arbitrator determined on the balance of probabilities that the tendencies, incidents or characteristics of Ms J's employment was employment of a nature causing hearing loss or further loss.

Having determined the matter in favour of the applicant, the matter was referred back to the Registrar for referral to an Approved Medical Specialist to determine the level of hearing loss.

Arbitral Appeals

The President is responsible of the operation of the internal arbitral appeal process in the Commission.

Appeals from decisions of the Commission constituted by an Arbitrator are made to Presidential members pursuant to section 352 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the 1998 Act).

Appeals are with leave, and by way of review of the decision appealed against.

The President, the two Deputy Presidents and part-time Acting Deputy Presidents, sitting alone, hear and determine appeals from arbitral decisions.

If the Presidential member is satisfied that he or she has been provided with sufficient information, the appeal can be determined on the documentary material without holding a conference or formal hearing. Whilst the majority of arbitral appeals are determined 'on the papers', a number of appeals require a full hearing.

Determinations by Presidential members are final, subject only to appeal on a point of law to the Court of Appeal (see section 353 of the 1998 Act).

Decisions of the Court of Appeal under section 353 are binding on the Commission and all parties to the proceedings to which the appeal relates.

Pre-filing Strike Out Applications

Workers who allege injury as a result of their employer's negligence may bring court proceedings to recover work injury damages. Before a claimant can commence proceedings for the recovery of work injury damages, he/she must serve a pre-filing statement. Under section 151D, proceedings cannot be commenced more than three years after the date of injury, except with the leave of the court in which the proceedings are to be taken. Time does not run in certain circumstances, including while a pre-filing statement remains current.

The President hears applications filed by defendants to strike out pre-filing statements served in claims for work injury damages (see section 315 of the 1998 Act and section 151DA(3) of the *Workers Compensation Act* 1987.

Questions of Law

The President hears and determines questions of law. From time to time, a novel or complex question of law may arise in arbitral proceedings. An Arbitrator, by his or her own motion, or on application by a party under section 351 of the 1998 Act, may refer a question of law to the President for determination. Leave to refer a question of law is granted only if the question is 'novel or complex'. In determining whether or not to grant leave to refer a question of law, the President will take into account, amongst other things, whether the question involves an interpretation of legislative provisions not previously considered at a Presidential or appellate level.

Despite the reference of a question of law to the President, the Arbitrator will, wherever possible, continue to progress the proceedings. The exception to this course will be where the question of law concerns the Arbitrator's jurisdiction to make a determination (section 351(4) of the 1998 Act).

Common Law – Mediation

The Commission's role in work injury damages claims is limited to providing an administrative and mediation framework, together with a process for determining if the degree of whole person impairment is sufficient to meet the threshold for the recovery of damages.

In most cases, a claimant must refer a claim for work injury damages for mediation at the Commission before court proceedings can be commenced. A defendant may only decline to participate in mediation where liability is wholly denied.

Where a claim proceeds to mediation, the Registrar will appoint a Mediator. All parties, including the worker and the insurer, are required to attend the mediation.

The Mediator must use his or her best endeavours to bring the parties to agreement on the claim. If the parties fail to reach agreement, the Mediator will issue a certificate to that effect and the parties may then proceed to court.

Case Study

Mr G worked as a process worker assembling a variety of electronic components. He alleged that during the period September 2008 to 24 April 2009 he developed severe pain in both hands. The pain manifested itself as electrical shocks to the thumbs and fingers of each hand, with more marked symptoms to the left dominant hand.

The central pleading in relation to alleged negligence of the employer was as follows:

- *the plaintiff was required to process more units than it was safe for him to do so*
- *the defendant failed to rotate sufficiently the different tasks the plaintiff was expected to complete in any one shift*
- *the plaintiff was required to use small pliers and screwdrivers without adequate rest breaks or alternative tasks being provided*
- *the employer failed to provide sufficient manpower to assist the plaintiff.*

In the Response, the defendant denied the allegations. In defence of the application, the defendant argued that the plaintiff was guilty of contributory negligence in that he:

- *failed to keep a proper lookout*
- *failed to exercise due care for his own safety.*

The matter proceeded to a mediation conference. During the conference, offers of settlement were exchanged between the parties. The parties reached a final settlement and, with the assistance of the Mediator, exchanged terms of settlement at the conclusion of the mediation.

Medical Assessments

Medical disputes are generally referred to an Approved Medical Specialist for assessment. Approved Medical Specialists are appointed by the President of the Commission to provide an independent medical assessment relating to a workplace injury.

The Registrar will refer disputes regarding the degree of permanent impairment directly to an Approved Medical Specialist.

The Approved Medical Specialist will usually examine the worker before issuing a Medical Assessment Certificate.

The following matters in assessments certified by an Approved Medical Specialist are conclusively presumed to be correct in proceedings before the Commission:

- **the degree of permanent impairment of the worker as a result of an injury**
- **whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality**
- **the nature and extent of loss of hearing suffered by a worker**
- **whether impairment is permanent**
- **whether the degree of impairment is fully ascertainable.**

Case Study

Ms E lodged an Application to Resolve a Dispute claiming 16 per cent whole person impairment. The impairment arose as a result of the applicant suffering a fall in the office where she was employed to carry out general clerical duties. Ms E sustained an injury to the right wrist and the left ankle. Her letter of claim attached a medical report that reported impairment to the right upper extremity, left lower extremity and post-surgical scarring to the right wrist.

The respondent accepted that Ms E had suffered an injury to the right wrist and left ankle. The medical evidence attached to its Reply reported a 9 per cent whole person impairment to the right upper extremity. The report indicated there was no impairment to the left lower extremity and the scarring was not sufficient to warrant an impairment rating.

The Registrar referred the dispute directly to an Approved Medical Specialist (AMS). Ms E was examined by the AMS. In addition to the findings on examination, the AMS also reviewed the conflicting medical reports of each of the parties, radiological reports and reports of treating specialists.

The AMS assessed 17 per cent whole person impairment. The impairment arose from the right upper extremity, left lower extremity and post-surgical scarring to the right wrist. The scarring was of a minor nature and assessed under the Temski scale.

Appeals against Medical Assessment

Registrar's Gatekeeper Function

Parties to a medical dispute may appeal against an assessment of permanent impairment by an Approved Medical Specialist pursuant to section 327 of the 1998 Act. Following registration of the medical appeal application and the exchange of submissions between the parties, the Registrar has a legislative requirement to exercise a 'gatekeeper' function regarding whether a ground of appeal as specified in section 327(3) of the 1998 Act has been made out in the appeal application. Solicitors in the Legal and Medical Services Branch, under the delegation of the Registrar, make the 'gatekeeper' determinations.

An appellant may rely on all or any one of four grounds of appeal. The majority of medical appeals rely on the ground that there is a 'demonstrable error' contained in the Medical Assessment Certificate.

If the medical appeal application is made on the ground that either the assessment was made using incorrect criteria

(section 327(3)(c)) or that the Medical Assessment Certificate contains a demonstrable error (section 327(3)(d)), or both, the application must be made within 28 days after the issuing of the Medical Assessment Certificate.

If the Registrar's delegate is satisfied that a ground of appeal is made out, the appeal application is referred to anAppeal Panel chosen by the delegate. The delegate may refer the matter for further assessment or reconsideration as an alternative to an appeal.

This year has seen a full suite of CommissionSolicitors performing 'gatekeeper' functions under delegation from the Registrar, with five Solicitors making determinations of medical appeal applications, in contrast to twoSolicitors performing the same function in 2009. The increase in staff resources for this function has resulted in improved and consistent processing times of medical appeal applications at the 'gatekeeper' level. In 2010, 69 medical appeal applications were rejected for failing to demonstrate that a ground of appeal had been made out.

The Medical Appeal Panel

The role of the Medical Appeal Panel is to conduct a review of the grounds of appeal raised by the appellant. However, it may also review other grounds of appeal, if it gives the parties an opportunity to be heard on those grounds.

Medical Appeal Panels are comprised of an Arbitrator and two Approved Medical Specialists.

A list of Medical Appeal Panel members is set out in Appendix 4.

The Medical Appeal Panel reviews material available to the Approved Medical Specialist (AMS) and documents filed in the medical appeal proceedings, including any additional information relied upon by the appellant. Where appropriate, the Medical Appeal Panel may deal with the medical appeal 'on the papers' without further submissions from the parties; or, the Medical Appeal Panel may decide to conduct a re-examination of the worker. It may also hold an assessment hearing where the parties may make oral submissions.

The Medical Appeal Panel must provide adequate reasons for determining the issue of whether or not to conduct a re-examination or a hearing, or to deal with the medical appeal on the papers.

The procedures undertaken by Medical Appeal Panels are set out in the *WorkCover Medical Assessment Guidelines* and section 328 of the 1998 Act.

The Medical Appeal Panel, like the AMS, is bound by the original AMS referral and the provisions in section 326 of the 1998 Act in relation to the status of medical assessments. Like the AMS, the Medical Appeal Panel's role and function in medical assessments rest on their task to ascertain the degree of permanent impairment of the worker, as assessed. This includes the determination of any proportion of permanent impairment that is due to a previous injury or pre-existing condition or abnormality.

The recent organisational restructuring of the Commission has resulted in the appointment of full-time and part-time in-house Arbitrators and sessional Arbitrators. Arbitrators on Medical Appeal Panels are selected by delegates from the pool of in-house and sessional Arbitrators. The structural changes proved to be beneficial in providing more consistent communication between Medical Appeal Panel convenors and Commission staff regarding the resolution of medical appeals by facilitating regular, direct or face-to-face interaction. This has allowed the Legal and Medical Services Branch to maintain the quality and timeliness of delivery of medical appeal decisions, in accordance with established key performance indicators for medical appeals.

Case Study

Mr G claimed he suffered a psychiatric injury in the course of his employment in 2005. The Registrar referred the matter to an Approved Medical Specialist (AMS) for assessment of Mr G's degree of permanent impairment.

The AMS assessed Mr G's psychiatric condition as 28 per cent whole person impairment, which included an additional 2 per cent whole person impairment for the effects of treatment to account for the improvements in his symptoms due to medication and the psychiatric therapy he was receiving.

The employer lodged an Application to Appeal Against the Decision of an AMS (medical appeal) on the basis that the AMS erred in applying incorrect criteria, which resulted in a demonstrable error in the Medical Assessment Certificate (MAC) where the AMS applied an additional two per cent whole person impairment for the effects of treatment.

The employer submitted that an increase in the rating, as applied by the AMS, is only applicable in cases where treatment has resulted in 'apparent, substantial or total elimination of the impairment'.

The Medical Appeal Panel determined the appeal on the papers, after carefully considering all the submissions by the parties, without an assessment hearing or further examination.

The Medical Appeal Panel considered the relevant provision in the WorkCover Guides for the Evaluation of Permanent Impairment, 3rd ed and found that the AMS was in error in applying an additional two per cent whole person impairment for the effects of treatment. The evidence before the AMS at the time of the medical examination was that Mr G remained significantly incapacitated by his psychiatric symptoms, despite appropriate and ongoing medication and psychiatric therapy.

There was nothing in the evidence before the AMS to indicate that, as a result of ongoing medical and psychiatric treatment, there had been an apparent, substantial or total elimination of Mr G's psychiatric impairment.

The Medical Appeal Panel determined that the grounds of appeal were made out and the AMS's MAC was revoked.

Costs Assessments

The general costs order in the Commission is that costs are to be as agreed or assessed. Failing agreement, application may be made to the Registrar to assess costs. Applications may be made for party/party costs, solicitor/client costs or agent/client costs.

Assessments are undertaken by delegates of the Registrar. Delegates have jurisdiction to assess costs in relation to workers compensation claims and disputes, and work injury damages claims. Prior to 2010, the majority of costs assessments were delegated to sessional Arbitrators. In 2010, the Commission embarked on a transition to assessment of costs by Solicitors in the Legal and Medical Services Branch, effectively making the assessment of costs a core business function of the Branch.

As part of the transition to in-house assessments, a training program has been implemented to increase the number of Solicitors in the Legal and Medical Services Branch who are delegated to undertake assessments of costs. It is anticipated that training will conclude in 2011 with the desired outcome of retaining a number of suitably qualified and trained Commission Solicitors to perform assessments of costs under delegation of the Registrar.

The Commission publishes all costs assessment decisions on the Commission's website at www.wcc.nsw.gov.au.

The Legal and Medical Services Branch continues to monitor assessment applications and identify trends. A continuing trend is the failure of parties to include costs orders in terms of settlement and consent orders. An assessment cannot proceed in the absence of evidence of an agreement or order for costs. Numerous applications made to the Commission for an assessment of costs are dismissed for what appears to be an oversight in the settlement documentation.

The most common issue in applications for assessment of costs initiated in the Commission is the entitlement to a disbursement paid to third parties. In respect of disbursements, matters of interpretation and degree are required in an assessment of costs. Consideration of disbursements and other costs may also require a reference to other pieces of legislation, such as the *Legal Profession Act* 2004 and the *Legal Profession Regulation* 2005.

Case Study

Ms B lodged an Application for Assessment of Costs following the issuing of a Certificate of Determination, where an order was made for the respondent to pay Ms B's costs and disbursements as agreed or assessed.

The matter was referred to a costs assessor.

The respondent agreed that Ms B's entitlement to and quantum of professional costs were correctly claimed, in accordance with Part 17 and Schedule 6 of the Workers Compensation Regulation 2010 (the 2010 Regulation). However, the respondent disputed her entitlement to payment of a second medical report by Dr J because the report was not admitted into proceedings.

The costs assessor assessed that Ms B's professional costs were reasonable and correctly claimed under the relevant provisions in Schedule 6 of the 2010 Regulation.

With respect to Dr J's second medical report, as it was not admitted into proceedings and was being claimed as a disbursement, the costs assessor decided that the test of 'necessarily incurred' applied. In the application of this test, it was determined that a careful consideration or perusal of the medical report was necessary. Ms B did not provide a copy of the medical report, despite being given several opportunities in the course of the application to do so.

In the absence of the provision of the medical report the subject of the dispute, the costs assessor decided that she was not in a position to determine whether the cost of obtaining the report was necessarily incurred given the nature of the claim.

Accordingly, the costs assessor disallowed the costs of the medical report as claimed.

Expedited Assessments

As the name suggests, the expedited assessment process provides for faster resolution of disputes than the general dispute resolution process. Matters are generally set down for a teleconference with the parties. Teleconferences are usually conducted approximately two weeks after lodgment of the dispute application. Conciliation conferences/ arbitration hearings are not scheduled and there are no provisions to issue directions for production. Filing of a Reply is optional and submissions are usually finalised during the teleconference. The filing of written submissions is accommodated for the more complex disputes. Additional material is usually filed and served prior to the teleconference.

Expedited assessments may be divided into three categories:

1. **Interim payment directions**
2. **Small claims**
3. **Workplace injury management disputes.**

Expedited Assessment Officers in the Legal and Medical Services Branch conciliate and determine these disputes under delegation of the Registrar.

Interim Payment Directions

Disputes concerning weekly payments of compensation of up to 12 weeks or medical expenses compensation up to $7500 are generally dealt with under the Interim Payment Direction (IPD) provisions (sections 297 to 304 of the 1998 Act).

An IPD is intended to ensure early intervention where an insurer fails to commence payment of compensation or fails to determine a claim within the required time, although an IPD may also be made when an insurer disputes liability and a dispute notice has been issued.

If a dispute fails to resolve at the teleconference, the delegate of the Registrar will determine the dispute by reference to the documents lodged and submissions made in the proceedings. If the dispute is determined in favour of the worker, the Expedited Assessment Officer will direct payment by the insurer, by way of an IPD. An Expedited Assessment Officer is to presume that an IPD is warranted in circumstances prescribed by the legislation. Decisions of Expedited Assessment Officers are not published.

The payment of compensation in accordance with an IPD is not an admission of liability by the insurer or employer.

Case Study

Ms G worked for an employer in the same position for 26 years. Her role involved heavy lifting. She experienced increasing shoulder pain in her left shoulder. Ms G had previously injured her right shoulder and liability for that claim was accepted.
Ms G has extensive osteoarthritis in both shoulders. The treating doctor was of the view that the heavy lifting was a direct cause of the osteoarthritis in the left shoulder. The treating doctor explained in detail how Ms G's job would lead to her contracting the disease. The respondent's medical expert was of the view that Ms G's condition was entirely constitutional and her employment was not a significant aggravating factor to her injury. On that basis, the insurer denied liability.

An expedited assessment application was lodged with the Commission.

A teleconference was held before an Expedited Assessment Officer. The parties failed to reach agreement by conciliation.

The Expedited Assessment Officer then determined the dispute having regard to the evidence presented and submissions by the parties. The Expedited Assessment Officer was satisfied that the medical evidence established that the osteoarthritis was a disease, and that the work undertaken by Ms G caused the disease. In the alternative, if this view was incorrect, the respondent's own medical expert conceded that employment may have aggravated the disease, albeit mistakenly discounting the influence of the aggravation, as, in the opinion of the expert, employment was not a significant aggravating factor.

The claim for medical expenses compensation was approved.

Small Claims

In some cases, Expedited Assessment Officers may determine past weekly compensation benefits claims for a closed period of up to 12 weeks under the 'small claims' provisions in sections 304A and 304B of the 1998 Act. Under the 'small claims' provisions, the delegate of the Registrar exercises arbitral functions and a dispute is determined by the issuing of a Certificate of Determination. The determination is subject to the appeal provisions in section 352 of the 1998 Act.

Case Study

Ms W claimed to have suffered a psychological injury in the course of her employment.

There was no dispute as to injury. The insurer declined to pay compensation, claiming that the psychological injury was caused by the reasonable actions of the employer involved in performance management.

An expedited assessment application was lodged in the Commission.

A teleconference was held before an Expedited Assessment Officer. The parties failed to reach agreement by conciliation.

The Expedited Assessment Officer determined the dispute having regard to the evidence presented and submissions by the parties.

The Expedited Assessment Officer determined that the actions of the employer in fact related to discipline rather than performance management. It was determined that Ms W was denied procedural fairness, and that the way the allegations and potential disciplinary outcomes were communicated by the employer, when viewed in their entirety, were unreasonable. The employer had failed to establish that the actions they had taken were reasonable.

The Expedited Assessment Officer made an award in favour of Ms W for her claim for weekly benefits compensation.

Workplace Injury Management Disputes

Workers, insurers and employers can apply to the Registrar to resolve disputes about workplace injury management where:

- **there is no injury management plan or the plan has not been followed**
- **there is no return to work plan or the plan has not been followed**
- **suitable duties have not been provided to the injured worker**
- **the worker's capacity to perform duties is in dispute.**

A teleconference will usually be held by an Expedited Assessment Officer in the first instance. If the parties fail to resolve the dispute by agreement at the teleconference, the Expedited Assessment Officer may make a recommendation in relation to resolving the dispute. The Expedited Assessment Officer may refer the matter to an Injury Management Consultant or other suitably qualified person to conduct a workplace assessment prior to the making of a recommendation. An Injury Management Consultant is a registered medical practitioner appointed by WorkCoverNSW. The Injury Management Consultant uses his or her specialised skills to assist the worker, the worker's nominated treating doctor and the employer in relation to the worker's return to work and/or injury management plan.

The Expedited Assessment Officer, in making a recommendation to the parties for a certain course of action to be adopted in order to resolve the dispute, usually concludes a matter.

Case Study

Ms F was injured while working as a cleaner in a hotel. Liability was accepted and workers compensation payments were commenced. The insurer filed an Application to Resolve a Workplace Injury Management Dispute as it was alleged that Ms F was not complying with a rehabilitation plan that had been implemented by the insurer.

A teleconference was convened.

At the teleconference, the parties presented diametrically opposed medical opinions as to Ms F's capacity to perform her duties and, for various reasons, the nominated treating doctor was reluctant to increase the number of hours the applicant was required to work.

By consent, an Injury Management Consultant (IMC) was appointed. The IMC negotiated with the insured, the treating doctor and the worker. It was discovered that the worker's attendance at medical appointments was disrupting the employer's ability to accommodate the suitable duties provided and frustrated the worker's immediate supervisor. It was ascertained that the insurer had arranged these medical appointments without realising the impact such appointments were having on the employer. Hence, the level of frustration in the employment relationship between the employer and Ms F could not be managed.

Further negotiations resulted in the incorporation of the nominated treating doctor's restrictions, as well as changes to the working day, to facilitate a graduated return to duties.

Internal Committees and Reference Groups

There are a number of committees made up of Commission members, staff and service partners that undertake projects and/or provide advice, recommendations and assistance in relation to the operations of the Commission. A brief description of the role and membership of each committee is set out below:

Practice and Procedure Committee

Chair: President Judge Greg Keating

Deputy President Bill Roche

Deputy President Kevin O'Grady

Registrar Sian Leathem

Senior Arbitrators Eraine Grotte, Deborah Moore and Michael Snell

Deputy Registrar (Operations and Business Support) Annette Farrell

Deputy Registrar (Legal and Medical Services) Rod Parsons

Secretariat: Geoff Cramp, Manager Executive Services

The Practice and Procedure Committee held quarterly meetings during 2010. The Committee operates as a deliberative and decision-making forum for a range of issues affecting practice and procedure in the Commission. During the reporting year, the Committee dealt with a range of matters, including:

- **implementation of the Workers Compensation Rules 2010**
- **proposed amendments to the workers compensation legislation**
- **availability of evidence concerning wages information in claims for weekly compensation**
- **updates to the Workers Compensation Regulation**
- **development of an Approved Medical Specialist Practice Manual.**

AMS and Mediator Reference Groups

During 2010, the Commission continued to hostApproved Medical Specialists (AMS) and Mediator Reference Groups. The reference groups meet quarterly and operate as advisory and consultative forums through which the Commission can provide information and obtain feedback from Commission service partners in relation to a variety of issues.

Matters dealt with by the AMS Reference Group in 2010 included:

- **content of the Annual AMS conference program**
- **possible development of an AMS Practice Manual and**
- **development of feedback mechanisms following the** revocation of a Medical Assessment Certificate on **appeal.**

Membership of the Committees is revamped on an annual or bi-annual basis. The current membership of the AMS Reference Group comprises:

AMS Reference Group

Chair: Registrar Sian Leathem

Secretariat: Organisational Performance Unit

Dr Geoffrey Boyce

Dr Peter Bourke

Dr Mark Burns

Dr Drew Dixon

Dr John Dixon-Hughes

Dr Phillipa Harvey-Sutton

Dr Hunter Fry

Dr Roger Pillemer

Dr Brian Williams

Ms Lyn Martin, Manager Legal and Medical Support

Ms Mary Hawkins, WorkCover NSW

Mediator Reference Group

Chair: Registrar Sian Leathem

Secretariat: Organisational Performance Unit

Mr Marshal Douglas

Ms Geri Ettinger

Mr John Ireland

Ms Katherine Johnson

Mr Steve Lancken

Mr Ross MacDonald

Ms Margaret McCue

Mr John McDermott

Mr John McGruther

Mr Garry McIlwaine

Ms Janice McLeay

Deputy Registrar Annette Farrell

Ms Lyn Martin, Manager Legal and Medical Support

Matters dealt with by the Mediator Reference Group in 2010 included:

- **the content of the Mediator's Protocol**
- **revision to the Registrar's Guideline on Work Injury Damages matters and**
- **future professional development seminars**

User Group

The President chairs the Commission's User Group, which is composed of the two full-time Deputy Presidents, the Registrar, two Deputy Registrars and representatives from the NSW Bar Association, the Law Society of NSW and WorkCover.

During 2010 the membership was as follows:

Chair: President Judge Greg Keating

Secretariat: Melanie Curtin

Deputy President Bill Roche

Deputy President Kevin O'Grady

Registrar Sian Leathem

Deputy Registrar Annette Farrell

Deputy Registrar Rod Parsons

Ms Mary Hawkins, A/g General Manager of the Workers Compensation Division, WorkCover NSW

Mr Greg Beauchamp, Barrister

Mr Steve Harris, Solicitor

Ms Roshana May, Solicitor

Mr Howard Harrison, Solicitor

Mr David Jones, Solicitor

Mr Brian Moroney, Solicitor

The group meets quarterly and is an excellent forum for discussion and feedback on operational and procedural issues to ensure the Commission's practices and procedures are working efficiently and meeting stakeholder expectations.

Issues discussed during the 2010 meetings included the following:

- **legislative reform**
- **transition to the new arbitral arrangements**
- **implementation of the Workers Compensation Rules 2010**
- **conduct of work injury damages mediations**
- **preparation of worker statements.**

Decisions Evaluation Committee

In 2008, the Commission developed and introduced the Arbitrator Professional Development Program. As part of this program, Arbitrators receive regular qualitative and quantitative information about their performance by way of statistical reports, peer review, Presidential Decision Feedback Forms and feedback from the Decisions Evaluation Committee.

The purpose of the Decisions Evaluation Committee is to:

- **provide feedback to Arbitrators on their written decisions as part of the Arbitrator Professional Development Program**
- **contribute towards improving the quality and consistency of written decisions in the Commission by establishing a regular audit program.**

The Committee comprises a Senior Arbitrator, the Registrar, the Deputy Registrar Legal and Medical Services, and is supported by the Manager, Legal and Medical Support.

The Committee meets on a regular basis and reviews between five and 10 arbitral decisions on each occasion. The Committee aims to evaluate two or three decisions of each Arbitrator in an annual performance review cycle. Following each meeting, written feedback is provided to individual Arbitrators.

Access and Equity

The Commission strives to ensure that all services are accessible and equitable for everyone. The Access and Equity Service Charter identifies the many ways the Commission achieves these goals:

Cost: Services to all parties are free.

Self-representation: Information on processes and procedures is made available to all parties either via the internet or in hard copy. A DVD is available for download and information leaflets are available in 11 languages. An e-bulletin is available on a quarterly basis.

Outreach: To assist the self-represented worker, information is available either over the counter or by telephone once an application has been lodged.

Disability Access: All conference and meeting rooms are accessible to everyone, hearing loops are available in all rooms, and a TTY (text telephone) service is available.

Interpreters: Upon request, interpreters can be provided free of charge in the language or dialect requested.

Regional Communities: Arbitrators have been appointed in regional and rural areas in an effort to allow hearings to be heard close to where workers reside.

Equity: The Commission has put in place strategies to ensure the making of equitable, fair, consistent and well-reasoned decisions. These include implementing the Code of Conduct and providing training to Arbitrators and Mediators.

Effective Relationships: The Commission offers ongoing education and training seminars for key interest groups including employers, insurers, medical practitioners, trade union personnel and the legal profession.

Complaints Handling

The Commission's complaint handling policy and procedure is outlined in Part 5 of the Access and Equity Service Charter.

The Commission is committed to responding promptly and fairly to any comments or complaints about its range of services. However, it is important to be aware that dissatisfaction with the outcome of a dispute is not a matter that can be appropriately managed through the internal complaint handling process. Rather, there are statutory rights of appeal and reconsideration for parties who are aggrieved by a decision of the Commission. Parties are advised, wherever possible, to obtain legal advice before seeking an appeal.

Complaints can be made about the actions of Commission staff or Members, including Presidential Members, the Registrar and Arbitrators. Complaints may also be made about the actions of a Mediator or an Approved Medical Specialist. The Commission maintains the view that a prompt and thorough response to suggestions and complaints about its practices and procedures plays an important role in improving services and creating confidence in the dispute resolution process.

Complaints about the actions of Commission staff,Arbitrators, Mediators or Approved Medical Specialists should be made in writing to the Registrar. If the complaint concerns the Registrar or a Presidential Member, it should be directed to the President for attention. Anonymous complaints cannot be accepted. Where a complaint is made verbally, a written response will not generally be provided.However, where appropriate, the Registrar will consider how matters raised in verbal complaints might inform improvements in the Commission.

Where a person has difficulty putting a complaint in writing, staff of the Commission will provide appropriate assistance.

The Registrar (or President) will investigate all written complaints and, where appropriate, may do one or more of the following:

- **consider what, if any, prompt action may resolve the complaint and, where appropriate, institute or recommend such action**
- **consult with a staff or Commission Member who is the subject of the complaint**
- **contact the complainant personally to attempt informal and speedy resolution of the complaint**
- **refer the complaint to the President for consideration in relation to reviewing the performance of an Arbitrator, Mediator or Approved Medical Specialist**
- **in the case of Commission staff, recommend that some action be taken in accordance with public sector procedures**
- **initiate changes to practices or procedures to address the issues arising in the complaint.**

Complaints Received in 2010

During the reporting year, the Commission received a total of 13 complaints, which is five more than in 2009 but six fewer than the number received during 2008.This represents less than 0.01 per cent of all applications lodged in the Commission. Eight of the complaints concerned medical assessments conducted by Approved Medical Specialists. Two complaints contained allegations of bias against anArbitrator. The remaining three complaints concerned an issue of practice or procedure of the Commission.

All of the complaints were acknowledged in writing within seven days of receipt. All but one received a full written response within 28 days. That matter was deferred as a reconsideration application was on foot at the time the complaint was received.

THE ORGANISATION

Members

The Commission currently consists of the following Members:

- **The President – Judge Greg Keating**
- **Two Deputy Presidents – Bill Roche and Kevin O'Grady**
- **Two Acting Deputy Presidents – Tony Candy and Lorna McFee**
- **The Registrar – Sian Leathem**
- **Three full-time Senior Arbitrators – Eraine Grotte, Deborah Moore and Michael Snell**
- **15 full-time equivalent Arbitrators (see Appendix 1)**
- **18 sessional Arbitrators (see Appendix 1)**

The Attorney General appoints the Members of the Commission.

President and Deputy Presidents

His Honour Judge Greg Keating is the President of the Commission. The President is the head of jurisdiction and works closely with the Registrar in the overall leadership of the Commission. The President also sets the general direction and control of the Deputy Presidents and Registrar in the exercise of their functions.

The President, together with two full-time Deputy Presidents and two part-time Acting Deputy Presidents, constitute the Presidential Members of the Commission.

During 2010, the Commission was assisted in maintaining its timely resolution of appeals by Acting Deputy Presidents, Mr Anthony Candy, Ms Deborah Moore, Mr Michael Snell and Ms Lorna McFee.

In August 2010, Ms Moore and Mr Snell resigned their appointments as Acting Deputy Presidents to take up positions as full-time Arbitrators and, on 18 August 2010, they were appointed Senior Arbitrators.

On 10 December 2009, Mr Candy and Ms McFee were each reappointed for a further 12 months.

The President, the Deputy Presidents and Acting Deputy Presidents hear and determine appeals from decisions of Arbitrators.

The President also has the responsibility of determining 'novel or complex' questions of law referred by Arbitrators, and, in relation to work injury damages matters, applications by defendants to strike out pre-filing statements.

The decisions of Presidential Members may be appealed to the New South Wales Court of Appeal on questions of law only.

Registrar

The Registrar is responsible for the administrative management of the Commission and is the functional head of the Commission's services.

The Registrar is directly responsible for providing high-level executive leadership and strategic advice to the President on the resources of the Commission, including human resources, finance, asset management, facilities, resources and case management strategies.

Deputy Registrars Ms Annette Farrell and Mr Rod Parsons, and Manager of Executive Services Mr Geoff Cramp, assist the Registrar.

In addition to the administrative responsibilities, the Registrar may exercise all of the functions of an Arbitrator. Further, the Registrar is responsible for the general control and direction of the Arbitrators in the exercise of their functions.

Arbitrators

On 1 July 2010, the Workers Compensation Commission introduced some significant changes to the way in which arbitral services are arranged and delivered. The departure from the previous structure of a large number of contracted, sessional arbitrators to a smaller number of full-time (or substantially full-time) in-house Arbitrators was over two years in the planning.

Since July 2010, arbitral services in the Commission have been provided by 12 full-time Arbitrators and a further three part-time Arbitrators. In October 2010, a further two full-time and one part-time Arbitrators were appointed. They are supported by a number of sessional Arbitrators to assist with regional matters and any excess workload in the metropolitan region. The Attorney General is expected to appoint an additional full-time Arbitrator in early 2011.

Following the passage of the *Workers Compensation Amendment (Commission Members) Act* 2010, three full-time Senior Arbitrators were appointed by the Attorney General in August 2010. The Senior Arbitrators assist in the training, management and appraisal of Arbitrators, and contribute to the development of practice and procedure in the Commission.

A full list of the Arbitral appointments appears in Appendix 1.

Service Partners

In addition to Arbitrators, the Commission also utilises the services of Approved Medical Specialists and Mediators. These service partners are engaged on an independent contractual basis and are appointed by the President.

Approved Medical Specialists

There are approximately 140 Approved Medical Specialists holding appointments with the Commission located throughout New South Wales. Approved Medical Specialists are appointed by the President in consultation with the Workers Compensation and Workplace Occupational Health and Safety Council.

Approved Medical Specialists are highly-experienced medical practitioners from a variety of specialities. To be appointed, they must have completed the necessary training in the WorkCover guidelines to assess whole person impairment, and their application must have undergone a rigorous assessment for impartiality. In this way, the Commission can ensure that the Approved Medical Specialists will provide an independent and unbiased opinion about the medical condition or injury of a worker.

The Commission refers medical disputes, such as the degree of permanent impairment of the worker as a result of an injury, to the Approved Medical Specialist for assessment. The selected Approved Medical Specialist will examine the worker and consider the appropriate reports and documents in the file and issue a Medical Assessment Certificate. An assessment of the degree of permanent impairment by an Approved Medical Specialist is binding on the parties.

A schedule of Approved Medical Specialists appears in Appendix 2.

Mediators

The Commission is responsible for mediating work injury damages claims referred to it under the *Workplace Injury Management and Workers Compensation Act* 1998 before court proceedings for such claims can be commenced.

Up until July 2010, the Commission was supported by 37 contracted Mediators who held appointments from the President that expired on 30 June 2010. Following a merit selection process, on 1 July 2010, the President appointed 25 Mediators for a period of three years. All of the Mediators on the panel have extensive experience in alternative dispute resolution, as well as knowledge of the workers compensation jurisdiction.

Mediators are required to use their best endeavours to bring the parties to a negotiated settlement. They conduct mediation conferences in the Commission's Oxford Street premises and in other regional locations when required.

A schedule of Mediators appears in Appendix 3.

Medical Appeal Panels

The *Workplace Injury Management and Workers Compensation Act* 1998 endows the Commission with the internal appellate jurisdiction to hear appeals against an assessment by an Approved Medical Specialist. These medical appeals are determined by a Medical Appeal Panel, which is constituted by an Arbitrator and two Approved Medical Specialists. The Medical Appeal Panel reviews the original decision by the Approved Medical Specialist and either confirms the original Medical Assessment Certificate or revokes it and substitutes a new Certificate.

To maintain the timeliness and quality of the determinations in Medical Appeals, 42 Approved Medical Specialists hold appointment to sit on Medical Appeal Panels.

A list of the Approved Medical Specialists who hear medical appeals is at Appendix 4.

Staff

There are approximately 100 full-time equivalent staff, in a number of units in the Commission, who are employed to carry out its functions. The staff range in grade from Grade 1 Clerks through to Senior Officers (Grade 2), as well as Legal Officers.

Presidential Branch

The Presidential Unit has four full-time and two part-time staff members in addition to the Presidential Members.

The Administrative Associates work closely with the Presidential Members, providing high level administrative support. They also assist the Research Associates in the case management of arbitral appeals, with the aim of streamlining case management and improving timeliness.

The Research Associates undertake research, prepare papers, and maintain an electronic index of presidential decisions as a resource for staff and Members. They also contribute to legislative and rules review.

In 2009, the Presidential Unit initiated and developed On Appeal', a monthly electronic publication of headnote summaries of Presidential and Court of Appeal decisions for Commission Members and staff. In 2010, in response to requests from the legal profession to have access to 'On Appeal', the Commission agreed to make it publicly available. 'On Appeal' is now published monthly on the website, providing all Commission stakeholders with access to this useful resource.

The most significant project undertaken by the Presidential Unit in 2010 was the development and publication of the 'WCC Style Guide: a guide to preparing decisions for publication'. The aim of the Style Guide is to promote clarity and consistency in writing, and to standardise the style and formatting of all Commission decisions, reasons, orders, directions and recommendations. In introducing the new Style Guide, the Unit delivered a number of training sessions to the Members and staff.

The Presidential Unit and the Commission library officers work together to ensure the timely publication of all Presidential decisions to AustLII. The Presidential Unit liaises with the editors of the Dust Diseases and Compensation Reports in the reporting and headnoting of Court of Appeal decisions from Presidential decisions and relevant Presidential decisions.

Organisational Strategy Branch

The Organisational Strategy Branch is responsible for planning, strategy and organisational development. The Branch comprises the Registrar's Office, the Executive Unit and the Organisational Performance Unit.

Registrar's Office

The Registrar's Office is responsible for a range of functions, including the coordination of responses to Ministerial, WorkCover and stakeholder enquiries, the issuing of Medical Certificates of Determination, the management of complaints against Arbitrators, Mediators, Approved Medical Specialists and staff and the co-ordination of presentations to internal and external audiences, including visiting delegations.

Executive Unit

The Executive Unit is responsible for the coordination of strategic and corporate planning processes, the preparation and monitoring of the Commission's budget, the provision of timely and accurate organisational data and the management of requests under the *Government Information (Public Access) Act*.

Organisational Performance Unit

Tasks undertaken in the Organisational Performance Unit include the coordination of training and development for staff, the management of appraisal processes for Arbitrators, Mediators and Approved Medical Specialists, the management of appointments of service providers, the coordination of Reference Group meetings and the publishing of internal and external communication materials.

Operations and Business Support Branch

The Operations and Business Support Branch, under the direction of Deputy Registrar Annette Farrell, manages the client services and business support functions within the Commission. The Branch has five units, including Registry Services, Dispute Services, Operations Support, Business Services and Information Systems.

Registry Services

The Registry is the first point of contact with the Commission for workers, insurers, legal representatives and the general public.

Dispute Services

Dispute Services staff are responsible for the case management of applications for dispute resolution from the end of the information exchange period to closure of the matter, excluding appeals. The unit is also responsible for case management of applications for mediation in work injury damages claims.

Operations Support

The Operations support unit initiates and undertakes service improvement projects across the Registry and Dispute Services units, develops and maintains business processes and procedures and undertakes audit functions within the operational areas.

The Unit is also involved in the implementation of legislative amendments and policy changes affecting operational practice. In 2010, this included the move to in-house Arbitrators and amendments to the Commission Rules.

Business Services

The Business Services Unit manages finance processing and purchasing, facilities and records of the Commission.

Information Systems

The Information Systems Unit provides support for the Commission's case management system and other IT applications and equipment.

The unit operates a help-desk facility for staff, members and service providers in relation to the case management system and to the general public for the Commission's on-line lodgement facility, eScreens.

Legal and Medical Services Branch

In 2010, following a restructure of the Commission's staff establishment, the Legal and Medical Services Branch, under the management and direction of Deputy Registrar Rod Parsons, became fully operational with the completion of recruitment action and the subsequent filling of various administrative and legal positions.

The Branch performs a wide range of legal and administrative functions including providing legal advice to Members and staff, undertaking various legal and quasi-legal functions and the ongoing development of Arbitrators. The Legal and Medical Service Branch comprises the Legal Unit, the Legal and Medical Support Unit, the Expedited Assessments Unit, the Administrative Support Unit (Legal), the Arbitrator Support Unit and the Research and Information Unit.

Legal Unit

The Legal Unit is chiefly responsible for managing applications for:

- **medical appeals**
- **costs orders**
- **costs assessments**
- defective pre-filing statements
- **orders for access and information to premises**
- orders in claims for benefits following the death **of a worker**
- **various other claims or disputes.**

The Legal Unit is also responsible for case management and the administrative requirements of judicial review and Court of Appeal actions in relation to medical assessments, medical appeals and various decisions made under delegation of the Registrar, including providing case summaries to members.

Legal and Medical Support Unit

The Legal and Medical Support Unit is responsible for project management and resource development in support of performance frameworks designed for Arbitrators, Approved Medical Specialists and Mediators. This work involves membership of the relevant reference groups; provision of professional development opportunities to Arbitrators, Approved Medical Specialists and Mediators and co-ordination of activities such as induction, Mentoring, Decisions Evaluation Committee and Peer Review.

Expedited Assessments Unit

The Expedited Assessments Unit is responsible for determining applications in relation to workplace injury management disputes, applications to cure a defective pre-filing statement where a dispute arises as to compliance with rules and provisions regarding pre-filing statements, interim payment directions, small claims and applications for a certification by the Registrar of an amount to be paid for the purpose of recovery in a court of proper jurisdiction pursuant to section 362 of the 1998 Act.

Administrative Support Unit (Legal)

The Administrative Support Unit (Legal) is responsible for the case management and administration of various applications, representations and projects managed and dealt with by the respective units in the Legal and Medical Services Branch. The Unit is effectively the engine room of the Branch, facilitating the smooth running of specialised and complex administrative functions while also providing a framework for interaction between the various units within and outside the Branch.

Arbitrator Support Unit

In 2010, following the appointment of in-houseArbitrators, the Arbitrator Support Unit was introduced to provide legal and administrative support to full-time and sessional Arbitrators.

The administrative support staff provide general administrative support and undertake proof-reading of arbitral decisions prior to issuing.

Solicitors in the Unit provide legal support toArbitrators by researching on points of law, preparing case summaries, contributing to legal research briefs, maintaining relevant legal resources, monitoring changes to legislation, proofreading Arbitrator decisions for legal, grammar and formatting issues, checking case citations and references, and assisting in the conduct of hearings when required.

Research and Information Unit

The Research and Information Unit is responsible for maintaining the Commission's research library.It is staffed by the Research and Information Officer who works directly with Presidential and Arbitrator members and staff within and outside the Branch, ensuring that everyone has access to significant sources of legal information. The Unit also provides assistance to the legal profession and members of the public.

2010 Workload Discussion

Registrations

During 2010, the total number of applications received by the Commission amounted to 11,592.This is a slight increase of 1 per cent from 2009 and demonstrates a remarkably stable workload over the past three years.

While there continue to be some fluctuations across different application types, the overall annual total remains largely the same.

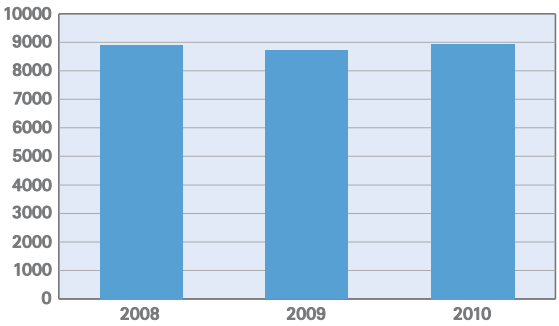
Application Type	2008	2009	2010
Application to Resolve a Dispute (Form 2)	8,898	8,707	8,921
Expedited Assessments (Form 1 and Form 1A)	558	586	516
Workplace Injury Management Dispute	154	124	139
Registration for Assessment of Costs	245	256	240
Commutations (Form 5A) and Redemptions (Form 5B)	163	267	227
Mediations (Form 11)	598	705	848
Arbitral Appeals (Form 9)	161	185	135
Medical Appeals (Form 10)	655	606	566
TOTAL	**11,432**	**11,436**	**11,592**

Applications to Resolve a Dispute

There have been some minor variations in the numbers of Applications to Resolve a Dispute (ARD) (Form 2) lodged over the past three years. The number of applications filed in 2010 largely returned to the same levels seen in 2008, following a slight 2 per cent reduction in Form 2 lodgments in 2009.

Monthly trends observed during 2008, 2009 and 2010 suggest that, while the Commission continues to experience seasonal variations, Form 2 applications tend to average around 750 per month. We anticipate that this broad trend will continue in 2011.

ARD Registrations 2008–2010



Issues in dispute

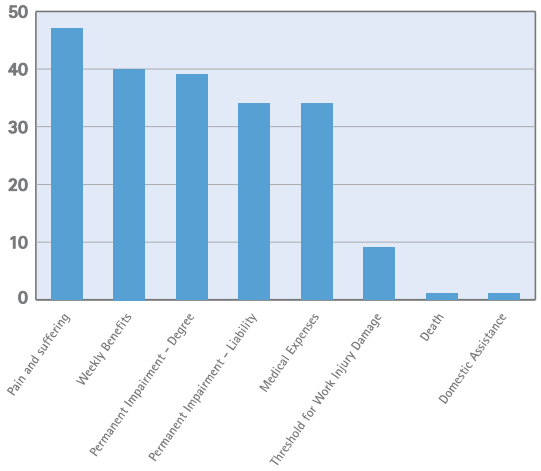
Applications to Resolve a Dispute (ARDs) usually involve a dispute over more than one issue. For example, they may involve a claim for weekly benefits, a claim for medical expenses, and a claim for lump sum compensation for permanent impairment.

During the reporting year, 73 per cent of ARDs included a claim for permanent impairment compensation under section 66 of the *Workers Compensation Act* 1987. The dispute might relate to liability, the quantum of the permanent impairment, or both.

A total of 47 per cent of ARDs included a claim of compensation for pain and suffering under section 67 of the *Workers Compensation Act* 1987. Where an applicant is found to suffer a permanent impairment of 10 per cent or more, he or she has an entitlement to an amount of compensation for pain and suffering. The amount for the most extreme case is currently set at $50,000.

A total of 40 per cent of ARDs included a claim for weekly benefits and 34 per cent of applications included a claim for medical expenses.

Issues in Dispute 2010

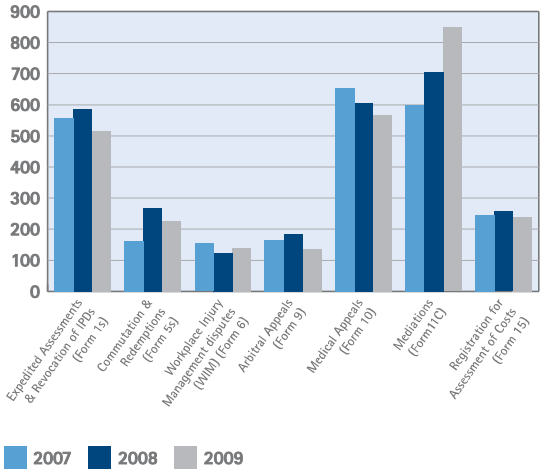


Other Applications

There was a slight decrease in the reporting year in the number of Applications for an Interim Payment Direction (Form 1). There were similar slight decreases in Applications to Revoke an Interim Payment Direction (Form 1A), Applications to Register a Commutation or Redemption (Form 5) and Applications for an Assessment of Costs (Form 15).

There was a slight increase in the number of Applications to Resolve a Workplace Injury Management Dispute (Form 6).

Registrations by Form 2008–2010 (excluding ARDs)



Mediations

As has been the case during the past three years, the number of Applications for Mediation to Resolve a Work Injury Damages Claim (Form 11C) continues to rise. In 2010, there was another marked increase of 20 per cent from 2009 levels, representing a cumulative increase of 42 per cent from 2008 levels.

Medical Appeals

There has been a continued reduction in the number of Appeals Against a Decision of an Approved Medical Specialist, down from 606 in 2009 to 566 in 2010.This represents an annual reduction of almost 7 per cent and follows on from a 7 per cent decrease in the previous year.As the number of Medical Assessment Certificates has remained steady during this period (total of 4379), the reduction suggests an increase in the quality and durability of the Certificates issued by the Commission's Approved Medical Specialists.

In 2010, 566 Appeals Against Medical Assessments were lodged. There were 569 medical appeals finalised.

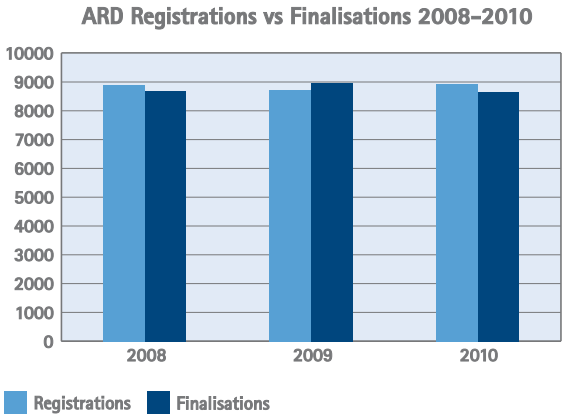
The number of medical appeals lodged against the number of Medical Assessment Certificates issued in 2010 averaged 13 per cent a month, which is identical to the medical appeal rate from 2009. The number of medical appeals lodged in 2010 was less than the Key Performance Indicators set for this measure.

Arbitral Appeals

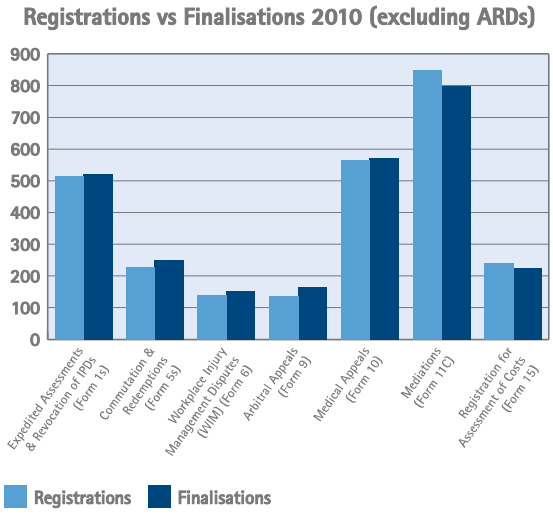
During 2010, 135 new applications to appeal a decision of an Arbitrator were filed and 164 applications were finalised. By the end of the year, the Commission had 25 appeals pending.

In 2010, the Commission experienced a 27 per cent reduction in the number of appeals filed against arbitral decisions. The reduction in appeal filings was most evident in the last six months of the year. This may, in part, be the result of a timing issue whilst the newly appointed Arbitrators build up a full case load. However, a sustained reduction in the appeal rate is anticipated following the move to full-timeArbitrators.

Finalisations



Over the past three years, the number ofARD registrations and finalisations has fluctuated by a margin of approximately two to three percent. This indicates both stability in the number of applications being filed and the capacity of the Commission to deal with the disputes.



During 2010, the Commission finalised more of the following types of applications than it registered during the year:

- **Arbitral Appeals (Form 9)**
- **Medical Appeals (Form 10)**
- **Workplace Injury Management Disputes (Form 6)**
- **Commutations and Redemptions (Form 5)**
- **Expedited Assessments (Form 1).**

There was a slight deficit in the number of finalisations of Applications to Resolve Dispute (Form 2) and Applications for Mediation to Resolve a Work Injury Damages Claim (Form 11C). This is likely to be due to the change in arbitral arrangements that occurred in July 2010 and to the changeover in the Mediator panel that was also implemented in July 2010.

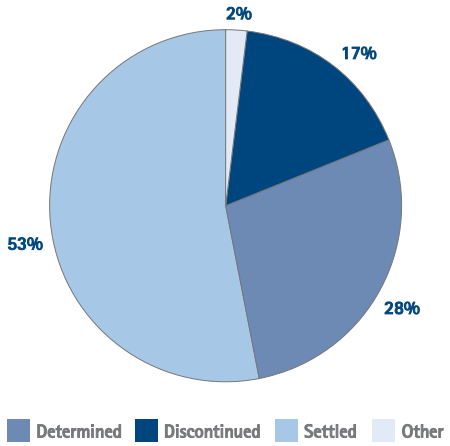
Outcomes

Applications to Resolve a Dispute

In 2010, 72 per cent of Form 2 applications were finalised without the need for a determination – that is, they were resolved by agreement between the parties or by some other means of finalisation. This means that only 28 per cent of applications required a formal decision by the Commission.

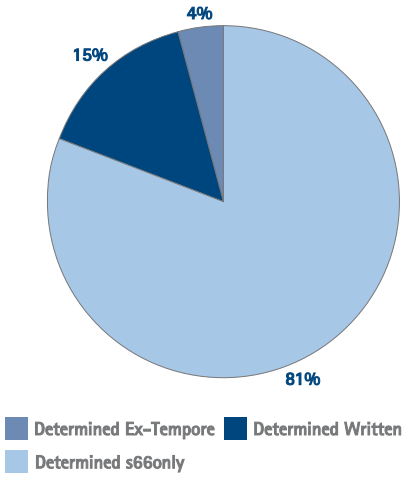
The settlement rate for ARDs increased during 2010 to a total of 53 per cent of ARDs, up from 48 per cent during 2009.

ARD Issue Outcomes 2010



Of the 28 per cent of Applications to Resolve a Dispute (2,434 applications) that were finalised by a formal determination, more than 80 per cent (1,971 applications) of these involved the issuing of a Medical Certificate of Determination by the Registrar. These Certificates finalise an Applicant's entitlement to section 66 compensation following a medical assessment by an Approved Medical Specialist.

ARD Determined Matters

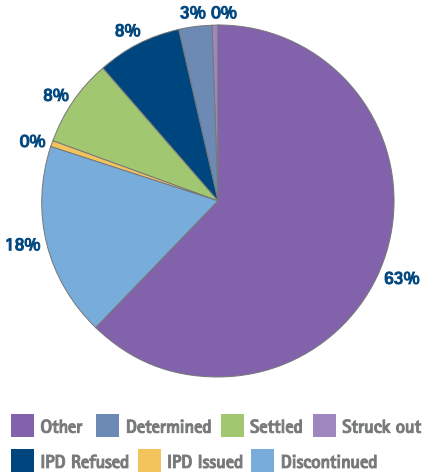


The proportions of written and extempore decisions made by Arbitrators during 2010 are similar to the proportions reported in 2009.

Expedited Assessments

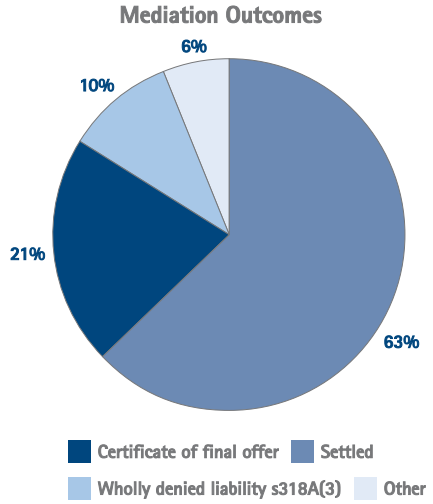
In 2010, 63 per cent of Applications for Expedited Assessment resulted in an Interim Payment Direction (IPD) being issued. A further 8 per cent were settled, while 18 per cent were discontinued. In 8 per cent of applications, an IPD was refused by the Expedited Assessment Officer.

Expedited Assessment Outcomes



Mediations

During the reporting year, a total of 63 per cent of all Applications to Mediate resulted in a settlement. However, where a defendant to an Application to Mediate wholly denies liability or where the matter is discontinued or struck out, the matter does not proceed to mediation. If those matters are excluded from the data, the proportion of matters settled at mediation during 2010 was 75 per cent. This represents an increase of 8 per cent from 2009 levels.

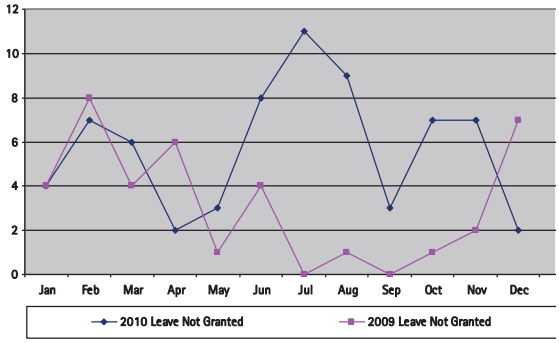


NB: 'Other' includes matters that are discontinued or struck out.

Medical Appeals

In 2010, there was an increase in the number of medical appeal applications rejected by Solicitors of the Legal Unit, under delegation of the Registrar as gatekeepers, for reasons that a ground of appeal as specified under section 327(3) of the 1998 Act had not been made out.

The following graph depicts a comparison of the number of rejected medical appeal applications or leave not being granted, as determined by Solicitors of the Legal Unit between 2009 and 2010.



In 2010, a total of 12.1 per cent of medical appeal applications were rejected by Solicitors of the Legal Unit. Of the 566 new medical appeal applications lodged during 2010, 69 were rejected. This rate is significantly higher than the rate of medical appeal applications rejected in 2009, which was 5.6 per cent (that is, of 606 new medical appeals lodged, only 38 applications were rejected).

A simple analysis indicates that there was an increase of more than 100 per cent in the rate of medical appeal applications rejected by Solicitors of the Legal Unit in 2010.

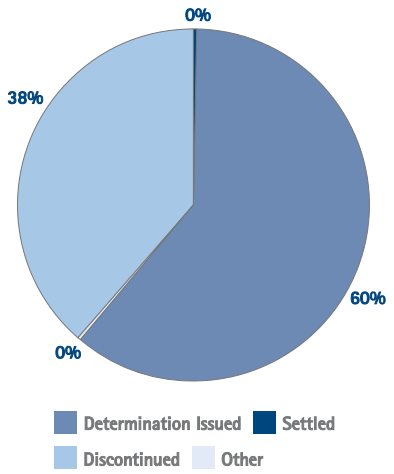
Arbitral Appeals

In 2010, 83 per cent of arbitral appeals were finalised by a Presidential determination. Thirteen per cent were settled or discontinued by the parties and the remaining 4 per cent were rejected by the Registrar for procedural non-compliance.

Costs Assessments

During 2010, there were 134 costs determinations issued, representing 60 per cent of all the Applications for Costs Assessment registered in the Commission. A further 38 per cent of applications were discontinued. This is often due to the parties reaching agreement between themselves.

Cost Assessment Outcomes



NB: 'Other' includes matters that are rejected, recommenced or struck out.

Key Performance Indicators

During 2010, the Commission continued to monitor its performance against a series of key performance indicators (KPIs) first developed in 2008. The KPIs are intended to track the Commission's progress in the delivery of a number of our statutory objectives, including timeliness and durability of decisions:

KEY PERFORMANCE INDICATORS	
Timeliness	**Target (if applicable)**
% of Dispute Applications resolved within:	
→ **3 months**	45% (excluding appeals) 40% (including appeals)
→ **6 months**	85% (excluding appeals) 80% (including appeals)
→ **9 months**	95% (excluding appeals) 94% (including appeals)
→ **12 months**	99% (excluding appeals) 98% (including appeals)
Average days to resolution for Dispute Applications with no appeal	105
Average days to resolution of Arbitral Appeals	112
Average days to resolution of Medical Appeals	100
% of Expedited Assessment Applications resolved within 28 days	90%

The graphs that appear in the following section provide data that is benchmarked against the relevant KPI.

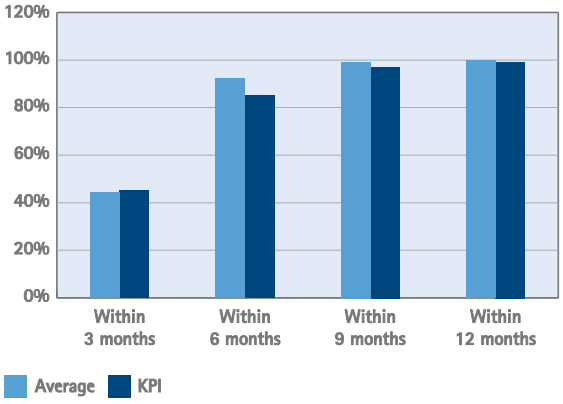
Timeliness

The Commission has developed a series of KPIs designed to monitor our effectiveness and efficiency in finalising dispute applications, both including and excluding appeal matters.

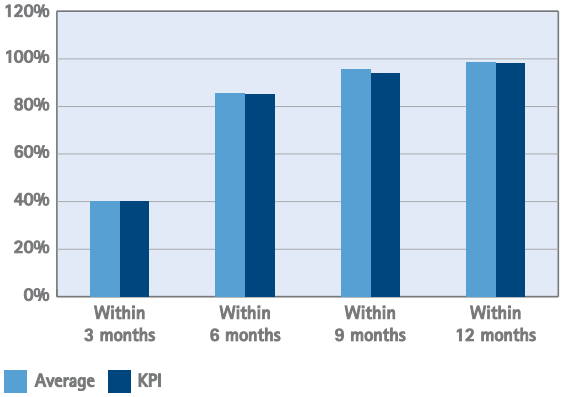
In most cases, the Commission was close to meeting or exceeding its KPIs during 2010, finalising approximately 44 per cent of all ARD applications (excluding appeals) in three months or less, with a total of 92 per cent being finalised within six months.

Fewer than 1 per cent of matters remain open for a period in excess of 12 months.

Time Taken to Finalise ARD Applications – Excluding Appeals

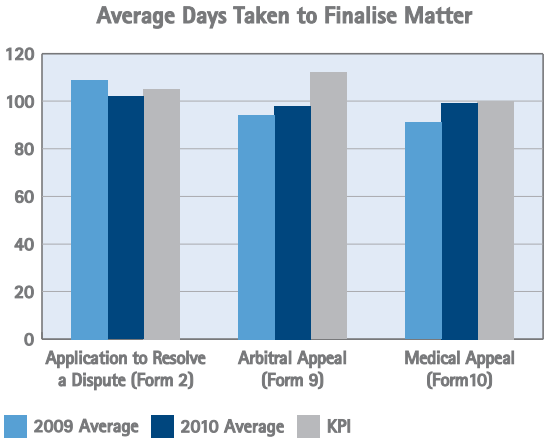


Time Taken to Finalise ARD Applications – Including Appeals



The Commission has also set KPIs for the average number of days required to finalise applications, being 105 days for an ARD, 112 days for an Arbitral Appeal and 100 days for a Medical Appeal.

The actual average number of days achieved during the reporting year were 102 for an ARD, 98 for an Arbitral Appeal and 99 for a Medical Appeal, indicating the Commission met all benchmarks in this area



Judicial Review of Registrar and Medical Appeal Panel Decisions

Under the *Supreme Court Act* 1970, parties who are aggrieved by decisions of the Registrar (or delegates of the Registrar) and Medical Appeal Panels may seek review of these decisions in the Supreme Court.

In 2010, the number of judicial review applications lodged in the Supreme Court against decisions of the Registrar and Medical Appeal Panels significantly decreased compared to those lodged in 2009. There were five judicial review applications lodged in 2010, considerably fewer than the number in 2009 (15 applications). This represents a judicial review rate of fewer than one per cent of all decisions made.

Decision Maker	Number of Applications Lodged
Medical Appeal Panel	4
Registrar	1
Medical Appeal Panel and Registrar	0
Total	**5**

Additionally, in 2010, there were six appeals lodged in the Court of Appeal against the decision of a single Judge of the Supreme Court relating to decisions made in respect of medical assessments.

Outcomes

In 2010, the Supreme Court handed down a total of 13 decisions in matters relating to decisions made by the Registrar and Medical Appeal Panels. Two judicial review applications were either discontinued or settled.

All of the 13 judgments were judicial review decisions of the Supreme Court. No determinations were made by the Court of Appeal.

Decision Maker	Dismissed	Upheld	Discontinued	Total
Medical Appeal Panel	5	5	0	10
Registrar	0	0	1	1
Medical Appeal Panel and Registrar	2	1	1	4
Total	**7**	**6**	**2**	**15**

In 2010, there were approximately 570 reviewable decisions issued by the Registrar and Medical Appeal Panels in relation to medical assessments and medical appeals. Accordingly, approximately one per cent of all reviewable decisions were successfully reviewed in the superior courts.

Appeals to the court of appeal from presidential decisions

Appeals from Presidential decisions on points of law are made to the Court of Appeal.

At the beginning of the year, there were six appeals from decisions of Presidential Members pending in the Court of Appeal. In 2010, five appeals were filed in the Court of Appeal against decisions from Presidential Members and six appeals from decisions of Presidential Members were finalised as follows:

2 – consent orders or discontinued

3 – appeal dismissed

1 – appeal upheld and matter remitted to the WCC for rehearing

In 2010, the appeal rate from Presidential decisions to the Court of Appeal was 3.7 per cent. The revocation rate of Presidential decisions by the Court of Appeal was less than 1 per cent.

Strategic Plan 2008-2011

OUR VISION

To be recognised for excellence in dispute resolution

OUR MISSION

To provide a fair and independent forum for the efficient and just resolution of workers compensation disputes inNew South Wales

OUR VALUES

The Workers Compensation Commission embraces values that focus on:

- **Fairness and Independence**
- **Accessibility**
- **Respect**
- **Professionalism**
- **Teamwork**

OUR FOCUS

Excellence in Client Service

Deliver exemplary service to our clients by anticipating and responding to their needs through innovative, flexible and accountable services

Skilled and Committed People

Establish a work culture of achievement, initiative and continuous improvement through leadership, learning, teamwork and participation

Engaged Service Partners

Work in partnership with our service providers to effectively manage the dispute resolution process to produce durable and consistent outcomes through clear communication and professional development

Streamlined Business Systems

Enhance systems that support our business and enable quality service provision

Achievements under the Corporate Plan

Focus: Excellence in Client Service

Launch of eScreens

The Commission's online form lodgment facility, eScreens, was launched on 1 October 2010.

There are a number of benefits to eScreens including:

- **24/7 access to lodge applications, replies and other forms**
- **online help text for completing forms and helpline support**
- **faster turn-around time for applications**
- **data validation to help minimise errors when submitting forms**
- electronic filing – upon filing, an electronic copy of **the form will be available to view, save and print**
- **electronic service – a sealed copy of the form will be returned electronically, enabling the user to serve electronically**
- **reduction in printing and photocopying costs.**

The Commission is initially limiting eScreens to the following forms:

Form 2 (Application to Resolve a Dispute)

Form 2A (Reply to an Application to Resolve a Dispute)

Form 2B

Form 2C

Form 2D

Form 4 (Certificate of Service)

Form 7

Form 7A

Form 8

Form 8A

Form 8B

Form 14B

Form 18

We expect other forms will be made ready for release in 2011.

The link to the online lodgment facility can be found at www.wcc.nsw.gov.au.

Anyone with inquiries regarding eScreens is welcome to call our helpline on (02) 8281-6328 between the hours of 8:30 am to 4:30 pm any working day.

Privacy Compliance

The Commission complies with privacy legislation by:

- **publishing a Privacy Statement on the Commission's internet, extranet and intranet sites concerning the accessing of information contained on the Commission's sites**
- **publishing the Policy on Publication of Decisions in WCC on the internet, intranet, and extranet. This policy provides information on the publication of decisions and outlines how a request can be made to suppress publication**
- **including a 'Privacy of Personal Information' statement on all of the Commission's forms, informing users of the Commission's collection, use, accessibility, and storage of personal information**
- **reviewing the Privacy Management Plan every three years – the next review is due in 2011.**

There were no complaints received by the Commission in 2010 under Part 5 (section 53) of the *Privacy and Personal Information Protection Act* 1998 (NSW).

e-Bulletin

The Commission distributes quarterly e-Bulletins containing information about practices, procedures and new developments in the Commission.

The e-Bulletin is available to any person or organisation who subscribes through the Commission's website.

The subject matter of recent Bulletins included:

- **new Arbitrator appointments**
- **new Form 20 – Miscellaneous Application**
- **regional listings**
- **statements from Workers**
- **'On Appeal' – monthly summary of Presidential decisions**
- **use of mobile phones in hearing rooms**
- **order of attachments**
- **psychiatric case submissions**
- **Senior Arbitrator appointments**
- **new *Workers Compensation Commission Rules* 2010;**

- **launch of eScreens**
- **attendance at teleconferences**
- **the Commission's business arrangements for December 2010 and January 2011**
- **chronological order of documents**
- **trial of new teleconference listing times.**

Other Client Services

The Commission also provides a variety of other client services, including:

- **Publication of decisions: The Commission is committed to the publication of its decisions on its website (www.wcc.nsw.gov.au) and on the Australasian Legal Information Institute (AustLII) website (www.austlii.edu.au) to ensure transparency, accountability, education and guidance to parties on all matters within the jurisdiction of the Commission**
- Making a financial contribution to AustLII **to publish Presidential decisions**
- **Publication of selected Presidential decisions in the Dust Diseases and Compensation Reports (DDCR)**
- **Provision of brochures and a DVD on a variety of topics regarding proceedings in the Commission. The brochures are also available in a variety of community languages.**

Continuing Legal Education Presentations

Various staff and members of the Commission, including the President, the Registrar and the Deputy Registrar (Legal and Medical Services), have presented in a number of Continuing Legal Education sessions before clients and legal practitioners.

Focus: Skilled and Committed People

New Organisational Structure

Following an organisational review conducted in 2008, the Commission evaluated two key recommendations relating to:

- **the model of engagement of Arbitrators**
- **the internal structure of the Commission.**

The review recommended the transition from a large group of contracted Arbitrators to a smaller pool of full-time, or substantially full-time, Arbitrators supported by sessional Arbitrators to cover rural locations and address any peaks in metropolitan case load.

The shift to a smaller group of in-house Arbitrators is aimed at improving the consistency and quality of decision-making.

During the reporting year, the Attorney General appointed 15 full-time equivalent in-house Arbitrators and 18 sessional Arbitrators. It is anticipated that a further full-time Arbitrator position will be filled in 2011.

Occupational Health and Safety Committee Report

The Commission continues to have a proactive Occupational Health and Safety Committee which systematically manages OH&S issues to ensure that the workplace is, as far as practicable, safe and without risks to the health of Members, staff and others.

In 2010, new committee members were elected. The current OH&S Committee members are:

Abu Sufian, Chairperson

Karen Carpenter, Secretary

Memory McIntosh, Staff Representative

Emma Lethbridge-Gill, Staff Representative

Joanne Jesswein, Staff Representative

Rodney Parsons, Management Representative

Mary Walsh, Observer

The OH&S Committee continues to work in a cooperative relationship with the Commission executive to ensure a safe work environment. In 2010, the OH&S Committee met quarterly and carried out routine inspections of the Commission's premises and equipment. The OH&S Committee prepared a report which made risk assessments, identified potential hazards and identified maintenance requirements. The Committee also monitors Injuries and Hazard Reports and is pleased to report only minor incidents during 2010.

Significant achievements for the OH&S Committee in 2010 included the implementation of a security policy for visitors to the Commission, management of the election and training of fire wardens, update of the OH&S Policy and Consultation Statement, improvements to the kitchen/lunch room facilities to complement changes to staff relocations brought about by the 2009 office fit-outs, and the updating of first aid signage and general information posters.

Legal Education

During 2010, the Commission provided opportunities to meet the development and training needs of all legal staff of the Commission. This was achieved through external formal training and in-house development opportunities, which included the creation of an electronic publication, On Review'. A session for the Law Society New Rule 42 compliance was held in conjunction with the Motor Accidents Authority and all legal staff were encouraged to attend.

WorkCover Training (Corporate Calendar)

WorkCover provides Commission staff with the opportunity to participate in a variety of training programs through its Learning Services Unit. Programs are designed to build on existing skills and knowledge and to improve the capability of teams in areas covering areas such as business skills, computer skills, and people and management skills. In 2010, 31 staff attended training in many of these areas.

Certificates **III and IV in Government**

The Commission continued to sponsor staff undertaking Certificate III and Certificate IV in Government as part of their professional development. In 2010, a total of 18 staff commenced their studies, which are due for completion in May 2011.

Leadership Development Program

In 2010, the Commission focused on developing a program to strengthen the leadership capabilities within the Commission. A 2010–2011 Leadership Program was developed involving 19 staff at various levels in the Commission who had leadership responsibilities as part of their role. The Commission partnered with the University of New England to deliver workshops, and individual business and executive coaching, as well as to deliver the nationally-accredited Diploma of Government program. The program continues in 2011.

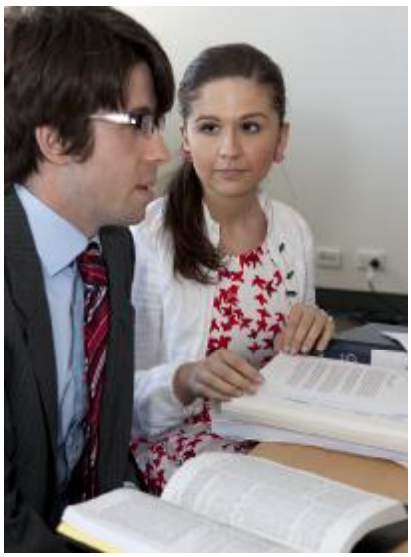
Review, Recognition and Development Program

Substantial work was undertaken in 2010 to design a new Review, Recognition and Development Program. The program aims to clarify the Commission's expectations of staff, encourage feedback and focus on improvement. A steering committee, project team and reference group representing staff at every level across the Commission were established to ensure the design and policy take into account the needs of staff, managers and the organisation. The program will be launched in 2011.

Summer Clerks

In partnership with the University of Western Sydney, the Commission provided two summer clerkships in 2010. This program has been in operation for five years.

The students were employed by the Commission over the university summer vacation period and rotated through the various areas of the Commission's Registry and the Presidential Unit.



Focus: Engaged Service Partners

A program of mandatory conferences and voluntary forums was conducted in 2010 for Arbitrators, Approved Medical Specialists and Mediators.

An annual Arbitrator Conference was conducted in November 2010 with topics including decision-writing, the delivery of extempore decisions, psychiatric disorders, when to disqualify yourself, the dispute resolution model and resilience training.

The annual Approved Medical Specialist Conference was conducted in May 2010 covering topics including working effectively with interpreters and section 323 deductions. Separate sessions were held for musculoskeletal, urology, psychiatry, ophthalmology, plastic, dermatology and ENT specialists to tailor the conference to the needs and interests of the relevant speciality groups.

Case Study

From discussions with Approved Medical Specialists and review of the reasons for appeals against their assessments of permanent impairment, it became apparent that s 323 deductions should be a particular focus for improvement in 2010.

Following on from the decision in Cole v Wenaline Pty Ltd [2010] NSWSC 78, a paper on section 323 was delivered at the annual Approved Medical Specialist Conference which provided legal guidance and practical examples.

An Explanatory Note was developed to assist Approved Medical Specialists in adopting the proper approach when determining deductions for previous injury or a pre-existing condition or abnormality under section 323 of the Work Injury Management Act. In consultation with Approved Medical Specialists and Arbitrators, the Medical Assessment Certificate was modified to assist Approved Medical Specialists articulate the reasons for deductions made.

Section 323 deductions was included as a regular topic for discussion in forums throughout the year and was included in the induction of Arbitrators undertaking the role of convenor in Appeal Panels.

Review of the Professional Development Program

During 2010, the Commission undertook a review of the Arbitrator Professional Development Program. The Review produced changes to the Arbitrator professional development framework to incorporate the new structure and role of Senior Arbitrators, some amendments to the professional development cycle as a result of a survey of Arbitrators and administrators of the program, and the development of an online planning and review tool.

Recruitment of Mediators

The Commission reviewed its mediator panel in 2010. It expanded the criteria for recruitment to include National Mediator Accreditation as a compulsory requirement for Commission Mediators. The panel now has a total of 28 Mediators. The full list of appointments is at Appendix 3 and available on the Commission's website: www.wcc.nsw.gov.au.

Arbitrator Practice Manual

In 2009, the Commission launched its Arbitrator Practice Manual. The Arbitrator Practice Manual provides guidance to members of the Commission on a range of procedural and ethical issues, as well as substantive legal issues of particular relevance to the work of the Commission.

The Commission has an ongoing commitment to keeping the Arbitrator Practice Manual relevant and up to date. Responsibility for updating the Arbitrator Practice Manual rests with the Legal and Medical Services Branch. The Legal and Medical Services Branch has committed to providing three updates per year, plus additional updates as may be urgently required.

In 2010, the Legal and Medical Services Branch issued three updates, plus one supplementary update, for the Arbitrator Practice Manual. The updates include review of significant decisions relevant to the workers compensation scheme made by the Presidential Members of the Commission and judgments delivered by both the Supreme Court of NSW and the NSW Court of Appeal. The updates also included changes to the workers compensation legislation that impact on the operation of the Commission.

'ON REVIEW'

'On Review' is an electronic document now published internally, containing all recorded judicial review and Court of Appeal outcomes and trends in relation to medical assessments, medical appeals, and decisions and functions of the Registrar and the Commission. In 2010, the Legal and Medical Services Branch commenced the initial design and development of 'On Review' to cater for the research and information needs of service partners and Members and staff of the Commission. The Review has now been consolidated and will be continued as an integral part of information sharing.

Focus: Streamlined Business Excellence

WORKERS COMPENSATION COMMISSION RULES 2010

The 2010 Rules took effect from 1 October 2010. The substantive amendments made were as follows:

- **The removal of rule 6.2, which purported to authorise the Commission to appoint a representative for an incapacitated person**
- **Amendments to Part 8 regarding the service and lodgment of documents, bringing the time for service by email into line with section 14M of the *Electronic Transactions Act* 2000 (that is, 5.00 pm instead of 4.30 pm)**
- **A new rule 9.9 inserting a procedural rule for death cases**
- **A new requirement that a chronology of principal** events be filed with the arbitral appeal application **(Rule 16.2(4)(e)) and that the respondent be** given the opportunity to file an alternative or supplementary chronology of events to that filed by **the appealing party (Rule 16.2(9)).**

INFORMATION SYSTEMS

During 2010, there were several key modifications made to Comcase, the Commission's case management system. The modifications were requested by users to enhance the system's functionality and usability.

There were also several changes and upgrades to other Commission applications throughout 2010, including upgrades to Internet Explorer, Microsoft Office and Microsoft Outlook.

WorkCover's Information Technology Services Branch (ITSB) completed a refresh of both network printers andPCs, thereby providing the latest and most reliable hardware to the Commission. Three interactive whiteboards were installed in the Commission's meeting rooms and training rooms.

Education and Collaboration

Inter-Jurisdictional Meeting

Each year in June, the Australasian Institute of Judicial Administration (AIJA) holds an annual Tribunals Conference that is well-attended by a range of decision-makers and staff from State, Territory and Commonwealth tribunals. Several years ago, it was agreed that, prior to the commencement of the Conference, an inter-jurisdictional meeting would be convened to promote information-sharing and collaboration across the various tribunals managing workers compensation disputes.

In 2010, the conference was held in Brisbane. By agreement, the Commission took responsibility for organising the meeting, with President Judge Keating as Chair.

Issues discussed included:

- **legislative changes**
- **medical decision-making**
- **member recruitment**
- **professional development and performance management.**

The 2011 meeting is scheduled to be held in Melbourne.

Council of Australasian Tribunals

The Council of Australasian Tribunals (COAT) is a peak body that facilitates liaison and discussion between tribunals throughout Australia and New Zealand. It supports the development of best practice models and model procedural rules, standards of behaviour and conduct for members, and increased capacity for training and support for members.

During 2010, members and staff of the Commission participated in various activities organised by COAT, including the annual conference organised by the NSW Chapter in May 2010, the national annual general meeting held in Brisbane in June, and the Whitmore Lecture delivered in September in Sydney. The Registrar has been a member of the Executive Committee of the NSW Chapter for several years.

Law Society's Government and Administrative Law Accreditation Working Group

During 2009, the Law Society of NSW announced that it would be developing a new area of accreditation in Government and Administrative Law.

In order to develop this new area, the Law Society established a working party which consists of knowledgeable and experienced practitioners currently working in the area, both within the public and private sector. The group met throughout 2010 and has now developed a curriculum and assessment regime that has been approved by the Law Society Council.

Accreditation is being offered for the first time in 2011. The Registrar of the Commission has recently been appointed as the Chair of the Government and Administrative Law Advisory Committee.

Visiting Delegations

WorkCover Western Australia

In June of 2010, the Commission had the pleasure of hosting a visit from officers from WorkCover WA. The Commission took the opportunity to brief the delegation on our case management system, stakeholder liaison, listing practices and our Arbitrator Professional Development Framework.

Judge Fleur Kingham

On 8 July 2010, the President of the Queensland Civil and Administrative Tribunal (QCAT), Judge Fleur Kingham, visited the Commission. The Judge discussed practice and procedures with the President and the Registrar.

Developments in the Law

The past year has seen significant legislative changes that impact on various functional areas of the Commission. Key amendments to the workers compensation legislation include the following.

Workers Compensation Amendment (Commission Members) Act 2010

This Act made changes to the *Workplace Injury Management and Workers Compensation Act* 1998 in relation to the appointment of Members of the Commission. The changes were designed to improve the arbitration process with a shift from sessional Arbitrators to full-time, salaried Arbitrators. A small pool of sessional Arbitrators was also retained.

The changes to the Act also allowed for the appointment of Senior Arbitrators who, in addition to managing a disputes case load, are also responsible for the induction, mentoring, training and appraisal of Arbitrators, as well as contributing to practice and procedure. The appointment of Arbitrators is now vested with the Attorney General and is no longer a function of the President of the Commission.

To assist in meeting the Commission's appeal case load, the Act also provided for the removal of the restriction on the appointment of two Deputy Presidents, with the Minister now able to appoint such Deputy Presidents as are necessary to undertake appeal work. To date, there has been no change in the number of Deputy Presidents appointed.

Workers Compensation Legislation Amendment Act 2010

The Act introduces significant amendments, which are scheduled to commence on 1 February 2011.

The following major amendments are expected to impact on the functional, legal and jurisdictional responsibilities of various Members and staff of the Commission:

- **The Commission will now have the power to make determinations with regard to expenses for medical and related treatment not yet incurred. This amendment overcomes the restrictions on access to future treatment for injured workers, highlighted by the Presidential decision of *Widdup v Hamilton* [2006] NSWWCCPD 258, where it was determined that the Commission has no jurisdiction to make determinations with regard to prospective medical treatment.**
- **An appeal against a decision of an Arbitrator will no longer be a full review of the Arbitrator's decision and will be limited to a determination as to whether the decision appealed against was affected by error. This amendment reverses the effect of the decision of the Court of Appeal in *Sapina v Coles Myer Ltd* [2009] NSWCA 71, where the Court found that an arbitral appeal is to proceed by way of a full review of the Arbitrator's decision.**

- An appeal against the decision of an Approved Medical Specialist will now be limited to the grounds on which the medical appeal is made and will not be a review of any other aspect of the medical assessment. This amendment impacts on the reliance of a Medical Appeal Panel on the authority established in *Siddik v WorkCover Authority of New South Wales* [2008] NSWCA 116, where the Court of Appeal decided that a Medical Appeal Panel is not confined to considering the grounds of review under which the medical appeal application was permitted to proceed by the Registrar, or on the grounds of appeal stated by the Appellant. The amendment limits the consideration of issues by the Medical Appeal Panel to only those raised in the grounds of appeal.
- Fresh evidence can no longer be adduced on a medical appeal or an arbitral appeal unless the evidence was both not available to the appellant and not reasonably obtainable by the appellant before the proceedings concerned. This reverses the decision in *Summerfield v Registrar of the Workers Compensation Commission of NSW* [2006] NSWSC 515, where the Supreme Court of NSW applied a disjunctive interpretation of the two limbs of the meaning of 'additional relevant information' in the context of section 327(3)(b).
- An appeal against interlocutory decisions of Arbitrators may be heard with leave of the Commission. The amendment is a departure from the previous position that an interlocutory decision may not be the subject of an arbitral appeal.
- The amending legislation removes the procedure for a party to file a request for reconsideration of a decision of an Approved Medical Specialist, under section 378 of the 1998 Act. The effect of the amendment is that a party who is dissatisfied by the decision of an Approved Medical Specialist must now seek reconsideration under either section 327(b) or section 329. The amendment represents a rationalisation of the reconsideration provisions, but does not remove the right to seek a reconsideration of a decision of an Approved Medical Specialist.
- An amendment to make it clear that an appeal against an Arbitrator's decision regarding weekly payments of compensation does not stay the decision. The amendment makes it clear that weekly benefits will remain payable, despite an arbitral appeal, which is a reflection of the general law position where an appeal does not automatically stay the original decision.
- Senior Approved Medical Specialists may be appointed from time to time, for the purpose of assisting in the professional development, guidance and appraisals of Approved Medical Specialists.

Workers Compensation Commission Rules 2010

The *Workers Compensation Commission Rules* 2010 came into effect on 1 October 2010.

Below is a summary of the significant amendments made to the *Workers Compensation Commission Rules* 2006:

- **Rule 6.2, which purported to authorise the Commission to appoint a representative for an incapacitated person, has been removed. Rule 6.3 becomes Rule 6.2 and applies the *Uniform Civil Procedure Rules* to incapacitated applicants for work injury damages as though the application was made in the District Court.**
- **In accordance with the *Electronic Transaction Act 2000*, electronic communication with the Commission, such as lodgment and service of documents via fax or email, received by 5.00 pm are taken to have been received on the same day. Also, documents served by the Commission and correspondence forwarded by the Commission by electronic communication by 5.00 pm are taken to have been sent and served on the same day.**
- **Rule 9.9 has been amended to require that in proceedings for lump sum compensation under section 25 of the *Workers Compensation Act 1987*, the personal representative of the worker, all dependants and any other persons claiming to be dependants shall be joined as respondents in the proceedings.**

Amendments have been made to appeal applications against an Arbitrator's decision. Rule 16.24(e) has been amended, requiring the appellant to lodge a chronology of events, comprising a list of principal events leading up to the lodging of the appeal, numbered consecutively with a date and a short description of each event. Further, Rule 16.2(9) has been inserted to allow the respondent to lodge an alternative or supplementary chronology of events.

As a consequence of the amendments, the Commission's Forms, Guides and Registrar's Guidelines were revised and amended. This includes the cessation of Forms 5B and 5D from 1 October 2010. Forms 5A and 5C can now be used for any injuries under the 1926 Act.

Apart from revision and amendment of the Commission's forms to comply with the *Workers Compensation Commission Rules* 2010, there were also some further amendments made to requirements for lodgment of Forms 2, 2A, 2C and 2D. These include compulsory pagination requirements for Forms 2C and 2D.

The revised Forms and Guides to completing Forms were made available on the Commission's website from 1 October 2010.

The Commission will issue revised Practice Directions following finalisation of the new *Workers Compensation Regulation* 2010 and the commencement of the *Workers Compensation Amendment Bill* 2010.

Workers Compensation Regulation 2010

In 2010, the Commission made comprehensive submissions on the proposed major amendments to the *Workers Compensation Regulation* 2003.

The Explanatory Note to the draft regulation outlined the key provisions identified in the *Workers Compensation Regulation* 2010, which commenced on 1 February 2011, including considerations of or amendments to the following relevant points:

- **diseases that are taken to be work-related**
- **the current weekly wage rates to be used for compensation calculation purposes**
- the rate at which the amount of benefits is indexed for inflation
- **weekly payments of compensation by way of income support and procedures for their discontinuation**
- **return to work programs, which are policies for the rehabilitation of injured workers**
- **rates applicable for occupational rehabilitation services**
- **approval of occupational rehabilitation providers**
- notification of workplace injuries
- **claims procedures**
- **the referral of medical disputes to referees or panels**
- **restrictions on obtaining medical reports costs in workers compensation matters and related common law claims**
- **the disclosure of information and the keeping of records.**

Significant Decisions of Presidential Members

Djukic v Tactical Cargo Solutions Pty Ltd (under external administration) **[2010] NSWWCCPD 123**

Section 4 of the *Workplace Injury Management and Workers Compensation Act* 1998, definition of worker; Sch 1 cl 2 of the *Workplace Injury Management and Workers Compensation Act*

O'Grady DP

22 November 2010

Facts:

In May 2000, Mr Djukic, an electrician, established a business known as Hoxton Communications, which provided the services of an electrician. At this time, he was also employed by Stowe Australia. When his position with Stowe Australia was made redundant in March 2003, he continued conducting his own business as an electrician.

In February 2007, Mr Djukic entered into an arrangement with Tactical Cargo Solutions Pty Ltd (the respondent) to perform certain electrical work at its Botany premises. In February 2008, a second agreement was reached regarding the performance of electrical work at the respondent's new Milperra premises. Mr Djukic issued invoices to the respondent for his work.

Mr Djukic injured his cervical spine on 10 March 2008, when he fell from a ladder whilst working at the Milperra premises occupied by the respondent. Mr Djukic's claim for compensation benefits in August 2008 was declined by the respondent's insurer in a s 74 notice dated 3 September 2008, on the basis that he was not a 'worker' or a 'deemed worker' under the Acts.

An Application to Resolve a Dispute was registered with the Commission on 27 April 2010 and the Arbitrator, in her determination issued on 16 August 2010, rejected Mr Djukic's submissions that he was at the relevant time either a worker or a deemed worker within the meaning of the legislation.

On appeal, Mr Djukic conceded that the work performed by him prior to 15 February 2008 had been performed as an independent contractor. It was Mr Djukic's case that, on 20 February 2008, a new contract came into being between him and the respondent, and that this contract was a contract of service having regard to the criteria identified by Wilson J and Dawson J in *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; 160 CLR 16 at 36 *(Stevens)* and the 'control test' in *Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney* [2005] NSWCA 8. He contended that the Arbitrator failed to consider, or misapplied, these tests. In the alternative, Mr Djukic argued that, upon a literal construction of cl 2 of Sch 1 to the 1998 Act, he is deemed to be a worker.

Held: Arbitrator's decision confirmed

Worker

1. The Arbitrator's conclusion that the arrangement entered into by the parties in February 2008 was a 'stand-alone' arrangement was correct. It was a separate and discrete contract.

2. Was this arrangement a contract of service or a contract for services? The High Court considered the matters relevant to the characterisation of a relationship of master and servant or otherwise in Stevens at 35:

> 'The classic test for determining whether the relationship of master and servant exists has been one of control, the answer depending upon whether the engagement subjects the person engaged to the command of the person engaging him, not only as to what he shall do in the course of his employment but as to how he shall do it; *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd*. The modern approach is, however, to have regard to a variety of criteria. This approach is not without its difficulties because not all of the accepted criteria provide a relevant test in all circumstances and none is conclusive. Moreover, the relationship itself remains largely undefined as a legal concept except in terms of the various criteria, the relevance of which may vary according to the circumstances.'

3. The Arbitrator considered the criteria set out in *Stevens* (at [24] of Reasons) and the question of 'control' (at [10] of Reasons).

4. The requirement that Mr Djukic had to get pre-approval from the respondent for the purchase of materials, together with the description of the work, that is, the installation of lights and security cameras, did not constitute 'control' of him by the respondent (at [48]). On balance, nothing in the evidence relating to the agreement entered into in February 2008 established that there had been a change in the relationship from one for services to one of service.

5. The submission by Mr Djukic that the Arbitrator misapplied the relevant test was rejected (at [49]), as was the suggestion that she failed to give adequate reasons for her decision (at [50]).

Deemed Worker

6. Mr Djukic's argument that he was a 'deemed' worker at the time of injury was based on a literal construction of the amended form of cl 2 of Sch 1 to the 1998 Act, which was amended by the *Workers Compensation Legislation Amendment (Miscellaneous Provisions) Act* 2005.

7. The form of cl 2 following amendment appears as follows on the New South Wales Government's legislation website and has been certified by Parliamentary Counsel in accordance with the provisions of s 45C of the *Interpretation Act* 1987:

   '(1) Where a contract:

   (a) to perform any work exceeding $10 in value (not being work incidental to a trade or business regularly carried on by the Contractor in the Contractor's own name, or under a business or firm name), or

   (b) [repealed]

   is made with the Contractor, who neither sublets the contract nor employs any worker, the contractor is, for the purposes of this Act, taken to be a worker employed by the person who made the contract with the Contractor.'

8. Mr Djukic submitted that the evidence established that he had made a contract with the respondent and he had not sublet the contract nor employed any worker and therefore should be considered a 'deemed worker' (at [54]).

9. 'The word 'or' appearing immediately before cl 2(1)(b) originally operated to render as disjunctive both sub-cls (a) and (b). The question raised in argument is whether retention, following amendment, of the word 'or' has the effect, as put by Mr Djukic, of making sub-cl (a) and the final words of the clause disjunctive' (at [58]). This is not the case, as the repealed sub-cl (b) is to be taken into account when construing the clause.

10. The application of the construction of cl 2 suggested by Mr Djukic did not reflect Parliament's intention (at [61]), which was 'to improve clarity without changing the scope of individuals to be generally covered' (at [59]). Regard should also be had to the context of the clause as it is found in the Schedule and the Act generally. The main purpose of the amending Act was to address outworkers' and on-hire contractors' entitlement to the benefits of the legislation (at [63]). The literal construction suggested by Mr Djukic would result in an enormous extension of the class of persons who would qualify as deemed workers.

11. Mr Djukic was injured whilst performing work that was incidental to a trade or business regularly carried on by him under the business name Hoxton Communications.

***Van Wessem v Entertainment Outlet Pty Ltd* [2010] NSWWCCPD 97**

Section 4, in the course of employment; s 9A, self-employed working director

Keating P

10 September 2010

Facts:

Mrs Van Wessem is the widow of Stephen Jan Van Wessem (Mr Van Wessem/the worker).

Mr Van Wessem was the sole working director of the respondent. He was killed on Bobbin Head Road in the Ku-ring-gai National Park whilst cycling on Sunday 15 February 2009 at approximately 11.00 am.

The respondent had a contract with Aussie Home Loans Pty Limited to provide advice and act as a mortgage broker for clients of Aussie Home Loans Pty Limited. Aussie Home Loans supplied referrals to Mr Van Wessem from inquiries made to them by potential customers. Mr Van Wessem had no office or premises to undertake this work. He worked from home, making contact with clients by using his mobile phone and email.

Mr Van Wessem's income was derived from commissions on home loans entered into by clients referred to him. He did not have any set hours of work, but was required to adhere to the terms of a contract with Aussie Home Loans and any other policies or directives issued by them.

Mr Van Wessem often worked outside normal working hours and frequently worked on weekends. When not undertaking work for Aussie Home Loans, Mr Van Wessem was free to go about his domestic and recreational activities as he chose.

Mr Van Wessem had been in contact with a potential client before undertaking the ride and his diary indicates that he was intending to either call or meet with the client later that day.

Mrs Van Wessem brought a claim under s 25.

QBE Workers Compensation (NSW) Limited, on behalf of the respondent, declined the claim on the basis that Mr Van Wessem's death did not arise out of or in the course of his employment with the respondent, and that his employment was not a substantial contributing factor to the injuries that led to his death.

The Arbitrator found in favour of the respondent on the basis that employment was not a substantial contributing factor to the injury. Mrs Van Wessem appealed.

Held: Arbitrator's decision confirmed

In the course of his employment

1. The respondent had entered into a contract with Aussie Home Loans that required it to be on-call during a set period of hours, namely, 9.00 am to 8.00 pm Monday to Friday and 9.00 am to 5.00 pm on weekends. The worker and the worker alone determined how and when, in the interests of the respondent, those contractual obligations were satisfied. Mr Van Wessem was effectively 'on-call' during the nominated span of hours. Mrs Van Wessem confirmed that the worker was required, as a matter of policy, to respond to referrals sent to him within two hours of receiving them, that is, he was required to contact potential customers within a two-hour period. There was no challenge to that evidence: [108].

2. The phrase 'arising in the course of employment' refers to a temporal relationship between the injuries and the employment. A causal connection is only relevant to injuries arising 'out of' the employment *(Davidson v Mould* [1944] HCA 10; 69 CLR 96; ALR 165 *(Davidson)*). In Davidson, the High Court held that the course of employment does not start and end with a worker's paid hours of employment. The temporal relationship includes all the time that the worker is engaged on the performance of his duties of employment and those things which are incidental to it: [99].

3. In *Hatzimanolis v ANI Corporation Ltd* [1992] HCA 21; 173 CLR 473; 106 ALR 611; 8 NSWCCR 242 *(Hatzimanolis)*, the majority of the High Court held that the Henderson-Speechley test, as it has become known, was too narrow to determine whether the injury occurred within the course of employment in cases where the injury had occurred outside actual working hours. The majority held at [13]:

'Consequently, the rational development of this area of law requires a reformulation of the principles which determine whether an injury occurring between periods of actual work is within the course of employment so that their application will accord with the current conception of course of employment as demonstrated by the recent cases, particularly the decisions of this Court in *Oliver* and *Danvers*'.

4. Whilst *Hatzimanolis* may be more readily applicable to injuries occurring during intervals or interludes within an overall period of work where the activity giving rise to the injury occurred where the employer has expressly or impliedly induced or encouraged the employee to spend the interval at a particular place or in a particular way, the High Court nevertheless accepted that, in determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment, 'not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen': [114].

5. In *Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Australia Pty Ltd* [2009] NSWCA 324; 7 DDCR 75 *(Badawi)*, the majority of the Court of Appeal applied the principles stated in *Hatzimanolis* and noted at [72] that difficult factual issues can arise in determining whether a worker was in the course of employment when injury was sustained, but they arise, not because the principle to be applied is uncertain, but because of the fluidity of employment circumstances: [115].

6. In *Hook v Rolfe* (1986) 7 NSWLR 40, Glass JA (Hope and Samuels JJA agreeing) recognised that the worker's activity undertaken for both work and non-work purposes may be within the course of employment. His Honour remarked that the solution to adopt in the case of an activity undertaken for multiple purposes is to inquire as to the relevant purpose and to disregard the others, not inquiring as to the dominant purpose. In *Mayhew v G & S Mayhew Pty Ltd* (1995) 12 NSWCCR 398, the worker was injured whilst installing a heating unit for his swimming pool on his roof. He was employed in a business which sold and installed such heaters. Armitage J held that the worker's injury either arose out of or in the course of his employment, finding that one of the purposes of the installation was work-related: [117].

7. The general nature and terms and circumstances of Mr Van Wessem's employment required him to be at call within a nominated span of hours.The fact that the worker took his mobile phone with him and routinely responded to calls, both domestic and business-related, during the course of his regular cycling activities lead to the conclusion that, during the course of those rides, he remained in the course of his employment: [121].

8. The respondent's submission that the course of the worker's employment was suspended periodically throughout the day and night, depending upon whether he was actually attending to employment-related duties, was rejected. That approach is inconsistent with the test enunciated in *Hatzimanolis* and confirmed in *Badawi*. To determine whether an injury occurs in the course of employment is answered not by looking to the circumstances of the particular occasion out of which the injury has arisen, but by having regard to the general nature, terms and conditions of the employment: [122].

9. To satisfy the general nature, terms and conditions of his employment, Mr Van Wessem was either obligated to, or elected to carry a mobile phone with him for the purposes of responding to referrals forwarded to him through Aussie Home Loans. He did this routinely. During the course of his regular rides, the unchallenged evidence is that he regularly placed calls to or received calls from clients or potential clients pursuant to the contractual obligations between his employer and Aussie Home Loans. It was part of the general nature and terms of his employment. When the worker was conducting himself in this way, he was acting in the course of his employment: [123].

10. At the time of his accident, Mr Van Wessem was in the course of his employment within the meaning of s 4: [124].

Substantial contributing factor

11. The meaning of 'substantial contributing factor' and the application of s 9A generally were considered at length in *Badawi*. The Court accepted that the requirement imposed by s 9A that the 'employment concerned' was a 'substantial contributing factor' involves a causative element. Causation is a fact-laden conclusion which must be based on commonsense: [128]–[129].

12. There was nothing about the time and place of the injury that linked it to the employment save for the fact that Mr Van Wessem was available to respond to phone calls at that time: [133].

13. Although there were similarities with cases such as *Badawi, Da Ros v Qantas Airways Ltd* [2010] NSWCA 89, *Watson v Qantas Airways Ltd* [2009] NSWCA 322 and *Hatzimanolis*, the facts in this case were different, in that the worker's employment did not require him to be at any particular location at a particular time when he was working, and did not require him to work at places remote from his home. It afforded him a certain amount of freedom to work at times that were more flexible than traditional working arrangements. This allowed him to combine his work with other pursuits: [137].

14. Mr Van Wessem had engaged in the practice of undertaking a Sunday morning bicycle ride for a considerable period of time before his company entered into its contract with Aussie Home Loans. His practice of undertaking the rides was not altered in any way as a result of undertaking that employment: [151].

15. In that sense, it could not be said that the employment concerned was a substantial contributing factor to the injuries. The nature of the work played no role in the accident. It did not require him to go cycling: [151].

***Martin v R J Hibbens Pty Ltd* [2010] NSWWCCPD 83**

Whether employment connected with New South Wales; s 9AA of the *Workers Compensation Act* 1987; meaning of 'usually works', 'usually based', and 'principal place of business'

Roche DP

4 August 2010

Facts:

Ms Bianca Martin worked for the respondent and other employers doing general forestry work from the year 2000 to January 2006. She generally worked in southeast Queensland, northern New South Wales and sometimes Victoria. It was the worker's evidence that, from the year 2000, she worked a number of broken periods of employment. She would work for the respondent when it could offer her periods of work and, between those periods of work, any other employer who was offering work.

A letter from the respondent dated 19 February 2008 identified Queensland work for the worker from 19 January 2003 to 25 May 2003, Queensland work for the worker from the week ending (w/e) 24 July 2005 to the w/e 11 December 2005, NSW work for the worker for the w/e 18 December 2005, Queensland work for the worker for the w/e 25 December 2005 to the w/e 30 December 2005 and NSW work for the worker for the w/e 8 January 2006 to 5 February 2006.

The worker gave evidence that her last period of work for the respondent was from approximately November 2005 to early February 2006. That period involved both Queensland work and New South Wales work. On 31 January 2006, the worker attended a property known as Sandilands' at Old Lawrence Way, Tabulam, in northern New South Wales while working for the respondent. In the course of spraying designated areas, she injured herself when she stepped into a hole and fell.

The worker also gave evidence that, when she worked for the respondent, all the equipment she used would either be delivered on site, or collected by her, from the respondent's principal place of business in New South Wales.

The worker's further evidence was that after the work at 'Sandilands' had been completed, she was intending to work in Queensland for a short period and then return to New South Wales, where she believed she would 'relocate' and work for the respondent for a period of at least two years because of a lucrative contract this respondent had obtained.

The Arbitrator found that the s 9AA(3)(a) test identified a State of connection of Queensland. He found that the worker's employment could be characterized as short periods with many employers. He also found that the worker spent the majority of her time working in Queensland, with 64 per cent of her total earnings coming from employment in Queensland, and 36 per cent coming from work in New South Wales. He considered that to be a good measure of the 'period of her employment and connection with the State'.

Held: Arbitrator's determination revoked; remitted to Registrar for referral to an Approved Medical Specialist for assessment.

1. The purpose of the legislation that introduced s 9AA into the 1987 Act was to 'eliminate the need for employers to obtain workers compensation coverage for a worker in more than one jurisdiction' and to ensure that workers 'working temporarily in another jurisdiction will only have access to the workers compensation entitlements – and common law benefits – available in their home State or 'State of Connection' and to provide certainty for workers about their workers compensation entitlements and ensure that each worker is connected to one jurisdiction or another': The Parliamentary Secretary, the Hon Ian MacDonald, second reading speech, NSW Legislative Council, 4 December 2002.

2. The terms of s 9AA(3) provide a series of cascading tests for determining the State with which a worker's employment is connected. If no answer is provided by s 9AA(3)(a), one moves to the next test in s 9AA(3)(b) and so on. If no State is identified by the three tests in s 9AA(3), a worker's employment is connected with New South Wales if he or she is in New South Wales when the injury happens and there is no place outside Australia under the legislation of which the worker may be entitled to compensation for the same injury (the 'location' test) (s 9AA(5)).

3. In relation to s 9AA(3)(a), the import of the words 'in that employment' in the phrase 'the State in which the worker usually works in that employment', concentrating on the provision and the provisions with which it interacts, means 'in that [contract of] employment'; not in that general area of employment such as a trade or profession, such as forestry work. However, it extends to both a contract of service and the kind of contract for services contemplated by Schedule 1 of the 1998 Act [63]–[65].

4. The evidence was unsatisfactory when considering the contract of employment. From the limited evidence available, it appeared that there were at least three, and possibly four, contracts of employment between the worker and the respondent. Alternatively, there was the possibility of two contracts of employment dividing the third contract.

5. Given that s 9AA(3)(a) concerns where the worker usually works in that employment, and as the injury occurred in the contract of employment between the worker and the respondent that was existing from 20 November 2005 to 31 January 2006, the question was where the worker usually worked for that contract of employment.

6. At [62], the meaning of 'usually' in 'usually works' in keeping with *Hanns v Greyhound Pioneer Australia Ltd* [2006] ACTSC 5 was adopted: it is where the worker 'habitually or customarily works', or works 'in a regular manner'. Even if it were open to have the entire employment relationship between the worker and employer as a frame of reference rather than just the employment contract during which the injury was received, which was open to doubt, no one State could be identified as the one in which the worker 'usually worked' [62].

7. Within the contract from 20 November 2005 to 31 January 2006, and for her other contracts with this employer, there was no State or no one State 'where [the worker] habitually or customarily worked in her employment with R J Hibbens [or] in a regular manner'. The only conclusion that was reasonable was that she worked in Queensland for this employer for part of the time and in New South Wales for part of the time. Further, s 9AA(6) provided no assistance on the facts. All that could be said about her relevant work history was that she worked according to demand (at [71]). There was no probative evidence of the parties' intentions (at [72]); and there was no evidence of 'temporary arrangements' (at [73]) to disregard whatever assistance that could give.

8. In relation to s 9AA(3)(b), the correct test for determining where a worker was 'usually based' is that set out in *Tamboritha Consultants Pty Ltd v Knight* [2008] WADC 78 *(Knight)*. The expression can include a camp site or accommodation provided by an employer. It was also noted that where a worker is usually based may coincide with the place where the worker usually works, but that need not be necessarily so. The evidence in this case was that the worker's base moved with her (at [79]). The lack of evidence made it impossible to apply the test.

9. In relation to s 9AA(3)(c), an employer's principal place of business is not necessarily the same as its principal place of business registered with ASIC under the Corporations Act, as a business need not be a corporation and not be registered for that reason. Rather, the employer's principal place of business means 'chief, most important or main place of business from where the employer conducts most or the chief part of its business'. Ms Martin's evidence as to where she went to obtain equipment and the address shown on the letter from the respondent indicated the main place of the respondent's business was in Kyogle in New South Wales.

10. In relation to s 9AA(5), the location test, Ms Martin's employment was arguably connected with New South Wales, as she was injured whilst working in New South Wales and there was no place outside Australia under the legislation of which she may be entitled to compensation.

11. The following principles were extracted from the authorities (at [60]):

    (a) regard should always be had to the terms of the contract of employment;

    (b) 'usually works' means the place where the worker habitually or customarily works, or where he or she works in a regular manner (*Hanns* at [26]). It does not mean the place where the worker works for the majority of time (*Knight* at [76]) and is not simply a mathematical exercise (*Avon Products Pty*

Ltd v Falls [2009] ACTSC 141 (*Falls*) at [43]), though the time worked in a particular location will naturally be relevant. It will also be relevant to look at where the worker is contracted to work *(Falls)*. Regard must be had to the worker's work history with the employer and the parties' intentions, but 'temporary arrangements' for not longer than six months within a longer or indefinite period of employment are to be ignored. Whether an arrangement is a 'temporary arrangement' will depend on the parties' intentions, which will be ascertained by looking at the worker's work history and the terms of the contract. A short-term contract of less than six months that is not part of a longer or indefinite period of employment will not usually be a 'temporary arrangement' *(Knight);*

(c) 'usually based' can include a camp site or accommodation provided by an employer *(Knight* at [83]). Where a worker is usually based may coincide with the place where the worker usually works, but that need not necessarily be so. In considering where a worker is 'usually based', regard may be had to the following factors, though no one factor will be decisive: the work location in the contract of employment, the location the worker routinely attends during the term of employment to receive directions or collect materials or equipment, the location where the worker reports in relation to the work, the location from where the worker's wages are paid, and

(d) an employer's 'principal place of business' is the most important or main place where it conducts the main part or majority of its business (*Knight* at [66]). It will not necessarily be the same as its principal place of business registered with ASIC.

Attorney General's Department v K **[2010] NSWWCCPD 76**

Psychological injury; relevance of worker's perception of events; excessive workload; causation; unsuccessful application for promotion; whole or predominant cause; s 11A of the *Workers Compensation Act* 1987; application of *State Transit Authority of New South Wales v Chemler* [2007] NSWCA 249; (2007) 5 DDCR 286; unmeritorious appeal; obligation of legal practitioners to comply with s 345 of the *Legal Profession Act* 2004 when certifying reasonable prospects of success in Part 3 of Appeal Against Decision of Arbitrator

Roche AP

21 July 2010

Facts:

K is a solicitor who worked in that capacity for the Attorney General's Department (the AGD) from about December 2000. She claimed weekly compensation from 2 June 2009 until 13 December 2009 as a result of a psychological injury (Adjustment Disorder with Depressed and Anxious Mood and a Major Depressive Episode) allegedly caused by an excessive workload, chronic pain from a work-related foot injury and harassment at work.

The AGD's insurer, Allianz, disputed liability for the claim on the basis that K's condition had arisen as a consequence of her 'misperception of events' such that the injury did not arise out of or in the course of employment and was not 'substantially work related'. Alternatively, the injury had been wholly or predominantly caused by reasonable action taken by the employer with respect to 'performance appraisal and promotion' (s 11A of the 1987 Act). The insurer did not dispute incapacity.

The Arbitrator found that K had received a psychological injury arising out of or in the course of her employment to which her employment had been a substantial contributing factor. He was not satisfied that the injury had been wholly or predominantly caused by reasonable action taken by the appellant employer with respect to performance appraisal and/or promotion. The Arbitrator awarded weekly compensation from 2 June 2009 to 26 July 2009 (total incapacity), 27 July 2009 to 4 November 2009 (s 38), 5 November 2009 to 30 November 2009 (s 40) and for the period 1 December 2009 to 13 December 2009. The Arbitrator also made a general order in favour of K in respect of s 60 expenses.

Held: Arbitrator's decision confirmed

1. The AGD disputed the award for total incapacity from 2 June 2009 to 26 July 2009. Roche AP found this ground of appeal to be completely without merit as Allianz never disputed incapacity in its s 74 notice.

2. At [45]–[51], Roche AP examined the current authorities on the relevance of a worker's perception of events and, at [52], he drew the following conclusions from these authorities:

   (a) employers take employees as they find them. There is an 'eggshell psyche' principle (Spigelman CJ in *State Transit Authority of New South Wales v Chemler* [2007] NSWCA 249; (2007) 5 DDCR 286 *(Chemler)* at [40]);

   (b) a perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in *Chemler* at [54]);

   (c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in *Chemler* at [69]);

   (d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in *Sheridan v Q-COMP* [2009] QIC 12; 191 QGIG 13);

   (e) there is no requirement at law that the worker's perception of the events must have been one that passed some qualitative test based on an 'objective measure of reasonableness' (Von Doussa J in *Wiegand v Comcare Australia* [2002] FCA 1464 at [31]), and

   (f) it is not necessary that the worker's reaction to the events must have been 'rational, reasonable and proportionate' before compensation can be recovered.

3. Roche AP (at [54]) noted that the critical question was whether the event or events complained of occurred in the workplace. If they did and the worker perceived them as creating an 'offensive or hostile working environment', and a psychological injury resulted, then it is open to find that causation is established. Submissions made on behalf of the AGD were rejected on the basis that they were linked to the incorrect assumption that a worker's reaction to events at work must be 'rational, reasonable and proportionate'. The Arbitrator only had to consider if the events complained of by K actually occurred, and if they did, whether her injury resulted from these events. He did not have to consider if K's perception was erroneous or irrational.

4. The AGD submitted that the Arbitrator failed to give reasons for discounting the evidence addressing 'promotional failure'. Roche AP was satisfied that the Arbitrator comprehensively explained the basis for his conclusion on this issue. The Arbitrator considered the 'promotional incident' in February 2008 (when K was advised that her most recent promotion application was unsuccessful and she ceased work) was 'a factor' in K leaving work, but did not conclude that it was the whole or predominant cause of K's injury. The Arbitrator correctly noted that the AGD bore the onus of proof to establish its defence under s 11A and it failed to do so.

5. To succeed with such a defence under s 11A, the AGD had to establish that K's injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the AGD with respect to, in this case, promotion. The suggestion that K may have had an 'adverse reaction' to an unsuccessful application fell well short of establishing this. The evidence made it clear that K was suffering from the effects of her workload and the clash with her manager well before she ceased work on 5 February 2008: [96]. Roche AP noted (at [40] and [89]–[96]) that the AGD called no relevant evidence on this issue and the s 11A defence had to fail.

6. The psychologist retained by the AGD did not consider s 11A because she concluded that the worker had not received a psychological injury. Therefore, it had no evidence on that issue.

7. It was accepted by Roche AP (at [86]) that K perceived that she had been unfairly treated at work, that her workload was excessive and the medical evidence confirmed that her work was demanding to the point that it caused her injury.

8. Roche AP (at [98] and [99]) noted that the appeal was completely without merit and reminded legal practitioners of their obligations pursuant to s345 of the *Legal Profession Act* 2004 when certifying reasonable prospects of success in Part 3 of an Appeal Against Decision of Arbitrator.

Significant Supreme Court Decision

Each year, decisions of the Registrar, an AMS, or a Medical Appeal Panel in relation to medical assessments and medical appeals may be challenged by way of judicial review in the Supreme Court of NSW or the NSW Court of Appeal.

In 2010, a small number of judicial actions have been either commenced or determined by the courts. A significant decision of the Supreme Court of NSW in 2010 dealt with a judicial review of a decision that impacts on the considerations of a Medical Appeal Panel in the application of section 323 of the 1998 Act for pre-existing condition or injury.

A deduction for pre-existing condition under section 323 of the 1998 Act should not be made on the basis of an assumption or hypothesis.

In an application for judicial review of the decision of a Medical Appeal Panel, which consisted of a majority judgment (medical specialist members) and a dissenting judgment (Arbitrator/convenor), the Supreme Court of NSW considered whether the majority of the Medical Appeal Panel had failed to correctly apply the requirements of section 323 of the 1998 Act.

Cole v Wenaline Pty Ltd* [2010] NSWSC 78 (Schmidt J, 23 *February 2010)

The worker suffered an injury (the first injury) in 1975 or 1976, which necessitated a discectomy. The worker then suffered a further back injury in October 2005 (the second injury) in the course of his employment with the respondent. As a result of the second injury, the respondent's insurer accepted liability and paid weekly compensation and medical expenses.

In February 2008, the worker underwent a lumbosacral discectomy. There was no dispute between the parties that the surgery was a result of the second injury. The worker then made a claim for lump sum compensation due to permanent impairment as a result of the second injury.

In the Commission, an Approved Medical Specialist (AMS) assessed the worker as suffering 16 per cent whole person impairment, and made a deduction of 50 per cent under section 323 of the 1998 Act attributed to the first injury, resulting in the total assessment of eight per cent whole person impairment.

The AMS made a deduction on the following facts:

- **the worker had previous discectomy in 1975 due to** the first injury
- **the worker had ongoing 'niggling pain and stiffness ever since'**
- there were significant degenerative changes observed **in the lower lumbar spine at the time of the second injury.**

The worker lodged a medical appeal. The issue for the Medical Appeal Panel in relation to section 323 of the 1998 Act was whether any proportion of the worker's permanent impairment was due to the first injury.

The Medical Appeal Panel issued two decisions – a majority judgment of the AMS members and a dissenting decision of the Arbitrator member. The decision of the two AMS members was the decision of the Medical Appeal Panel, in accordance with section 328(6) of the 1998 Act.

The majority of the Medical Appeal Panel agreed with the AMS on the issue of the section 323 deduction, and were of the view that the evidence clearly showed that there was 'previous impairment'. They said that, hypothetically, if the worker had been examined prior to the second injury, the fact of the first surgery, the history of persistent and niggling pain and stiffness, and significant degenerative changes, would have led to the conclusion that the worker had a level of permanent impairment prior to the second injury.

The worker sought a judicial review of the Medical Appeal Panel's decision.

Schmidt J in the Supreme Court quashed the decision of the Medical Appeal Panel and remitted the matter to the Medical Appeal Panel to be determined according to law.

Her Honour found that the majority Medical Appeal Panel members conducted their assessment on a basis inconsistent with the requirements of section 323 of the 1998 Act.

Her Honour stated that section 323 does not permit an assessment to be made on the basis of an assumption or hypothesis that, once a particular injury has occurred (the first injury), it will always contribute to the impairment flowing from any subsequent injury (the second injury), 'irrespective of outcome'.

Her Honour went on to state that section 323 requires establishing, on the available evidence, the following:

- **what the level of impairment is after the second injury**
- **whether a proportion of the impairment is due to the** first injury
- **what the proportion is.**

Her Honour ultimately found that the evidence suggested that the degree of permanent impairment before and after the second injury was quite different. Why the proportion of the degree of permanent impairment after the second injury was found to be due to the first injury was not sufficiently explained, other than by the assumption made by the majority AMS members of the Medical Appeal Panel.

The decision lends strong support to the approach that section 323 of the 1998 Act requires a determination of whether or not any proportion of permanent impairment assessed is due to any previous injury or pre-existing condition or abnormality, on the basis of evidence of the actual consequences of the previous condition, injury or abnormality and the subsequent injury. A previous injury, even to the same body part, does not automatically invoke a deduction under section 323 of the 1998 Act. The test is whether the previous injury actually contributes to the current impairment to the extent that the level of the contribution may also be assessed based on available evidence, and not based on assumptions or speculations.

Appendix 1:

MEMBERS OF THE COMMISSION

President

His Hon Judge Greg Keating

Deputy Presidents

Mr Bill Roche
Mr Kevin O'Grady

Acting Deputy Presidents

Mr Anthony Candy
Ms Lorna McFee

Registrar

Ms Sian Leathem

Senior Arbitrators

Eraine Grotte
Deborah Moore
Michael Snell

Arbitrators (as at 31 December 2009)
* Denotes new appointment

Full-time

Brett Batchelor
Elizabeth Beilby*
Garth Brown
Glenn Capel*
Christine D'Souza*
Grahame Edwards*
Michael McGrowdie
Annemarie Nicholl
Jane Peacock
Paul Sweeney*
Craig Tanner

Part-time

Ross Bell
Marshal Douglas
Richard Perrignon*
Josephine Snell*

Sessional

Robert Caddies*
William Dalley
Bruce McManamey (MAP)
Jeffrey Phillips SC*
Jennifer Scott
John Wright*
Janice Connelly
John Hertzberg
Peter Molony (MAP)
Faye Robinson
Natasha Serventy
John Wynyard (MAP)
Margaret Dalley
Carol McCaskie (MAP)
Dennis Nolan
Carolyn Rimmer
Annette Simpson
Leigh Virtue

The Registrar has and may exercise all the functions of anArbitrator by operation of section 371(1) of the *Workplace Injury Management and Workers Compensation Act*1998. The Deputy Registrars also hold Arbitrator appointments.

Appendix 2:

APPROVED MEDICAL SPECIALISTS

Dr Robert Adler
Dr Timothy Anderson
Dr Peter Anderson
Dr John Ashwell
Dr Mohammed Assem
Dr John Beer
Dr Neil Berry
Dr Trevor Best
Dr Graham Blom
Dr James Bodel
Dr Anthony Bookallil
Dr Geoffrey Michael Boyce
Dr Kenneth Brearley
Dr Robert Breit
Dr Frank Breslin
Dr David Bryant
Dr Peter Burke
Dr Mark Burns
Dr William Bye
Dr Christopher W Clarke
Assoc Prof W Bruce Conolly
Dr Richard Crane
Dr David Crocker
Dr John Cummine
Dr Michael Davies
Dr Thomas Davis
Dr Michael Delaney
Dr Drew Dixon
Dr John Dixon-Hughes
Professor John Duggan
Dr Hugh English
Dr Donald Kingsley Faithfull
Assoc Prof Michael Fearnside
Dr Antonio E.L Fernandes
Dr Sylvester Fernandes
Dr Robin B. Fitzsimons
Dr Susanne Freeman
Dr Hunter Fry
Dr John F W Garvey
Dr Robert Gertler
Dr Peter Giblin
Dr Dolores Gillam
Dr Michael Gliksman
Dr Nicholas Glozier
Dr David Gorman
Dr Scott Harbison
Dr Henley Harrison
Dr Philippa Harvey-Sutton
Professor Robin Higgs
Dr Yiu-Key Ho
Dr Peter Holman Dr Alan Home
Dr Nigel Hope
Dr Kenneth Howison
Dr Murray Hyde-Page
Dr Peter L Isbister
Dr Anthony Johnson
Dr Lorraine Jones
Dr Sornalingam Kamalaharan
Dr Hari Kapila
Dr Gregory Kaufman
Dr Sikander Khan
Assoc Prof Leon Kleinman
Dr Peter Klug
Dr Edward Korbel
Dr Lana Kossoff
Dr Damodaran Prem Kumar
Dr Sophia Lahz
Dr William Lennon
Dr Keith Lethlean
Dr Michael Long
Dr Ivan Lorentz
Dr William Lyons
Dr David Macauley
Dr Nigel Marsh
Dr Tommasino Mastroianni
Dr Andrew McClure
Dr Gregory McGroder
Dr John D. McKee
Dr Ross Mellick
Dr Roland Middleton
Dr Frank Machart
Dr Wayne Mason
Dr Ross Mills
Dr Michael McGlynn
Dr David McGrath
Dr Ian Meakin
Dr Allan Meares
Prof George Mendelson
Dr Patrick John Morris
Dr Paul Christopher Myers
Assoc Prof Robert Oakeshott
Dr Chris Oates
Dr David Daniel O'Keefe
Dr John O'Neill
Dr Kim Ostinga
Dr Roger Parkington
Dr Julian Parmegiani
Dr Brian Parsonage
Dr Robert Payten
Dr Roger Pillemer
Dr Graham Pittar
Dr Stuart Porges
Dr Thandavan B Raj
Dr Loretta Reiter
Dr Michael Robertson
Dr Michael Rochford
Dr Norman Robert Rose
Dr Tom Rosenthal
Dr Roger Rowe
Assoc Prof Michael Ryan
Dr Avtar Sachdev
Dr Philip Sambrook
Dr Edward Schutz
Dr Joseph Scoppa
Dr James Scougall
Dr Thomas Silva
Dr Andrew Singer
Dr John H Silver
Dr John Sippe
Dr David Sonnabend
Dr Gregory Steele
Dr Michael Steiner
Dr John P. H. Stephen
Dr J Brian Stephenson
Dr Harry Stern
Dr John Robert Strum
Dr Geoffrey Stubbs
Dr Stanley Stylis
Dr Nicholas A Talley
Dr Stuart Taylor
Dr Graham Vickery
Dr Harold Waldman
Dr William Walker
Dr Tai-Tak Wan
Dr George Weisz

Dr John Moore Greenaway
Dr John Harrison
Dr Richard Haber
Dr Steven Ng
Dr Paul Niall
Dr Brian Noll
Dr Kalev Wilding
Dr Peter Sydney Wilkins
Dr Brian Williams

Appendix 3:

MEDIATORS

Robyn Bailey
Geoff Charlton
Marshal Douglas
David Flynn
John Hertzberg
James Kearney
Margaret McCue
John McGruther
Chris Messenger
John Weingarth
Ross Bell
Janice Connelly
Geri Ettinger
David Francis
John Ireland
John Keogh
John McDermott
Garry McIlwaine
Dennis Nolan
Jak Callaway
Jennifer David
Robert Foggo
Nina Harding
Katherine Johnson
Steve Lancken
Ross MacDonald
Janice McLeay
Jennifer Scott

Appendix 4:

MEDICAL APPEAL PANEL APPOINTMENTS

Medical Appeal Panel Approved Medical Specialists

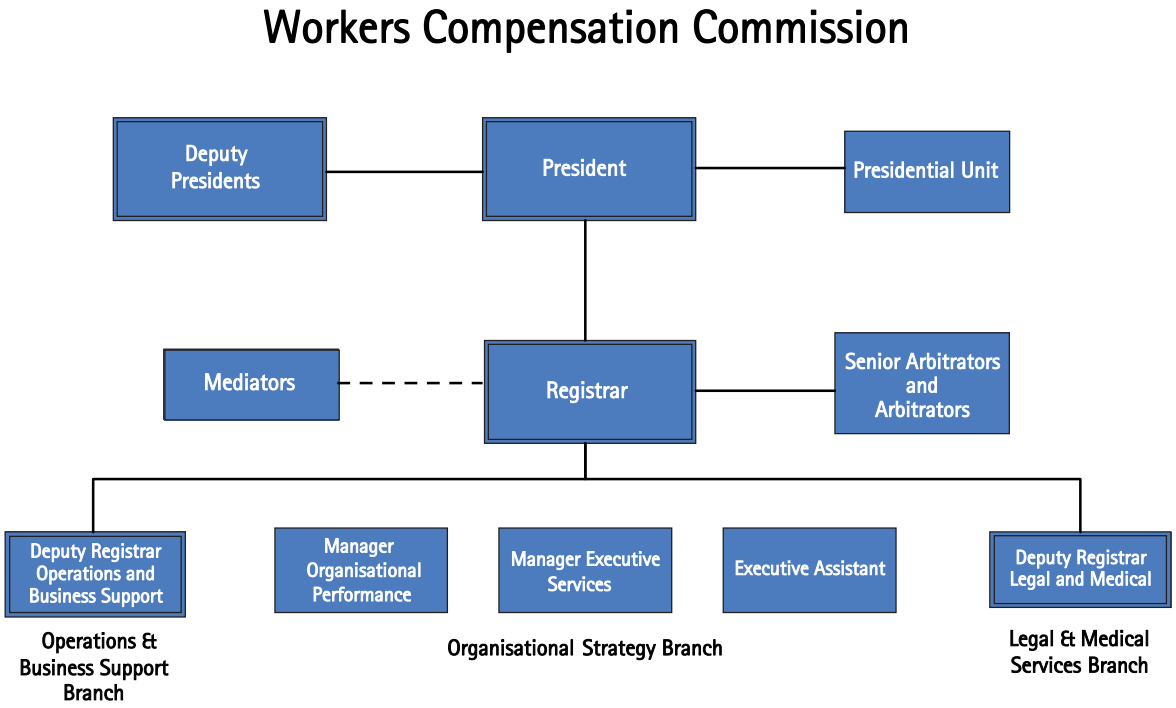
Dr John Ashwell
Dr Robert Breit
Dr Mark Burns
Dr Michael Davies
Dr Robert Gertler
Dr Peter Isbister
Dr William Lyons
Dr Paul Niall
Dr Julian Parmegiani
Dr James Scougall
Dr Graham Vickery
Dr James Bodel
Dr David Bryant
Dr Richard Crane
Dr John Dixon-Hughes
Dr Nicholas Glozier
Dr Lana Kossoff
Dr Gregory McGroder
Dr Brian Noll
Dr Roger Pillemer
Dr Gregory Steel
Dr Brian Williams
Dr Anthony Bookallil
Dr Peter Burke
Dr David Crocker
Dr Michael Fearnside
Dr Philippa Harvey-Sutton
Dr Sophia Lahz
Dr Ross Mellick
Dr Robert Oakeshott
Dr Joseph Scoppa
Dr John Brian Stephenson

Medical Appeal Panel Supplementary Approved Medical Specialists

Dr Peter Anderson
Dr Geoffrey Boyce
Dr Antonio E L Fernandes
Dr John Garvey
Dr Anthony Johnson
Dr Keith Lethlean
Dr Nigel Marsh
Dr Ross Mills
Dr Stuart Porges
Dr Tom Rosenthal
Dr Nicholas Talley
Dr Neil Berry
Dr Michael Delaney
Dr Sylvester Fernandes
Dr Michael Gliksman
Dr Gregory Kaufman
Dr David Macauley
Dr Wayne Mason
Dr Patrick Morris
Dr Thandavan Raj
Dr Avtar Sachdev
Dr Stuart Taylor
Dr Frank Breslin
Dr John Duggan
Dr Susanne Freeman
Dr Scott Harbison
Dr Edward Korbel
Dr Frank Machart
Dr Tommasino Mastroianni
Dr Graham Pittar
Dr Michael Robertson
Dr Harry Stern
Dr William Walker

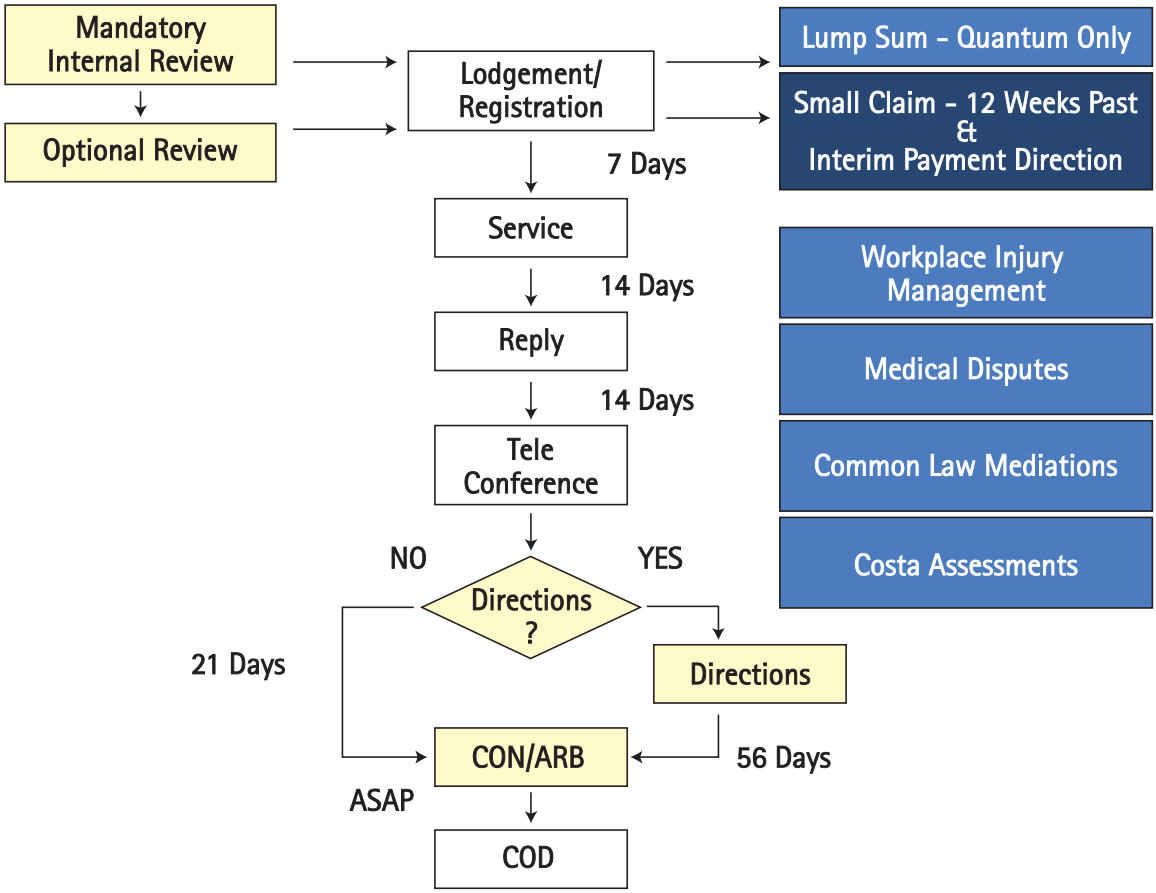
Appendix 5:

WORKERS COMPENSATION COMMISSION ORGANISATIONAL CHART



Appendix 6:

PROGRESS OF A MATTER IN THE WORKERS COMPENSATION COMMISSION



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April 2011

WORKERS
COMPENSATION
COMMISSION