



**WORKERS
COMPENSATION
COMMISSION**

ANNUAL REVIEW 2019/20

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Workers Compensation
Commission

OVERVIEW

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PRESIDENT'S REPORT



It is with great pleasure that I present the 2019/20 annual review. Unfortunately, this year will be seared upon our collective memory for the most unfortunate of reasons. Firstly, there was the severe bushfire season last summer. Almost as soon as the bushfire threat had been bested, the coronavirus pandemic arrived upon our unsuspecting community. The plague initially arrived as a rumour, a thing that normally happens far away from our everyday lives, before completely disrupting our way of life and economy. Before our community knew it, we were involved in an event the likes of which has not occurred in Australia since the arrival of the Spanish flu epidemic immediately after World War I.

The Commission first opened its courts for business in 1926. It has continually served the citizens of New South Wales notwithstanding the Great Depression, World War II, the 1970s oil shock and innumerable other events. This tradition of service through adversity has been continued during the pandemic.

On 23 March 2020, due to the deteriorating public health situation, I made the difficult decision to cease the Commission's in-person operations. Since that time, and at the date of the drafting of this report, the Commission's premises remain closed. Immediately after this decision was made, management, staff and members quickly adapted operations to fully remote working. Since that time, the Commission has laudably dealt with and disposed of its usual caseload. Staff and members are to be congratulated for the manner in which they approached what was, on any view, a significant unplanned change in operations. Injured workers naturally are concerned that their cases be heard promptly and efficiently, and the advent of the pandemic would doubtless have caused concern as to whether they would have to wait for their hearing, or if it would take place at all. Due to the diligence and commitment of all the Commission staff and members, there was no need to adjourn cases. What was previously



The creation of a new commission is a rare event in the New South Wales justice system. The Personal Injury Commission starts not as a greenfield operation but as a combination of two groups of very experienced, highly specialised staff and decision-makers in both jurisdictions.

done in person rapidly transferred to telephone or audiovisual conferences and hearings. For a period it was also necessary to cancel in-person Approved Medical Specialist examinations, due to the risk travel to and attendance at such examinations posed for injured workers and doctors alike. These in-person examinations have recommenced and are accompanied by strict hygiene guidelines for the protection of all involved.

I must say all this has been achieved with the goodwill and cooperation of the legal profession, and in this regard I must pay special tribute to members of the Commission's User Group. Notwithstanding everything going on in their own lives and practices as a result of the pandemic, they were available to confer with me and Commission staff in order to ensure that near-to-normal operations could be maintained. I also pay special thanks to the Presidents of the Bar Association and Law Society of New South Wales for their assistance in what has been a trying time for our whole community.

As at the date of this report it is not known when in-person operations will recommence at 1 Oxford Street. What is known, however, is that the Commission's staff and members, our medical specialists and the legal profession will be able to contend with this challenge for as long as it takes. The combination of our IT system/online portal and the can-do attitude of all involved has seen us through what has been a very difficult year. The pandemic has shown that hearings by audiovisual means are a real alternative to in-person hearings. I can see that in the future, when life hopefully returns to a semblance of normality, the Commission will deploy a suite of hearing options – both in-person

and audiovisual. This will certainly be a benefit for litigants in remote rural areas, who, with this technology, could have their cases heard within the same timeframes as city litigants.

As if the pandemic were not enough to deal with in the one year, significant legislation affecting the Commission's future was considered and passed by the New South Wales Parliament in August 2020. In my report in the 2018/19 Annual Review, I recounted how the Legislative Council Standing Committee on Law and Justice had recommended the consolidation of the workers compensation insurance scheme and CTP insurance scheme dispute resolution systems into a single personal injury tribunal. On 5 August 2020, the New South Wales Parliament enacted the *Personal Injury Commission Act 2020*, and Australia's newest tribunal will open its hearing rooms on 1 March 2021. The new Commission, established in two Divisions – Workers Compensation and Motor Accidents – represents an idea that has been a long time coming. While it is sad that the famous name of the Workers Compensation Commission will pass into legal history, and it is a name that has been a part of the justice system in New South Wales for almost a century, the new Commission will most decidedly be built upon the shoulders of that which has gone before.

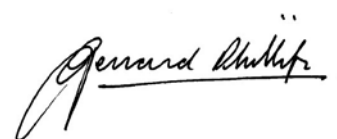
Over the next three to four months we will be welcoming new colleagues as we combine the Workers Compensation Commission and Dispute Resolution Service staff and members into the Personal Injury Commission. It is to be noted that this new Commission was the subject of broad support across the Parliament and from various stakeholder groups. The new Commission starts, therefore, with

much goodwill and support. Its commencement will be marked with a ceremonial sitting on 1 March 2021.

In order to take the steps necessary to establish the new Commission, I have been appointed as its inaugural President. Rod Parsons, the current Registrar of the Workers Compensation Commission, has been appointed as Division Head of the Workers Compensation Division. Marie Johns, the current Principal Claims Assessor within the Dispute Resolution Service, has been appointed as the Division Head of the Motor Accidents Division. These three roles, together with the Executive Director (Principal Registrar), will constitute the executive leadership team of the new Commission.

The creation of a new commission is a rare event in the New South Wales justice system. The Personal Injury Commission starts not as a greenfield operation but as a combination of two groups of very experienced, highly specialised staff and decision-makers in both jurisdictions.

The past year, therefore, has been one of adversity and change. Notwithstanding multiple challenges, we have continued to serve the injured workers of this state and determine their cases in accordance with law. This ethos of service will be foundational for the success of the new Commission.



Judge Gerard Phillips
President
Workers Compensation Commission
Sydney
September 2020

ACHIEVEMENTS DURING THE YEAR



7,201

dispute applications
registered



7,201

dispute applications
finalised



3,949

telephone
conferences



1,814

conciliation/
arbitration hearings



1,736

medical
assessments



1,491

mediation
conferences



91%

resolution of Form 2
Applications without a
formal determination



68%

settlement of work injury
damages cases that
proceeded to mediation

**Published
Decisions**



81 Presidential
408 Arbitral
224 Medical Appeal




Workers Compensation
Commission

VALE LINDA ASHFORD (1941–2020)



On Friday 19 June 2020, her Honour Acting Justice Linda Ashford died suddenly when returning to her home in Sydney after presiding over a criminal trial in the Supreme Court of the ACT earlier that day.

Her passing, so unexpected as it was, has shocked and saddened her many friends and colleagues.

Those of us who had the privilege of knowing her knew Linda as a kind, caring and compassionate person. If you were one of the lucky ones Linda befriended, you had a friend for life – a friend who cared deeply and showed genuine and sustained interest in your health and welfare and that of your family.

Her Honour was born in Sydney. Her father was an army officer and her mother a stay-at-home mum. She lived her entire life in the family home in Annandale in Sydney, which she shared with her sister Carol.

Notwithstanding her many achievements in life, her Honour remained very grounded. She had a huge presence in the local community and dined regularly with her neighbours and friends.

Her Honour's achievements were many and varied. After completing her schooling, at Fort Street Girls' High School in Millers Point, New South Wales, she trained as an obstetrics nurse at the Royal Prince Alfred Hospital before going on to study midwifery at Hornsby Hospital.

After completing her nursing studies, her Honour travelled extensively around Europe during the mid-60s. This included a stint working as a nurse at St Thomas' Hospital in London. In the late 1960s her Honour returned to Australia, where she decided to study law. Little did she know that she was about to embark on a career to which she would devote the rest of her professional life.

”

Her Honour will be remembered as an intelligent, fair and compassionate Judge. Her judgments were well reasoned and well written and were rarely interfered with on appeal. She was courteous, to a fault, to practitioners who appeared before her. No matter how wanting a case may have been, you could always be guaranteed a fair hearing in Judge Ashford's court. She will be greatly missed by us all.

While her Honour was completing her law degree, she worked as a law clerk for a number of firms, including Maurice May and McClellands. It was at McClellands in the late 1970s that Linda and I first met and became firm friends, a friendship that endured until her untimely passing.

After her admission as a solicitor in 1984, her Honour commenced working for Taylor and Scott, where she soon became an associate partner.

In 1987, her Honour was appointed one of the inaugural Commissioners of the Compensation Court of New South Wales. In September 1997, she was appointed a Judge of the Compensation Court, being one of the first females to have served on the Court.

In 2003, the Compensation Court of New South Wales was abolished. Together with her fellow Judges, her Honour was then appointed a Judge of the District Court of New South Wales, where she served, with distinction, until her retirement in 2013. Although prior to her appointment to the District Court her Honour had focused on civil work, she quickly mastered the intricacies of criminal law and was soon comfortable sitting in either jurisdiction.

Her Honour was active in an array of interests in the legal and wider community. These included her roles as a member of the education and house committees of the District Court, a member of the University of Technology Sydney faculty Board, and foundation trustee of the UTS alumni foundation.

Her Honour's charitable works included her membership of the Board of Rainbow Lodge, a not-for-profit organisation which provides transitional housing and support services to men re-entering the community after a period of incarceration.

A prodigious worker, her Honour could not settle into complete retirement. Appointments offered to her to sit as an Acting Judge in the District Court of New South Wales, an Acting Judge of the Supreme Court of the ACT, and an Arbitrator in the Workers Compensation Commission of New South Wales were all too appealing to refuse. She accepted all of them and spent her remaining years working in each of those jurisdictions at various times – not because she needed to but because she loved the work and the camaraderie that went with it.

Outside the law, her Honour had many interests. In particular, she was an avid theatregoer and for many years enjoyed the company of a group of close friends attending regular performances of the Sydney Theatre Company. She also regularly attended the Australian Opera.

It is well known among her family and friends that her Honour adored animals and cherished her two labradors, Bella and Hugo. She was also in the practice of fostering rescue dogs, mainly labradors.

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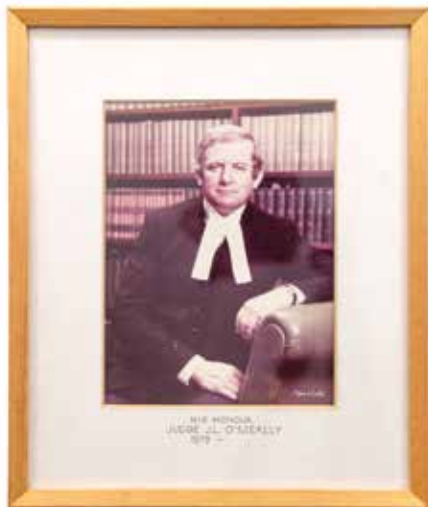
The Hon Greg Keating

Retired Judge and former President of the Workers Compensation Commission





A MEMOIR OF THE FIRST WORKERS COMPENSATION COMMISSION



The Hon J L O'Meally AM RFD'

Judge Phillips has asked me to write a few lines in anticipation of the dissolution of the Workers Compensation Commission and the creation of the Personal Injury Commission. He did suggest something in the 'Ad multos annos' vein would be appropriate.

Having given the matter a little consideration, I thought to refer to some whose names appear in the Workers Compensation Reports and the Compensation Court Reports, either as advocates or judges, who are no longer with us, and some still alive. In this exercise it will be easier to write in the 'De mortuis nil nisi malum' vein.

The first thing to notice is the contribution made by so many to the law and to Australian society. Many of them are, however, now forgotten or unknown names, but in their day they were leaders of the Bar and of the Bench. Of those whose names appear in the Reports, Jock McClemens, Wilfred Collins, Colin Begg, Tony Larkins, Jack Slattery, Peter McNerney, Jeremy Badgery-Parker, Michael Grove, Michael Campbell, John Brownie, Hal Sperling, Peter Newman, Alan Abadee, Tim Studdert, David Kirby, John Hislop, Cliff Hoeben and Peter Hall became judges of the Supreme Court.

Sir Gordon Wallace and Michael Kirby each became Presidents of the Court of Appeal. Others appointed to the Court of Appeal were John Dashwood Holmes, Harold Glass, Gordon Samuels and Jerrold Cripps. Wallace used to sit on the bench with a magnifying glass held in front of his face, which tended to enlarge its most prominent feature, his nose. Upon sitting down, Holmes would have his tipstaff place a rug over his knees. He had a face which

had volcano-like rifts and a sallow complexion, the colour of death.

Apart from Sir John Kerr (one-time Chief Justice of New South Wales), there were two other Vice-Regents: Sir William Deane (one-time Justice of the High Court of Australia) and Gordon Samuels (one-time Judge of Appeal). Two, Michael Kirby and Michael McHugh, left the Court of Appeal to become Justices of the High Court of Australia. Lionel Murphy's name appears in the Reports and he, too, became a Justice of the High Court. Greg Sullivan became Solicitor-General of New South Wales; Maurice Byers became Solicitor-General of Australia. Trevor Morling and Marcus Einfeld became judges of the Federal Court. Phil Head, who had been a prisoner of war in Changi, became a judge of the District Court. Les Downs and Fred Kirkham also became judges of the District Court.

A H Colon was the brother of Alf Colon, who established the Directorate of Research and Civil Affairs, which advised General Blamey during World War II. The Directorate became ANGAU, the Australia New Guinea Administrative Unit, which set policy for post-war development of Papua New Guinea. Its members included John Kerr, Hal Wootten (who became a judge of the Supreme Court) and the poet James McAuley, who, with Harold Stewart, was responsible for the Ern Malley literary hoax, two of whose victims were Max Harris and the artist Sidney Nolan.

Dr Helmore, one of the founders of the firm Sparke Helmore, wrote the text on Real Property. As there were Queen's Counsel, he agitated for the creation of Queen's Solicitors. Another solicitor of note was Doug Hawke. He was a solicitor advocate

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who had a propensity to write humorously offensive letters to opponents.

When I was appointed to the Commission in 1979, there were 10 other judges. All but three – Frank McGrath, Michael Campbell and Harry Bauer – are now dead. In 2003, when the Compensation Court – the successor to the first Commission, created in 1926 – was dissolved, there were 15 judges, five acting judges and three Commissioners.

I succeeded Colman Wall, who had the best and most equable judicial temperament of any judge before whom I had ever appeared. He was a great bushwalker and had walked through most parts of New South Wales. He also had a profound interest in Australian history and was a member of the Council of the Royal Australian Historical Society.

After graduating in Arts and Law, John Williams travelled to the UK. He would delight his colleagues in the judges' common room, recounting events of his cycling journeys through the English countryside and his visits to and conversations with the writers Alistair Cooke and Evelyn Waugh.

Williams had prosecuted the Ambon War Crimes Trials following World War II. He did not speak of the war until he retired. He then re-enrolled at the University of Sydney and obtained an MA in history writing about those prosecutions. Later, a film, *Blood Oath*, was made with Bryan Brown playing the part of Williams. It re-enacted events before, during and after the trials. In one scene, no doubt introduced only to add spice to the plot, he was on a beach having it off with a nurse from the soldiers' hospital. At the

reception after the premiere, John's wife took to him: "You never told me about her", she said.

Williams had a most convoluted style of speaking. In any sentence, clauses would qualify clauses, and many floated. After the premiere of *Blood Oath*, I was speaking with Bryan Brown, who told me Williams had visited the set and addressed the cast. Brown said: "He's the most brilliant man I've ever met." I asked what led him to that view. "When he spoke to us, I couldn't understand a word he said."

Williams was an early member of the Australian Army Legal Corps, a number of whose officers attended his obsequies at St John's College at Sydney University, in full uniform.

Bill Gibson, a Judge of the Commission, also travelled to the UK after completing his studies. He travelled with one of his friends who, like him, had grown up in Mullumbimby on the north coast of New South Wales. They were in the UK when war was declared and both joined the Royal Air Force. His friend distinguished himself and was awarded the Distinguished Flying Cross. He was invited to the Palace to receive it from the King. As it was pinned on his chest the King asked: "Where do you come from?" "I come from Mullumbimby, Your Majesty", he replied. "Oh", said the King, "Where is that?" "Ah, Your Majesty, I think the best way to explain it is to say it's halfway between Billinudgel and Myocum." Gibson always gave this same description of the place of his youth.

Gibson used to travel on circuit with a portable barbeque in the boot of his car and, when the opportunity arose and circumstances permitted, he would stage a get-together with

counsel and solicitors involved in the circuit. He also had an interest in horse racing. There is an apocryphal story that he kept abreast of events on the track while he was in court by placing a transistor radio in the inside pocket of his bar jacket and threading the cord to the earpiece through his left sleeve. The earpiece was said to be secreted in his left ear by his left hand. There was said to be an occasion when a sudden movement of his left arm caused the cord to be pulled from the radio, which made the broadcast audible, letting everyone in court know who had won the fifth at Randwick.

Noel Westcott had an extraordinary medical knowledge. At the Bar, he was the most effective cross-examiner of doctors I ever observed. He sometimes reduced doctors who propounded dubious opinions to quivering masses of protoplasm.

Kevin Coleman was a saintly man. He retired early from the Bench and worked on a voluntary basis for the St Vincent de Paul Society until the illness from which he died prevented it. He said the law had been good to him and provided a comfortable living. He thought he should repay the debt.

Tom Falkingham was a natty dresser, but his chambers were the untidiest I'd ever seen. When he died, he was part heard in more than 200 cases.

My friend Jim Poulos once came into court to appear, but without a wig. In accordance with the old custom invoked when counsel are incompletely robed, I said to him: "Mr Poulos, I cannot see you." "You cannot see me, Your Honour?" he replied. "No, Mr Poulos, I cannot see you." Poulos then cocked a snoop – put his left thumb onto the side of the palm of his right hand and his

right thumb on his nose. He then wiggled both hands and blew a raspberry. The court adjourned until composure was restored.

My life on the bench changed with the appointment of Brian Moroney; after Frank Liddy, Moroney was the second New South Wales solicitor to be appointed to the Bench. He moved to Sydney from Newcastle, where he had a thriving personal injury practice. He would say outrageous things in court, never malicious, and recount them in the judges' common room. When Michael Campbell refused to believe anyone would say such things in court, Moroney would produce a transcript, often manufactured, to show it to his colleagues as evidence of what had been said. He played the piano by ear and enlivened many a circuit dinner with music and song.

As a solicitor, Brian Moroney briefed Horrie Millar to do his workers compensation cases. When Brian ultimately returned to Newcastle on circuit, Horrie was apprehensive about running a case in front of him. A series of reasons was advanced, the last of which was that his client was so ill that he couldn't travel. "Well", said Moroney, "I'll direct an ambulance be sent for to bring him to court." "Ah", said Horrie, "It was not so long ago that Your Honour was chasing ambulances. Now you command the whole fleet."

Horrie was Australia's Rumpole. He had graduated with first-class honours in mathematics and philosophy. Like Rumpole, he had an encyclopaedic knowledge of the poetry of Wordsworth. Unlike Rumpole, he did not wear a bow tie, and his tie was a calendar of his breakfasts for the preceding three

months. It was not always his own wig he wore in court and there were instances of a wig being removed from his head by its owner while Horrie was on his feet. He once told me he regretted there were no longer eccentrics at the Bar.

Horrie Millar was also a hypochondriac and always close to death. When John Williams died, Horrie phoned Brian Moroney to console him on the loss of his friend and colleague. During the course of the conversation he said of John: "Of course, he was not nearly as sick as I am."

Besides Horrie Millar, there are two other advocates who should be mentioned. They are Jim Baldock and Ron Hotchkiss. Jim was a bachelor and, going on what he said every day in court, he spent every evening and until 3.00 am reading



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A MEMOIR OF THE FIRST WORKERS COMPENSATION COMMISSION

briefs in cases which were never ready to proceed. He was reputed to be a gardener of some note, but, if his assertions were true, his work in chambers would have left little time to work in the garden. The shelves in Ron's chambers were stocked with bottles of wine rather than books. His taste in wine was more sophisticated than his taste in clothes. When Michael Campbell was leaving the Compensation Court to go to the Supreme Court, he spoke at a farewell. He remarked: "I have appeared against Your Honour in many cases at the bar, and some after your appointment to the bench."

Dinners were a common feature of circuits of both the first Commission and the Compensation Court. The number of musicians among the compensation practitioners ensured the dinners were lively affairs. On the rare occasions the list was disposed of before lunch, usually by settlements, picnics were sometimes held with country and city practitioners all joining in. Circuits were welcome throughout the state, particularly by politicians. A swag of money was often left behind which aided provincial economies.

Before the first iteration of the Workers Compensation Commission was dissolved, the Commission was responsible for supervising most aspects of workers compensation. The Commission licensed insurers and heard applications to disqualify them, issuing policies where conduct warranted such action. The Insurance Premiums Committee, over which the Chairman of the Commission presided, regulated the costs of premiums.

Submissions that there should be one body dealing with all aspects of compensation for personal injury were often made, but not accepted by Government. The changes consequent upon creation of the Personal Injury Commission are welcome and, in my opinion, a step on the way to further rationalising compensation for personal injury.

1 Judge, Workers Compensation Commission 1979–1984. Judge, Compensation Court 1984–2003. Member, President, Dust Diseases Tribunal 1989–2011.



The Hon J L O'Meally AM RFD¹

Past Heads of the Workers Compensation Commission and Compensation Court of New South Wales

His Honour Judge R J Perdriau – Chairman, Workers Compensation Commission 1926–1951

His Honour Judge A C Conybeare QC – Chairman, Workers Compensation Commission 1951–1972

His Honour Judge C C Langsworth – Chairman, Workers Compensation Commission 1972–1982

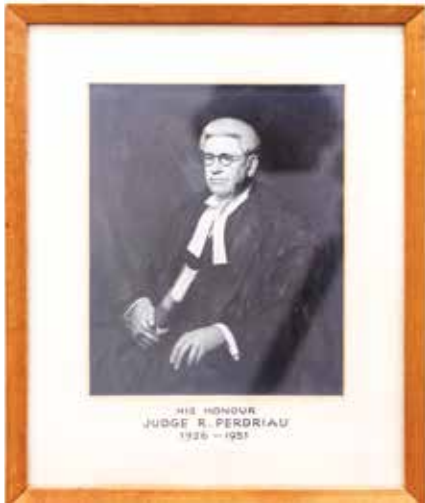
His Honour Judge F R McGrath OBE – Chairman, Workers Compensation Commission 1982–1984, Chief Judge, Compensation Court of New South Wales 1984–1993

The Hon Justice M W Campbell QC – Chief Judge, Compensation Court of New South Wales 1994–2003

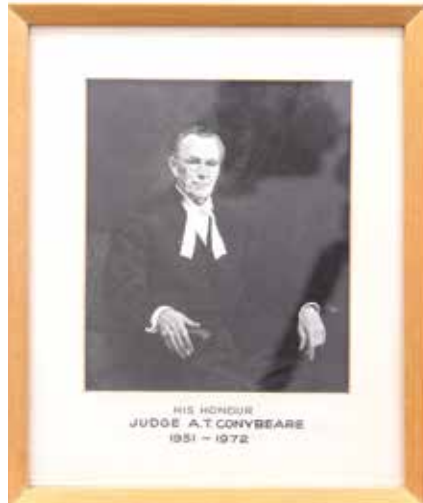
The Hon Justice T W Sheahan AO – President, Workers Compensation Commission 2002–2007

His Honour Judge G M Keating – President, Workers Compensation Commission 2007–2018

His Honour Judge G M Phillips – President, Workers Compensation Commission 2019–2021



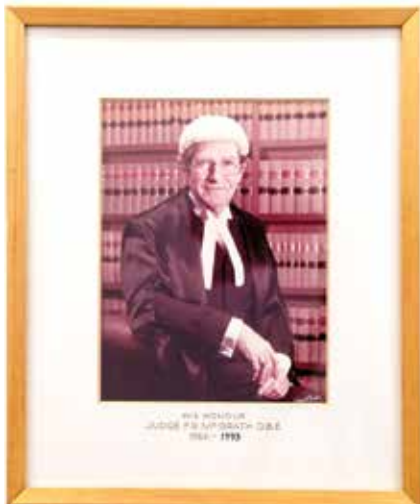
His Honour Judge R J Perdriau – Chairman, Workers Compensation Commission 1926–1951



His Honour Judge A C Conybeare QC – Chairman, Workers Compensation Commission 1951–1972



His Honour Judge C C Langworth – Chairman, Workers Compensation Commission 1972–1982



His Honour Judge F R McGrath OBE – Chairman, Workers Compensation Commission 1982–1984, Chief Judge, Compensation Court of New South Wales 1984–1993



The Hon Justice M W Campbell QC – Chief Judge, Compensation Court of New South Wales 1994–2003



The Hon Justice T W Sheahan AO – President, Workers Compensation Commission 2002–2007



His Honour Judge G M Keating – President, Workers Compensation Commission 2007–2018



His Honour Judge G M Phillips – President, Workers Compensation Commission 2019–2021



ABOUT THE COMMISSION

Our Role

The Workers Compensation Commission is an independent statutory tribunal within the justice system of New South Wales.

The Commission's primary function is to resolve workers compensation disputes between injured workers and their employers. The Commission also facilitates the resolution of disputes in work injury damages claims through mediation.

The Hon Victor Dominello MP, Minister for Customer Service, is the Minister responsible for the administration of workers compensation legislation, except the appointment of members, which falls to the Attorney General.



Hon Victor Dominello MP

Our Objectives

The Commission's objectives are to:

- Provide a fair and cost-effective system for the resolution of disputes;
- Reduce administrative costs;
- Provide a timely service;
- Provide an independent dispute resolution service that is effective in settling disputes and leads to durable agreements;
- Create a registry and dispute resolution service that meets expectations in relation to accessibility, approachability and professionalism; and
- Establish effective communication and liaison with interested parties.

In exercising their functions, members of the Commission must have regard to these objectives.

Our Functions

Workers compensation disputes are usually resolved by informal conciliation conferences conducted by telephone and/or in person. If a dispute cannot be resolved by conciliation, the Commission will hold a formal arbitration hearing and will decide whether a claim should be paid and the extent of any entitlement to workers compensation benefits.

When required to decide a dispute, the Commission aims to provide fast,

consistent and durable outcomes. A summary of significant decisions in 2019/20 is set out in Appendix 4.

In-person conciliations and arbitration hearings, referred to as con/arbs, are held in Sydney and other locations throughout New South Wales. Con/arbs will usually be held at locations convenient to injured workers. However, due to the COVID-19 pandemic, all con/arbs were held via teleconference from 23 March to the end of the reporting period.

The Commission continues to be effective in resolving disputes in a timely manner. The Commission's new digital service delivery platform has assisted in improving the timely exchange of information.

The Commission encourages the early exchange of information and open communication between parties. Most parties are legally represented, and an interpreter is provided if required to assist a worker.

Relevant Legislation

- *Workers Compensation Act 1987* (1987 Act);
- *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act);
- *Workers Compensation Regulation 2016* (2016 Regulation);
- *Workers Compensation Commission Rules 2011* (2011 Rules).

OUR PEOPLE



Our Members

As at 30 June 2020, the Commission was comprised of:

- Judge Gerard Phillips, President;
- Michael Snell and Elizabeth Wood, Deputy Presidents;
- Larry King SC and Geoffrey Parker SC, Acting Deputy Presidents;
- Rodney Parsons, Registrar;
- Glenn Capel and Josephine Bamber, Senior Arbitrators;
- 5 full-time and 18 sessional Arbitrators (see Appendix 1).



President and Deputy Presidents

As head of the Commission, the President works closely with the Registrar in a strategic leadership role and is responsible for the general direction and control of the Deputy Presidents and the Registrar.

Presidential members hear appeals in relation to errors of fact, law or discretion against decisions made by Arbitrators. Appeals against Presidential members in point of law go to the New South Wales Court of Appeal.

The President is also responsible for determining novel or complex questions of law, applications to strike out pre-filing statements in work injury damages disputes, and administrative functions such as issuing Practice Directions.

Registrar

The Registrar manages the Commission's operations and is responsible for the general direction and control of Commission staff, Arbitrators, Mediators and Approved Medical Specialists.

The Registrar provides high-level executive leadership and strategic advice to the President on the Commission's resources, including human resources, budget, asset management, facilities and case management.

In addition to operational responsibilities, the Registrar may exercise all the functions of an Arbitrator.

Senior Arbitrators and Arbitrators

Through conciliation, Senior Arbitrators and Arbitrators work with parties to explore settlement options and outcomes and attempt to find an acceptable solution for all. If a dispute is not settled through conciliation, the Arbitrator can make a binding determination following a formal arbitration hearing.

Medical Appeal Panels, made up of one Arbitrator and two Approved Medical Specialists, determine appeals against assessments by Approved Medical Specialists.

Senior Arbitrators also have strategic responsibilities and are involved in the professional development and mentoring of Arbitrators.

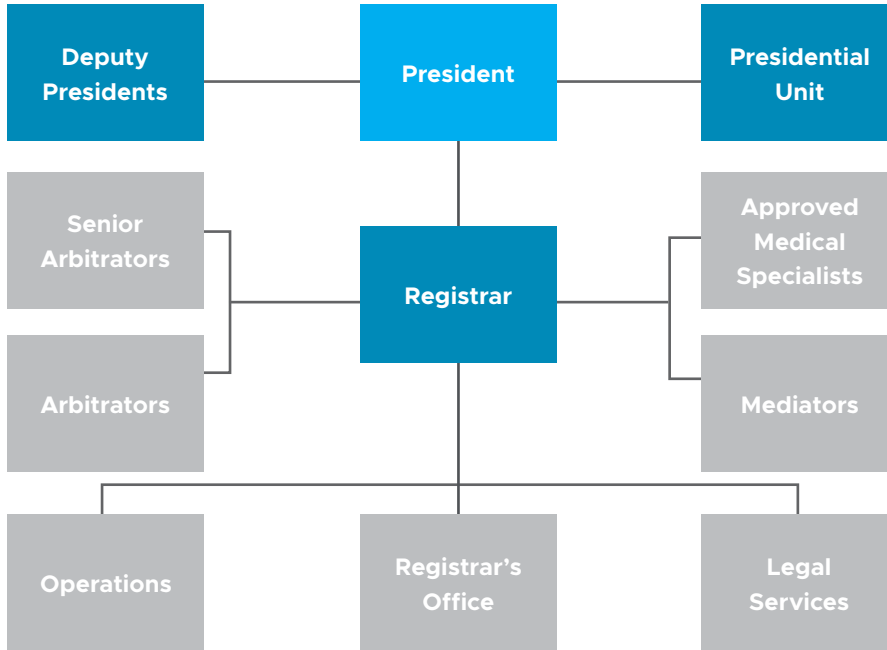
Our Staff

The Commission has two senior executives – Director Operations and Director Legal Services – and 59 non-executive staff across four business areas:

- Operations Branch;
- Legal Services Unit;
- Registrar's Office;
- Presidential Unit.



Organisation Structure



Operations Branch

The Director Operations leads staff in the provision of Registry Services, Dispute Services, Operations Improvement and Administrative Support. The branch provides registry services, case management services, Arbitrator, Mediator and Approved Medical Specialist support, and process improvement initiatives. The Director Operations is also part of the Commission's executive committee and holds an Arbitrator appointment.

Registry Services staff are the first point of contact for workers, insurers, legal representatives and the public. The unit manages the call centre, mailroom, registration of dispute applications process and information exchange process, as well as concierge functions for the Commission's hearing rooms in its Darlinghurst premises. Concierge functions were ceased while face-to-face conferences were suspended. The unit is also responsible for

maintaining the Commission's research library and managing file archives and sound recording processes.

Dispute Services staff are responsible for case management of workers compensation and work injury damages disputes and make interim decisions to effectively progress matters through the Commission. The unit refers medical disputes to Approved Medical Specialists for assessment and manages medical appeals.

Operations Improvement staff are responsible for service improvement projects across Registry Services and Dispute Services, maintaining business processes and procedures, and managing audit and risk within the operational areas.

Administrative Support staff work closely with the Director Operations and Arbitrators to provide administrative support.

OUR PEOPLE

Legal Services Unit

The Director Legal Services leads a team of legal staff who provide professional services to the Commission and stakeholders. The Director Legal Services is also part of the Commission's executive committee and holds an Arbitrator appointment.

Legal services include the statutory decision-making functions of the Registrar, providing legal advice to members and staff, responding to legal enquiries from the public and the legal profession, updating the Commission's **Arbitrator Practice Manual** and **Approved Medical Specialist Practice Manual**, publishing a weekly case summary, and issuing the external publication entitled **On Review**. **On Review** is available on the Commission's website (www.wcc.nsw.gov.au).

Statutory decision-making functions include:

- Expedited assessments;
- Assessing the merit of medical appeal applications;

- Costs assessments;
- Curing defective pre-filing statements;
- Disputes regarding access to information and premises;
- Conduct money/production fees; and
- Case preparation of applications in respect of the death of a worker.

Registrar's Office

The Registrar's Office is responsible for planning, strategy, organisational development and corporate services.

Office of the Registrar staff provide general support to the Registrar, including coordinating responses to Ministerial correspondence and government agency and stakeholder enquiries, and coordinating presentations to internal and external stakeholders and other interested groups.

The office is also responsible for managing the budget cycle,

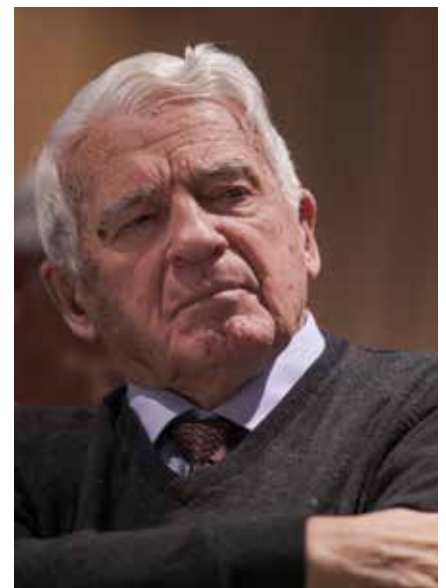
providing timely and accurate organisational data, and managing risk and audit functions.

The **Business Support Unit** is within the Registrar's Office and its staff provide corporate support services, including delivery of information services, data analysis of performance, people capability development, project management and facilities management.

Presidential Unit

Presidential members are supported by dedicated staff who provide administrative support, legal research, and case management of appeals and other matters.

Staff prepare a regular online publication entitled **On Appeal** which summarises Presidential, New South Wales Court of Appeal and High Court decisions. The summaries provide a snapshot of the facts, legal principles and reasons involved in appeal cases. **On Appeal** is available on the Commission's website (www.wcc.nsw.gov.au).



OUR PARTNERS

Approved Medical Specialists

Approved Medical Specialists are highly experienced medical practitioners from a range of medical specialties. They assess workers in relation to medical disputes, including assessing the degree of permanent impairment resulting from work-related injuries.

Medical assessments are conducted throughout New South Wales, or by video in appropriate circumstances.

Approved Medical Specialists also sit on Medical Appeal Panels.

As at 30 June 2020, there were 107 Approved Medical Specialists who held appointments with the Commission (see Appendix 2).

Mediators

Mediation of work injury damages disputes by Commission-appointed Mediators is mandatory before injured workers can commence court proceedings.

Mediators will attempt to bring the parties to agreement through mediation conferences, which are conducted in Sydney and in regional New South Wales locations. However, due to the COVID-19 pandemic, all mediation conferences were held via teleconference from 23 March to the end of the reporting period.

If the parties are unable to reach an agreement at mediation, the injured worker may then commence court proceedings.

As at 30 June 2020, there were 26 Mediators who held appointments with the Commission (see Appendix 3).

Our Dispute Pathways

Each day, the Commission deals with a wide range of disputes, including:

- Legal issues regarding whether a worker is entitled to compensation;
- Entitlement to and the amount of:
 - Weekly compensation payments;
 - Medical, hospital, rehabilitation and related expenses;
 - Lump sum compensation for permanent impairment;
 - Compensation for the death of a worker;
 - Domestic assistance;
 - Damage to artificial aids and clothing;
- Work capacity disputes;
- Whether compensation benefits should be paid if a worker no longer lives in Australia;
- Workplace injury management disputes;
- Entitlement to interest on compensation benefits;
- Apportionment of compensation payments if more than one injury;
- Review of weekly compensation entitlements (exempt workers only);
- Refunding of weekly compensation;
- Whether compensation is to be reimbursed to the Nominal Insurer;
- Disputes regarding return to work, including education and retraining;
- Applications to strike out pre-filing statements;
- Applications to cure defective pre-filing statements;
- Question of law applications;
- Applications for certificates to recover amounts ordered to be paid;
- Applications for access to information and premises;
- Applications for an order for costs (exempt workers only);
- Assessments of legal costs entitlements and apportionments (exempt workers only).

Disputes are triaged according to the type of claim, the amount of compensation, and/or the intended remedy. There are four main dispute pathways:



Expedited assessments



Legal disputes



Medical disputes



Work injury damages disputes



Expedited assessments

This dispute resolution process is designed to resolve disputes quickly and efficiently. Disputes for weekly compensation benefits up to 12 weeks and/or medical expenses compensation up to \$9,590.10 (as at 30 June 2020) are fast-tracked to a teleconference before a delegate of the Registrar. Disputes regarding work capacity and injury management are also expedited in this way. The teleconference is held 14 days from the date of lodgement of the dispute, and most disputes are resolved at this stage.

The parties are almost always legally represented in expedited assessments, and insurers are encouraged to attend.

Workplace injury management disputes allow the parties to openly discuss appropriate steps to return an injured worker to meaningful employment. A delegate may refer a workplace injury management dispute to an injury management consultant for independent assessment.

If a dispute is not otherwise resolved at the teleconference, the delegate issues an interim payment direction or recommendation within 14 days of the teleconference. This decision is binding.

Either party can apply for a review of a delegate's decision and, in some cases, may be able to make an internal appeal to a Presidential member.



Legal disputes

Disputes for weekly compensation exceeding 12 weeks, medical and related expenses compensation exceeding \$9,590.10 (as at 30 June 2020) and all other compensation types are listed for teleconference before an Arbitrator 28 days from the date the dispute is lodged. If the matter does not resolve at teleconference, the Arbitrator will list the matter for a combined in-person conciliation conference and arbitration hearing (con/arb) – within three weeks if the matter is ready to go ahead or up to eight weeks if third-party documents (e.g. medical records) are required to be produced before the Commission.

Arbitrators must use their 'best endeavours' (as stated in the 1998 Act) to bring the worker and employer to agreement. An Arbitrator will attempt to resolve the dispute during the teleconference and the in-person conciliation phase.

If the matter does not resolve during the in-person conciliation phase, the Arbitrator will begin an arbitration hearing. The arbitration hearing is sound-recorded, and a written or oral decision is issued within 21 days of the hearing.

Either party may appeal to a Presidential member against an Arbitrator's decision for error of fact, law or discretion.



Medical disputes

Medical disputes, mostly concerning the degree of permanent impairment resulting from an injury, are generally referred to Approved Medical Specialists (AMs) for assessment. In certain circumstances, disputes concerning an entitlement to compensation for permanent impairment will be referred to an Arbitrator for conciliation and possible determination.

Medical assessments are held approximately 35 days from the date of lodgement of the dispute, with assessment certificates issued within 14 days thereafter.

A party may appeal against an assessment of permanent impairment through an internal appeal to a Medical Appeal Panel (comprised of an Arbitrator and two Approved Medical Specialists). An appeal may proceed only if the Registrar's delegate is satisfied, on the face of the application and any submissions, that at least one of the grounds for appeal has been made out.



Work injury damages disputes

Workers must participate in mediation in the Commission before court proceedings can be started for work injury damages. Mediators must use their 'best endeavours' (as stated in the 1998 Act) to bring the worker and employer to agreement.

After the application by the worker and the response by the employer are received, the parties are requested to agree on a date for a Mediation Conference, to take place within 28 days. When a date is agreed, the matter is allocated to a Mediator.

Mediators attempt to bring the parties to a negotiated settlement. If, however, the parties fail to reach agreement at mediation, the Mediator will issue a Certificate of Final Offers, and the worker may then begin court proceedings.

The Commission is also responsible for resolving pre-trial disputes relating to:

- The threshold for entitlement to work injury damages;
- Defective pre-filing statements;
- Directions for access to information and premises;
- Pre-filing strike-out applications.



APPEALS

Arbitral Appeals

A party to a dispute about compensation may appeal against an Arbitrator's decision. The appeal is referred to the President or a Deputy President of the Commission for determination.

Arbitral appeals are limited to whether the decision appealed against was affected by any error of fact, law or discretion, and to the correction of such error. It is not a new hearing.

An arbitral appeal must be made by application to the Registrar and will not go ahead unless the Registrar is satisfied that it complies with relevant procedural requirements. Leave must be sought to appeal against a decision that is not a final decision in the dispute.

Presidential members may determine appeals 'on the papers' if they are satisfied that sufficient written information has been supplied in connection with proceedings, or after a telephone conference or formal hearing.

An Arbitrator's decision may be confirmed or revoked. If revoked, a new decision may be made in its place or, alternatively, the dispute may be allocated to a new Arbitrator for re-hearing.

Determinations by Presidential members may be appealed in point of law to the New South Wales Court of Appeal.

Medical Appeals

A party may appeal against a medical assessment concerning permanent impairment on four grounds:

- Deterioration of the worker's condition;
- Availability of additional relevant information;
- Incorrect criteria;
- Demonstrable error.

The Registrar, or delegate, must be satisfied that a ground of appeal is made out before referring the matter to a Medical Appeal Panel, comprised of an Arbitrator and two Approved Medical Specialists. The Registrar may also refer the matter to an Approved Medical Specialist for further assessment, as an alternative to an appeal, or reconsideration of the original assessment.

The Medical Appeal Panel determines whether further submissions are required, whether the worker needs to be re-examined by a panel member, and/or whether an assessment hearing is required to allow the parties to make oral submissions to the Appeal Panel. Alternatively, appeals may be dealt with 'on the papers' if the Panel is satisfied that sufficient written information has been supplied in connection with proceedings, without holding any conference or formal hearing.

The Medical Appeal Panel may confirm the original medical assessment or revoke the assessment and issue a new Medical Assessment Certificate in its place.

Decisions of Medical Appeal Panels are binding but are subject to judicial review by the New South Wales Supreme Court.




Workers Compensation
Commission

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OUR PERFORMANCE

KEY PERFORMANCE INDICATORS

The Commission has two critical key performance indicators (KPIs): achieving timeliness in dispute finalisation and ensuring the durability of outcomes. Both these KPIs are closely monitored.

During the year, there has been improvement in the percentage of disputes resolved within three months for disputes resolved without an appeal. The resolution

rates for disputes resolved within six, nine and 12 months have essentially been maintained. Overall, this has led to a reduction in the average number of days to finalise these matters.

There has also been improvement in the percentage of disputes resolved within three months for disputes resolved where one of the parties has appealed against the decision of

an Arbitrator or an assessment by an Approved Medical Specialist.

The resolution rates for disputes with an appeal resolved within six, nine and 12 months have, again, essentially been maintained.

Decisions made by Arbitrators and assessments made by Approved Medical Specialists continue to be durable, with low revocation rates.

Timeliness	Target	2017/18	2018/19	2019/20
% of dispute applications resolved (no appeal):				
• 3 months	45%	61%	65%	69%
• 6 months	85%	94%	95%	95%
• 9 months	95%	99%	99%	98%
• 12 months	99%	100%	99%	99%
Average days to resolution for dispute applications with no appeal	105	91	87	85
% of dispute applications resolved (with appeal):				
• 3 months	40%	55%	59%	62%
• 6 months	80%	87%	88%	88%
• 9 months	94%	95%	96%	95%
• 12 months	98%	98%	98%	98%
Average days to resolution for dispute applications with an appeal		109	105	103
Average days to resolution of arbitral appeals	112	95	106	164
Average days to resolution of medical appeals	100	89	78	76
% of expedited assessments resolved within 28 days	90%	79%	80%	85%
Durability	Target			
% of determined dispute applications revoked on appeal ¹	< 15%	6%	5%	6%
% of Medical Assessment Certificates revoked on appeal ²	< 15%	6%	7%	8%

1. This KPI represents the number of arbitral decisions revoked expressed as a percentage of the total number of appellable arbitral decisions (i.e. excluding section 66 determinations).

2. This KPI represents the number of Medical Assessment Certificates revoked by a Medical Appeal Panel expressed as a percentage of the total number of Medical Assessment Certificates issued.

Total Registrations

The table below shows the number of applications registered

by the Commission for the past two financial years. Overall, total registrations during 2019/20

increase by 423 compared to the previous year.

Application Type	2018/19	2019/20
Application to Resolve a Dispute (Form 2)	4,711	4,852
Application for Expedited Assessment (Form 1)	60	180
Workplace Injury Management Dispute (Form 6)	33	29
Application for Assessment of Costs (Form 15)	4	5
Registration of Commutation (Form 5A)	32	38
Application for Mediation (Form 11C)	1,472	1,673
Application to Cure a Defective Pre-filing Statement (Form 11B)	5	3
Application to Strike Out a Pre-Filing Statement (Form 11E)	3	5
Disputed Direction for Access to Information and Premises (Form 11)	3	2
Arbitral Appeal (Form 9)	89	69
Application for Leave to Refer a Question of Law (Form 13)	0	0
Medical Appeal (Form 10)	366	345
TOTAL	6,778	7,201

The number of Applications for Expedited Assessment increased significantly during 2019/20 compared to the previous year. This was due to a change in the legislation, taking effect in January 2019, which returned work capacity disputes to the Commission's jurisdiction. Work capacity disputes accounted for 56% of all Form 1 applications.

The number of arbitral appeals reduced by 22% in 2019/20 compared to the previous year. This again demonstrates the durability of the decisions of the Commission's Arbitrators.

The number of medical appeals reduced by 6% in 2019/20 compared to the previous year. The Commission suspended in-person

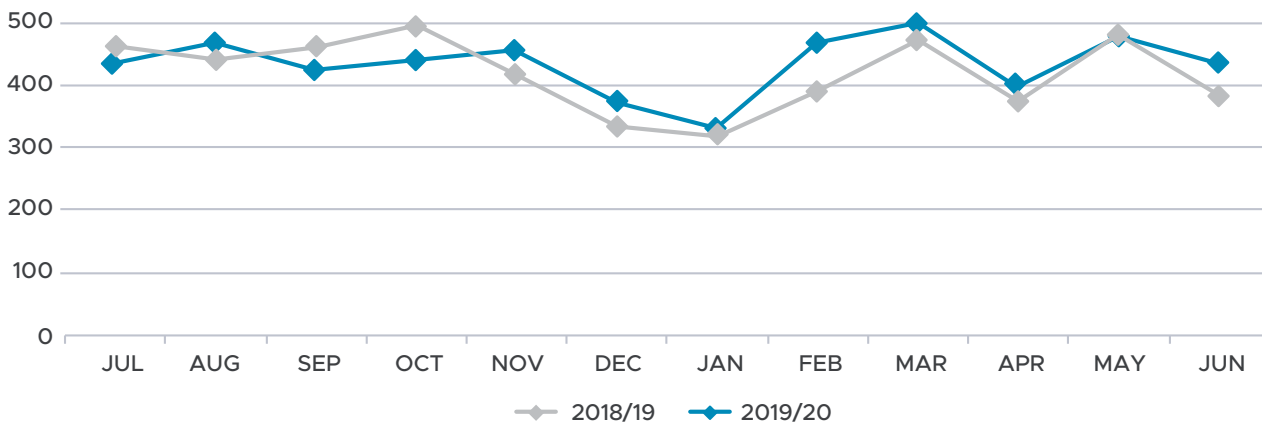
medical assessments during the final quarter of the 2019/20 financial year as part of its response to the COVID-19 pandemic. This equated to a 67% reduction in medical assessments during that period. As a result, the number of medical appeals during that period reduced significantly.

KEY PERFORMANCE INDICATORS

Applications to Resolve a Dispute (Form 2)

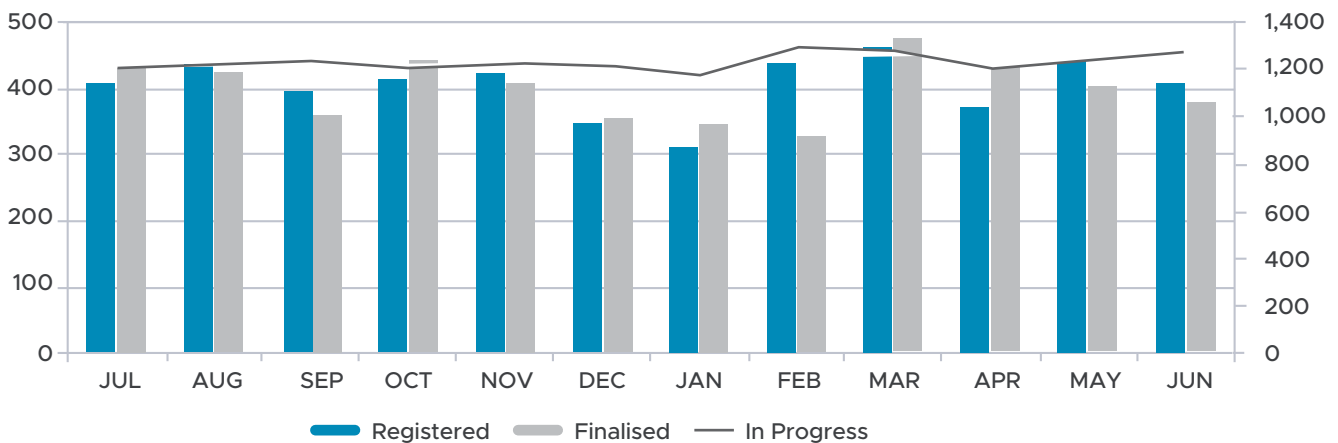
Most of the compensation dispute applications lodged in the Commission are Applications to Resolve a Dispute (Form 2). The figure below, which compares the number of Form 2 dispute registrations over the past two financial years, shows a very stable workload, with a modest increase of only 3% in 2019/20. In 2019/20, on average, 404 Form 2 dispute applications were lodged per month, compared to 393 per month in the previous year.

FORM 2 – COMPARISON OF REGISTRATIONS



A monthly comparison of Form 2 disputes lodged and finalised in 2019/20 is shown in the figure below. The figure also indicates the number of active Form 2 dispute applications at any given time. The number of active disputes was maintained between a low of 1,180 matters and a high of 1,293 matters. As at 30 June 2020, there were 1,273 active Form 2 dispute applications on hand.

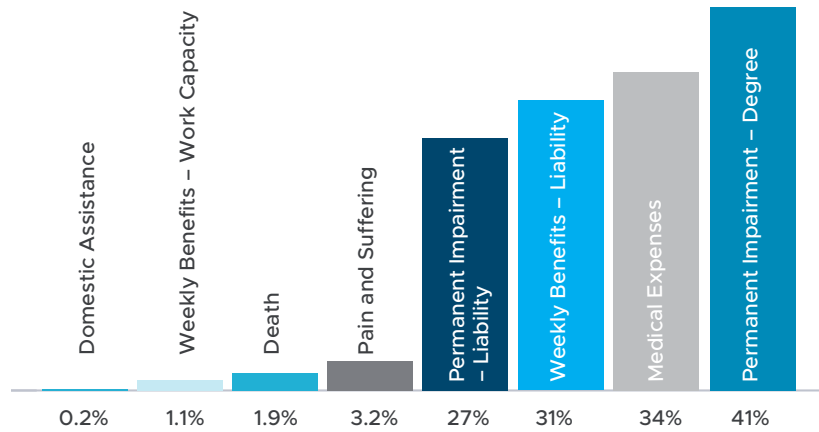
FORM 2 – REGISTERED, FINALISED AND IN PROGRESS



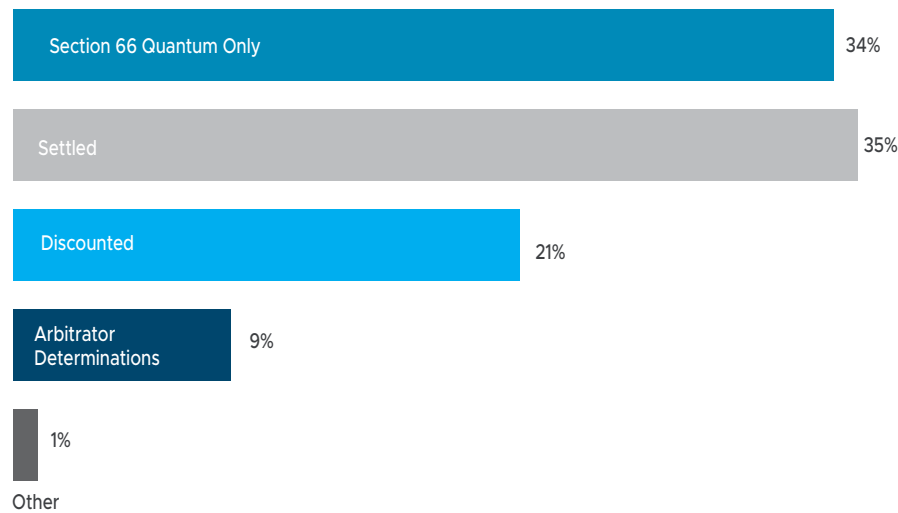
Most Form 2 dispute applications involve claims for more than one type of compensation benefit. Weekly payments compensation, medical and related expenses compensation and permanent impairment compensation make up most of the disputed compensation types.

FORM 2 – COMPENSATION IN DISPUTE 2019/20

In 2019/20, disputes limited to the degree of permanent impairment (quantum only) made up 34% of all resolutions for Form 2 dispute applications, down from 39% in 2018/19. The reduction is due to there having been fewer medical assessments, due to the pandemic. Settlements throughout the year remained strong, with Arbitrators required to determine only 9% of disputes in the reporting period.



FORM 2 – OUTCOMES



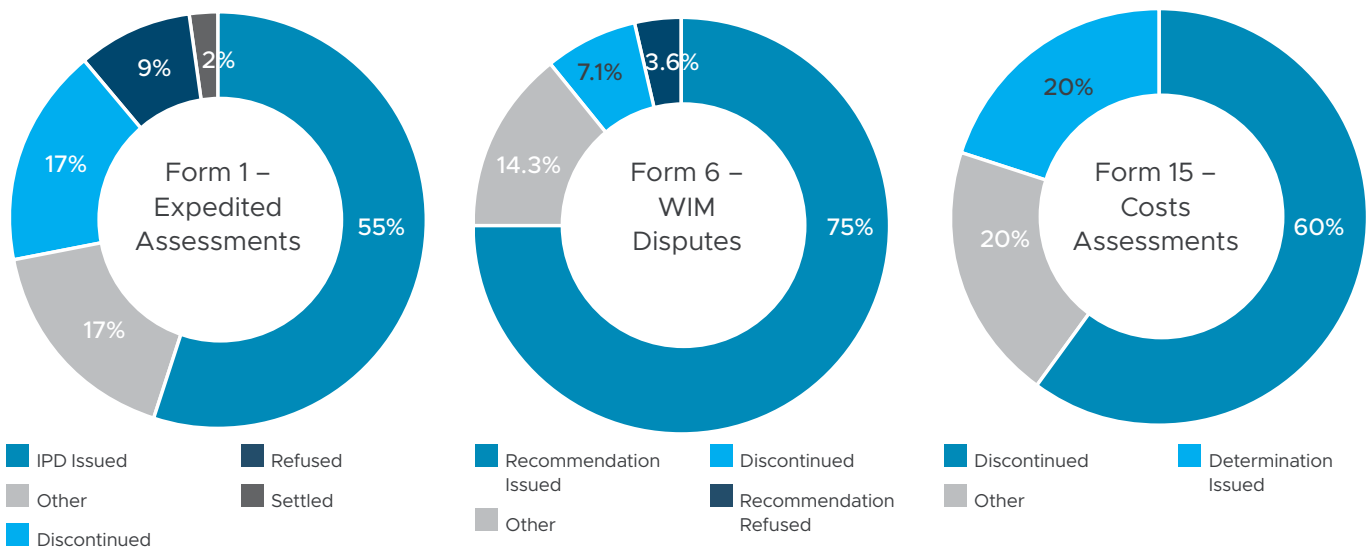
KEY PERFORMANCE INDICATORS

Other Compensation Dispute Applications

Other compensation dispute applications (excluding appeals) included:

- Application for Expedited Assessment (Form 1);
- Application to Resolve a Workplace Injury Management (WIM) Dispute (Form 6);
- Application for Assessment of Costs (Form 15).

The figures below show outcomes for expedited assessments, WIMs and assessment of costs.



Locations

During 2019/20, the Commission held 1,814 con/arbs at 19 locations:

Albury	Ballina	Bathurst	Coffs Harbour
Dubbo	Gosford	Griffith	Newcastle
Orange	Penrith	Port Macquarie	Queanbeyan
Sydney	Tamworth	Taree	Tweed Heads
Wagga Wagga	Wollongong	Wyong	

Work Injury Damages Dispute Applications

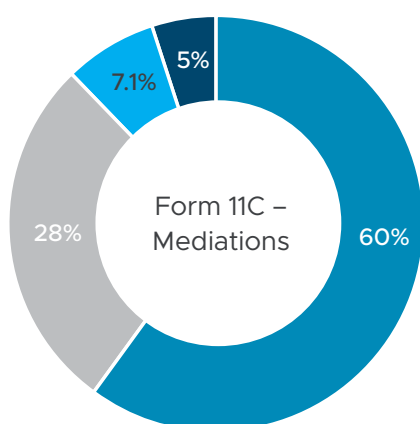
The Commission plays a significant role in resolving work injury damages claims through pre-trial case management and mediation services.

In 2019/20, the Commission registered 1,673 Applications for Mediation to Resolve a Work Injury Damages Claim (Form 11C), an increase of 14% compared to the previous year.

The figure below shows the breakdown of outcomes for all work injury damages applications, including those that did not proceed to a mediation conference.

Mediation conferences were held in 1,491 matters during the reporting period, of which 1,016 (68%) were settled.

The Commission also resolved six Applications to Strike Out a Pre-filing Statement (Form 11E) and four disputes related to Access to Information and Premises (Form 11).



Other
Settled
Certificate of Final Offer
Wholly Denied Liability

Arbitral Appeals

In 2019/20, the Commission received 69 Applications to Appeal Against a Decision of an Arbitrator (Form 9), a decrease of 22% compared to the previous year. During the same period, Presidential members determined 80 appeals, and six applications were discontinued.

Overall, 6% of appellable decisions by Arbitrators were revoked on appeal.

Medical Appeals

There were 1,800 Medical Assessment Certificates issued in 2019/20, a decrease of 21% compared to the previous year. This is largely due to the Commission suspending in-person medical assessments during the final quarter of the 2019/20 financial year as part of its response to the COVID-19 pandemic.

The number of Application to Appeal Against Decision of Approved Medical Specialist (Form 10) lodgements decreased by 6%, from 366 appeals lodged in 2018/19 to 345 in 2019/20.

There were 391 medical appeals finalised in 2019/20. Approximately 8% of Medical Assessment Certificates issued were revoked on appeal.

Judicial Review of Registrar and Medical Appeal Panel Decisions

In 2019/20, 12 judicial review applications were lodged in the Supreme Court of New South Wales. Of those matters, nine were against the decisions of Medical Appeal Panels and three were against decisions of delegates of the Registrar. Overall, the judicial review rate was approximately 5.8% of all decisions made by Medical Appeal Panels and Registrar's delegates.

In 2019/20, the Supreme Court determined one judicial review application, quashing the decision of a Medical Appeal Panel. Two appeals were discontinued and the other nine were to be decided.

Appeals to the Court of Appeal from Presidential Decisions

In 2019/20, the Court of Appeal disposed of 12 appeals against Presidential decisions.

Of those matters, five notices of intention expired, four appeals were dismissed, and three appeals were upheld, of which one was remitted to the Commission for re-determination.

As at 30 June 2020, two Presidential decisions were before the Court of Appeal awaiting determination.

EDUCATION AND COLLABORATION

User Group

The User Group, comprised of Commission representatives and representatives from the State Insurance Regulatory Authority, the New South Wales Bar Association and The Law Society of New South Wales, meets quarterly to raise issues relevant to practice and procedure in the Commission. As at 30 June 2020, the User Group membership was:

- Judge Gerard Phillips, President (Chair);
- Michael Snell, Deputy President;
- Elizabeth Wood, Deputy President;
- Rodney Parsons, Registrar;
- Siobhan Flores-Walsh, Director Operations;
- Michael Wright, Director Legal Services;
- Josephine Bamber, Senior Arbitrator;
- Glenn Capel, Senior Arbitrator;
- Nicholas Cobb, State Insurance Regulatory Authority;
- Ross Stanton, New South Wales Bar Association;
- Shane Butcher, The Law Society of New South Wales;
- Kristi McCusker, The Law Society of New South Wales;
- Stephen Harris, The Law Society of New South Wales;
- Andrew Mulcahy, The Law Society of New South Wales.

Council of Australasian Tribunals

The Commission is a member of the Council of Australasian Tribunals (COAT), the national body through which tribunal representatives come together to examine and compare ideas, working methods, organisation and management, member induction training and support programs.

The President is a committee member and the Registrar was, until April, the Secretary of the New South Wales Chapter of COAT.

Workers Compensation Inter-Jurisdictional Meeting

The Commission's President convenes and chairs the annual Inter-Jurisdictional Workers Compensation Dispute Resolution Organisations Meeting. This annual meeting was initiated by the Commission to provide a forum for discussing current issues affecting workers compensation dispute resolution jurisdictions across Australia and New Zealand.

It is a useful networking tool which facilitates and promotes information-sharing and collaboration among workers compensation dispute resolution organisations facing similar types of issues.

It provides a valuable forum for discussing such things as legal and procedural issues, conciliation techniques, dispute resolution pathways, use of technology in dispute resolution, statistical data, reform, appointment of members, induction methods, and training materials.





Workers Compensation
Commission



CONFERENCES AND SEMINARS

In-house Conferences and Forums

The Commission holds annual professional development conferences for Approved Medical Specialists, Arbitrators, Mediators and staff. Conference sessions feature both internal and external speakers.

At the **Mediator Conference**, the theme of the first session was ‘the Role of Support People in Mediation’. The session was presented by Janice McLeay and Paul McLeay from McLeay Consulting. The discussion explored, with the assistance of the participants, the traits to look for in a support person.

Lucy Shanahan, Partner at Kingston Reid, presented on the topic ‘Bullying and Harassment in the Context of Mediation’. Lucy began by defining discrimination, bullying and harassment, and how people might be injured in the workplace, then looked at the various duties and responsibilities of individual workers and employers. She highlighted the importance of understanding what the law says and how it works, with a particular focus on understanding the backstories of the claimants seen in mediation.

Anne Sutherland-Kelly, Senior Fellow, Faculty of Law, Monash University, presented on the topic ‘Agreement, Closure and Risk Management in Mediation’. Anne highlighted the differences in the mediators’ role in private practice, based on National Mediator Accreditation System (NMAS) standards, and their role as Commission mediators under the legislation. She examined what may and may not be good faith mediator behaviour.

At the **Arbitrator Conference**, Dr Jonathan Hamberger PSM gave a presentation on interest-based bargaining. The key theme was ‘Getting to Yes – Negotiating Agreement Without Giving in’.

The Hon Ruth McColl AO gave a presentation on conciliation-related research conducted by the Australian Dispute Resolution Advisory Council.

Lucy Shanahan, a Partner at Kingston Reid, gave a presentation on bullying and harassment in the workplace. The key theme was ‘What Is Appropriate Behaviour and the Effects of Bad Conduct’.

Jeremy Gormly SC addressed on the fine line between acceptable persuasion and bias in conciliation. The key theme was that arbitration is a well-known process that is judicial in nature, while conciliation is extra-judicial.

Unfortunately, the **Approved Medical Specialist Conference** could not go ahead for 2019/20 due to the pandemic. A number of other initiatives are being explored by the Commission to support Approved Medical Specialists.

At the **Staff Conference**, Stuart White from the Registry Team compiled a video on the year that was, reflecting on the achievements of staff.

Senior Arbitrator Jo Bamber, Senior Approved Medical Specialist Dr Drew Dixon and Mediator John McGruther gave staff insights into their roles at the Commission and thanked staff for their support in making the process seamless for stakeholders.

Trevor Torrance, a Senior Manager at Bendelta Consulting, delivered a presentation on ‘Dealing with

Change’. Trevor highlighted the stages of change and gave tips on how to adapt and manage through change. Ali Davies, a Manager at Bendelta, delivered a session on ‘Highly Effective Teams’. Through a series of activities, Ali engaged the group and demonstrated various ways of interacting and collaborating within teams to achieve better outcomes.

Arbitrator Cameron Burge delivered an insightful presentation from the perspective of the injured worker. Cameron highlighted the challenges and emotions that workers experience during the dispute resolution process. He pointed out the extra anxiety experienced by workers for whom English is not their first language and workers who may have language, literacy and/or numeracy challenges.

The Commission continued its commitment to professional development through regular practice meetings and forums for staff, Arbitrators, Mediators and Approved Medical Specialists.

Legal Seminars

Commission staff delivered a number of presentations to legal firms in 2019 to assist the profession to transition to the online lodgement of matters via the Comcase e-portal, which became mandatory from 1 January 2020.

The online lodgement sessions focused on the significant service delivery changes at the Commission that have occurred with the digital service delivery platform. Presenters outlined the changes to the way our clients will do business with us and how these changes deliver on the New South Wales Government’s priorities of

providing better digital services and improving access to justice.

External Presentations by Invitation

During 2019/20, Commission members and staff presented regularly at conferences and seminars hosted by other government agencies and private sector organisations.

Support and Development

During 2019/20, the Commission arranged customised training in decision writing for Arbitrators, which was delivered by noted former Victorian County Court Judge Tom Wodak.

Decision makers were also given the opportunity to attend customised mediation training delivered by leading Australian mediator Steve Lancken. This training was well attended and well received and will assist participants to achieve improved alternative outcomes in their work.



CONFERENCES AND SEMINARS



PUBLICATIONS

Bulletins

The Commission publishes several periodic bulletins for members, service partners and stakeholders, including:

- **e-Bulletin** – for legal and insurance professionals;
- **Arbitrator Bulletin** – for Arbitrators;
- **AMS Bulletin** – for Approved Medical Specialists;
- **Mediator Bulletin** – for Mediators.

The Commission also publishes a monthly staff newsletter, **WCC Watch**.

During the pandemic the Commission published a weekly newsletter to staff called **Around the Grounds**. This newsletter served to fill an immediate gap when all the Commission's staff and in-house Arbitrators started to work exclusively from home. It provided a point of cohesion during a very confusing time by reminding everyone that our workload and performance would continue as normal even though we were not together at the office.

On Appeal

On Appeal summarises Presidential members' decisions and provides an overview of relevant High Court and Court of Appeal decisions.

The publication is issued periodically and is accessible via the Commission's website www.wcc.nsw.gov.au.

On Review

On Review summarises all decisions of the Court of Appeal and Supreme Court in relation to judicial review applications against decisions of the Registrar, Approved Medical Specialists and Appeal Panels. It consists of two publications: the first contains a list of all decisions and case summaries in chronological order, while the second contains the same resources grouped by subject matter. Each includes hyperlinks to both the decision and a summary. **On Review** was regularly updated during the year.

On Review is accessible via the Commission's website. wcc.nsw.gov.au.

Weekly Summaries

The Commission publishes a weekly summary of relevant Presidential, Arbitral, Medical Appeal Panel and Registrar decisions.

Arbitrator Practice Manual

The **Arbitrator Practice Manual** provides guidance to Commission members on a range of procedural and ethical issues and contains extensive discussion on substantive and relevant legal issues. The manual enhances the consistency of the dispute resolution process and the durability of the Commission's determinations.

The manual, first published in 2009 and subsequently revised, continues to be regularly updated.

Approved Medical Specialist Practice Manual

The **Approved Medical Specialist Practice Manual** helps Approved Medical Specialists understand the dispute resolution model and the relationship between their functions and those of Arbitrators.

It includes chapters on practical issues, such as best practice for conducting examinations, and legislative issues, such as deductions for previous injuries or pre-existing conditions. The manual, first published in 2012, continues to be updated.



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GOVERNANCE AND ACCOUNTABILITY

OVERVIEW

The Commission maintains a robust corporate governance framework that covers:

- Strategic planning;
- Corporate and business unit planning; and
- Governance and consultative committees and forums.

To ensure risk is managed appropriately and resources are used ethically and efficiently, the Commission incorporates best practice governance into its service delivery model.

Governance Committees and Forums

Various committees and forums, comprising a mixture of staff, service partners and external stakeholders, help the Commission to make decisions and meet governance arrangements. They provide opportunities for information-sharing, consultation and the development of options in relation to the Commission's operations.

Executive Committee

The Executive Committee, which meets weekly, is the Commission's strategic and management decision-making forum. The Committee, chaired by the President, comprises the Registrar, Director Operations and Director Legal Services.

Senior Leaders Group

The Registrar meets monthly with the Director Operations, Director Legal Services and other senior leaders. The meetings are an interactive information and communication channel involving discussion of key events, issues and emerging trends in the Commission and within each business unit.

Operational Leaders Group

The Commission's operational leaders meet monthly with members of the Executive and Senior Leadership teams. These meetings provide an opportunity to share information across units, raise issues, and make recommendations relating to people, process and performance.

Practice and Procedure Committee

The Practice and Procedure Committee is primarily responsible for reviewing the Commission's rules. It also operates as a deliberative and decision-making forum for a range of issues affecting practice and procedure in the Commission.

Service Provider Consultation

Reference groups and practice meetings for Arbitrators, Approved Medical Specialists and Mediators provide forums for information-sharing and input to practice and procedure.

Business Continuity Group

Early in February 2020, the Commission activated the Business Continuity Group (BCG) in response to the evolving pandemic. The BCG is a group of senior leaders within the Commission whose role it is to ensure that the business of the Commission continues if there is a major disruption to the Commission's operations. From March to the end of June the BCG met twice per week and was effective in keeping the Commission's dispute resolution processes operating.



Access and Equity

The Commission's Access and Equity Service Charter sets out standards for accessible and equitable services. In this regard, the Commission has developed a range of practices, policies and procedures, including:

- Free dispute resolution services;
- Information resources on the internet;
- Outreach services for self-represented workers;
- Free interpreter services;
- Hearings in regional and rural locations.

Codes of Conduct

The Commission has developed codes of conduct for Arbitrators and Approved Medical Specialists.

These codes seek to guide Arbitrators and Approved Medical Specialists in carrying out their duties in a manner that is consistent with the objectives of the Commission and assist them to:

- Identify and resolve ethical disputes;
- Ensure the highest standards of conduct in their relationship with the parties;
- Maintain appropriate standards of professional performance.



Complaint Handling

Complaints can be made about the actions of Commission members, staff, Approved Medical Specialists and Mediators.

During the year, the Commission received a total of three complaints. All concerned proceedings held by Arbitrators.

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

Risk Management

The nature of the Commission's business operations exposes it to a wide range of risks. As such, in line with good governance, the Commission has developed and implemented a risk management framework that is compliant with ISO 31000:2018 Risk Management – Guidelines.

The framework helps the Commission identify, assess and treat risks in line with its risk tolerance, which is determined by a matrix that incorporates operational risks, financial risks, reputation, fraud, legal and people impact criteria.

PEOPLE & CULTURE

Employment Provisions

The Attorney General appoints members of the Commission, while the President, in accordance with criteria developed by the Minister for Customer Service, appoints Approved Medical Specialists and Mediators. Staff are employed under the *Government Sector Employment Act 2013*, supported by its regulation and rules.

Member and Service Partner Retention and Appointments

The Commission's Approved Medical Specialists are appointed for periods of up to three years. At the end of the appointment period, the Commission undertakes a recruitment process to ensure that the needs of the Commission will be met for the next three-year period. In October 2018, 112 medical specialists were appointed for three-year terms by the President (105 reappointments and seven new appointments). The complete list of Approved Medical Specialists can be found in Appendix 2.

Learning and Development

In addition to the conferences and seminars set out on pages 32–33, Commission staff and members completed a range of internal and external learning and development activities during the year, including:

- COAT (Council of Australasian Tribunals) National and New South Wales Chapter annual conferences;
- The Resolution Institute accredited mediator course.

Work Health and Safety and Wellbeing

The Commission supports wellness initiatives, such as flu vaccinations and fitness passports.

Staff can access a range of work/life balance initiatives, including flexible working hours, part-time work and job-sharing.

The Commission recognises the efforts of community groups, such as the Salvation Army, through its annual Christmas Appeal.

The Social Committee hosted a variety of social events during the year, including a Melbourne Cup function and a Christmas party. All social events included fundraising for various charities. Various business units also organised informal morning teas and lunches.

Graduate Program

The Commission, in conjunction with the Department of Customer Service and the Public Service Commission, is participating in an 18-month graduate rotation program. The structured program involves three six-month placements across government agencies and offers a diverse experience that allows graduates to build their career in the public service.

The graduate rotation program also provides an opportunity for Commission staff to participate as mentors to graduates, providing advice and guidance to help them navigate the start of their careers. Mentors also participate in workshops with their mentees to build strong relationships.

Workplace Diversity

The Commission's workplace diversity policy emphasises valuing and respecting the diversity of our workforce and the contributions of our staff. The Commission recognises and embraces the important skills and experiences of people from different cultures, backgrounds and abilities.

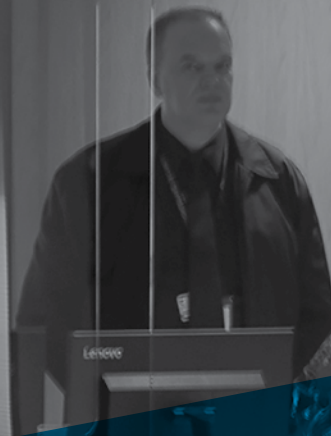
Consultation Mechanisms

The Commission is committed to workplace relations that value consultation, communication, cooperation and input from employees on matters that affect the workplace. There are formal and informal opportunities for employee consultation, including:

- Quarterly staff meetings, involving formal, structured information-sharing followed by an opportunity for informal networking;
- Reference group and practice meetings for Arbitrators, Approved Medical Specialists and Mediators, providing forums for information-sharing and input to practice and procedure;
- Staff surveys, including online surveys in which staff can provide feedback on workplace issues such as work health and safety.



Workers Compensation
Commission



APPENDICES

APPENDICES

Appendix 1 – Arbitrators

(As at 30 June 2020)

Senior Arbitrators

Josephine Bamber

Glenn Capel

Arbitrators

Full Time

Elizabeth Beilby

Cameron Burge

Rachel Homan

John Isaksen

Paul Sweeney

Sessional

Brett Batchelor

Ross Bell

William Dalley

Marshal Douglas

Grahame Edwards

Gerard Egan

John Harris

Catherine McDonald

Deborah Moore

Jane Peacock

Richard Perrignon

Michael Perry

Nicholas Read

Carolyn Rimmer

Anthony Scarcella

Jill Toohey

John Wynyard

Philip Young

Under section 371(1) of the 1998 Act, the Registrar may exercise all the functions of an Arbitrator.

The Director Operations, Siobhan Flores-Walsh, and Director Legal Services, Michael Wright, are also appointed as Arbitrators.

Appendix 2 – Approved Medical Specialists

(As at 30 June 2020)

Dr Nigel Ackroyd

Dr Peter Anderson

Dr Tim Anderson

Dr Douglas Andrews

Dr John Ashwell

Dr Mohammed Assem

Dr John Baker

Dr Christopher Bench

Dr Roy Beran

Dr Neil Berry

Dr Trevor Best

Dr Graham Blom

Dr James Bodel

Dr Frank Bors

Dr Robert Breit

Assoc Prof David Bryant

Dr Mark Burns

Dr Gregory Burrow

Dr Beatrice Byok

Prof John Carter

Dr Lionel Chang

Dr Richard Crane

Dr David Crocker

Dr Paul Curtin

Dr Michael Davies

Dr Michael Delaney

Dr Paramatma Dhasmana

Dr Drew Dixon

Dr John Dixon-Hughes

Dr Hugh English

Prof Paul Fagan

Dr Donald Kingsley Faithfull

Assoc Prof Michael Fearnside

Dr Sylvester Fernandes

Dr Robin B Fitzsimons

Dr John F W Garvey

Dr Peter Giblin

Dr Margaret Gibson

Dr John Giles

Dr Michael Gliksman

Prof Nicholas Glozier

Dr David Gorman

Dr Richard Haber

Dr Ian Hamann

Dr Henley Harrison

Dr Philippa Harvey-Sutton

Dr Mark Herman

Dr Roland Hicks

Dr Yiu-Key Ho

Dr Alan Home

Dr Michael Hong

Assoc Prof Nigel Hope

Dr Kenneth Howison

Dr Murray Hyde-Page

Dr Robert Ivers
Dr Mark Jones
Dr Gregory Kaufman
Dr Edward Korbelt
Dr Lana Kossoff
Dr Damodaran Prem Kumar
Dr Robert Kuru
Dr Sophia Lahz
Dr David Lewington
Dr Michael Long
Dr Frank Machart
Dr Wayne Mason
Dr Tommasino Mastroianni
Dr Andrew McClure
Dr Michael McGlynn
Dr David McGrath
Dr Gregory McGroder
Dr John D McKee
Dr Ian Meakin
Dr Allan Meares
Dr Ross Mellick
Dr Patrick John Morris
Dr Jonathan Negus
Dr Bradley Ng
Dr Paul Niall
Dr Brian Noll
Dr Chris Oates
Dr John O'Neill
Dr Robin O'Toole
Dr Julian Parmegiani
Dr Brian Parsonage

Dr Robert Payten
Dr Roger Pillemer
Dr Thandavan B Raj
Dr Anne-Marie Rees
Dr Loretta Reiter
Dr Samson Roberts
Assoc Prof Michael Robertson
Dr Michael Rochford
Dr Tom Rosenthal
Dr Joseph Scoppa
Dr Farhan Shahzad
Dr Wasim Shaikh
Dr Michael Steiner
Dr J Brian Stephenson

Appendix 3 – Mediators

(As at 30 June 2020)

Ross Bell
Laurence Boule
Jak Callaway
Philip Carr
Janice Connelly
Gerard Egan
Geri Ettinger
David Flynn
Robert Foggo
Nina Harding
John Ireland
Katherine Johnson
John Keogh
Bianca Keys
Stephen Lancken
Margaret McCue
John McGruther
Garry McIlwaine
Chris Messenger
Dennis Nolan
Philippa O'Dea
Anthony Scarcella
Jennifer Scott
John Tancred
John Weingarth
John Whelan

Appendix 4 – Developments in the Law

Ballas v Department of Education [2020] NSWCA 86

Court of Appeal, 6 May 2020

Bell P, Payne JA and Emmett AJA

The applicant, Ms Ballas, was employed as a primary school teacher by the first respondent (the Department of Education) until a series of events resulted in significant psychological injury.

The Approved Medical Specialist (AMS) assessed the applicant as having WPI of 8%. The applicant was put in class 2 for social and recreational activities in part because she spent one hour at a club to gamble on poker machines.

The Delegate of the Registrar refused to allow the application to appeal against the medical assessment on the grounds that assessment of which category applies is a matter within the AMS's discretion.

The applicant sought judicial review, but the primary Judge held that the Delegate had not misunderstood or failed to address the applicant's submissions.

The applicant appealed to the Court of Appeal.

The Court held that assessment of arguability as referred to in *Vannini v Worldwide Demolitions Pty Ltd* [2018] NSWCA 324 was required. The Delegate of the Registrar was not required to assess the correctness of the argument but was required to assess if the submissions put forward by the applicant for an appeal were arguable.

The Court held that the Delegate had failed to do this and had misconstrued the nature of the error that the applicant had identified

as the demonstrable error in her submissions.

The Court held that the Delegate had used "categories" to refer to "classes" rather than scales and had confused the terminology. The Delegate was incorrect to assert that scales were a matter of discretion for an AMS. There is a difference between a characterisation exercise and an exercise of discretion.

The Court accepted the submission of the appellant that the AMS was in error to take into account the appellant's gambling activities for the purpose of the scale of social and recreational activities, as that scale was concerned with interactions with other people.

The correct process for the delegate, the Court held, was to embark on a process to achieve satisfaction that an "arguable case of error" had been established.

The first respondent submitted that a reconsideration decision of the Workers Compensation Commission that had refused to reconsider the Certificate of Determination in this matter precluded supervisory jurisdiction.

The Court held that the reconsideration decision did not have this effect as jurisdictional error was involved in both the process that resulted in the Certificate of Determination and in the decisions themselves.

Secretary, Department of Education v Johnson [2019]

NSWCA 321

Court of Appeal, 20 December 2019

Macfarlan AJ, Emmett AJA and Simpson AJA

The respondent, Ms Johnson, sustained a psychological injury (the First Injury) during the course of her

employment by the applicant, the Secretary of the New South Wales Department of Education.

Subsequently Ms Johnson sustained psychological injury (the Second Injury) in the course of employment with another employer, Aboriginal Hostels Limited. The Second Injury was regulated by Commonwealth legislation and therefore not compensable under the New South Wales scheme.

Two medical assessments were issued certifying that the WPI of the worker as at 9 June 2017 and 11 April 2018 was 19% and 17% respectively. The second assessment followed a reconsideration by the AMS. Both findings would have entitled the worker to lump sum compensation.

A Medical Appeal Panel determined that the second medical assessment certificate should be revoked and a new medical assessment certificate issued certifying that the WPI for the First Injury was 6%. If that assessment were to stand, the worker would not be entitled to lump sum compensation.

Ms Johnson sought judicial review. The matter was heard before a Supreme Court judge, who held that the Appeal Panel had erred in making an apportionment between the First Injury and Second Injury.

The applicant sought leave to appeal from the orders made by the primary Judge.

The Court held that it was necessary for the AMS and the Appeal Panel to assess the degree of WPI of the worker that was caused by or is attributable to the First Injury.

The Court held that there is no difference between the legal view of causation in tort, where injury may be attributable to more than

one cause operating concurrently, and causation in the field of workers compensation, subject to the qualification that, in a claim for workers compensation, the question of foreseeability does not arise. It suffices for the effects of injury to result from a chain of legal causation unbroken by a novus actus interveniens.

State Government Insurance Commission v Oakley (1990) 10 MVR 570 (*Oakley*) was applied. From *Oakley*, there are three possible categories where an earlier injury is followed by a later injury. The Court found that the Appeal Panel had not conducted a proper review of the seriousness of the two injuries and of the extent to which the First Injury impacted on the second. The Appeal Panel did not conclude that the Second Injury had broken the causal chain between the First Injury and the worker's impairment. A necessary part of the Appeal Panel's task was to consider, in the light of the medical evidence, into which of the three *Oakley* categories the respondent's case fell. This was not done. This amounted to jurisdictional error.

Section 22 of the 1987 Act, with respect to apportionment of liability to pay compensation, had no operation in this case since Aboriginal Hostels Limited was not amenable to the New South Wales workers compensation legislation.

Although there was jurisdictional error on the part of the Appeal Panel, the primary Judge erred in saying the decision that ought to have been reached by the Appeal Panel was that the worker's degree of impairment was 19%. That is a matter for determination by the Appeal Panel. The matter was remitted for reconsideration by the

Appeal Panel according to law.

Leave to appeal was granted and the appeal was dismissed with costs.

Hochbaum v RSM Building Services Pty Ltd; Whitton v Technical and Further Education Commission t/as TAFE NSW [2020] NSWCA 113
Court of Appeal, 17 June 2020
White JA, Brereton JA and Simpson AJA

The appellants, Mr Hochbaum and Ms Whitton, were injured in the course of their employment with the respondents RSM Building Services and Technical and Further Education Commission (TAFE NSW), in 2000 and 1999 respectively.

Each made a claim for compensation and was in receipt of weekly compensation payments before 1 October 2012, when the new workers compensation regime, introduced by the (NSW) *Workers Compensation Legislation Amendment Act 2012* (the 2012 Amendment Act), commenced.

Section 39(1) of the 1987 Act provides that a worker has no entitlement to weekly payments of compensation after an aggregate period of 260 weeks, whether or not consecutive, in respect of which a weekly payment has been paid or is payable.

However, section 39(2) provides that the section does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%, this being a worker with "high needs".

A Senior Arbitrator of the Commission held that the applicants were entitled to weekly payments from the date on which they had

ceased being paid.

The President of the Commission overturned that decision on appeal, holding that section 39(2) of the 1998 Act had a temporal element that disapplies section 39(1) for a worker with high needs until a medical assessment is conducted that certifies permanent impairment.

The Court found that the function of section 39(3) is not to impose a medical assessment as a precondition to the engagement of section 39(2).

The Court held there was no temporal element in section 39(2) applying *Borovac v Corporate Ventures Pty Ltd t/as Bowsers Asphalt* (1995) 12 NSWCCR 84.

The Court found that, if it did, this would have the extraordinary result that issues falling under section 39 could not be resolved consensually. A medical dispute would also need to be engineered to engage section 39(2) of the 1998 Act.

It was held that the authority relied on by the President, *Shi v Migration Agents Registration Authority*, was not a case where "the critical statutory question was met or not met on a particular date".

It was held that section 39(2) of the 1998 Act exempts workers whose injuries result in a whole person impairment of more than 20% from the 260-week cap otherwise imposed by section 39, although the impairment may not be established until long after the injury.

Prince v Seven Network Operations) Ltd [2019] NSWCC 313
Workers Compensation Commission Arbitrator, 25 September 2019
Arbitrator Burge

APPENDICES

The applicant, Ms Prince, was a contestant on *House Rules*, a home renovation reality television show produced by the respondent, during and after which she was subjected to events that she alleged resulted in psychological injury,

The Arbitrator held that the contract between the applicant and the respondent was one of service. The applicant had to give up her time and usual vocation and had to relocate where instructed by the respondent.

The Arbitrator considered the indicia in *Stevens v Brodribb Sawmilling Company Pty Ltd*, *Gerob Investments Ballina Pty Ltd t/as Beach Life Homes v Compton* was analysed as a case that usefully explained the process of balancing these indicia.

The Arbitrator held that the applicant was a worker employed by the respondent within the meaning of section 4 of the 1987 Act. This finding was on the basis of a number of considerations, including that the rate of remuneration was set by the respondent, the activity done by the applicant was for the benefit of the respondent, and the applicant completed all tasks when directed by the respondent. The respondent exercised a high degree of control over the applicant's activities. In the event that the applicant was not a worker, the Arbitrator held that she would fall under the definition of "deemed worker".

The Arbitrator held that there was nothing to suggest that the tensions experienced by the applicant on the set of the show did not occur. The Arbitrator accepted a submission that the availability of a trained psychologist was suggestive of the program being a contentious and

psychologically fraught working environment.

The respondent had the power to edit social media posts, and failure to do so contributed to the injury sustained by the applicant. She suffered psychological injury as a result of the deterioration of relationships within the workplace and by her portrayal by the respondent on television and social media.

The fact that the other contestants regarded the applicant as a bully indicated a breakdown in relationships on the set which contributed to the applicant's injury, along with the impacts of the social media posts.

The applicant was held to be a worker of the respondent and to have suffered a psychological/psychiatric condition in the course of her employment.


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