WORKERS COMPENSATION COMMISSION

WORKERS COMPENSATION COMMISSION

Annual Review 2013

March 2014

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PRESIDENT'S FOREWORD

Throughout the year the Commission's Members and staff focused principally on managing the large spike in applications following the introduction of the *Workers Compensation Legislation Amendment Act* 2012 (the 2012 amendments). At the start of 2013, the number of applications on hand escalated from an average of around 3,500 matters to 8,013 matters. By mid April, that number had increased to just over 10,600, which is about three times the average workload in terms of matters on hand.

Due to a monumental effort by Members and staff at all levels, by the end of December 2013 the Commission had made significant inroads into resolving the backlog of cases and finished the year with 5,987 matters on hand.

The significant increase in workload has led to some unavoidable and substantial delays in the Commission's targeted timeframes for the resolution of disputes. However, I am pleased to report that the Commission expects to resume its normal scheduling timeframes by the end of June 2014. In June 2013, the majority of Commission full time, part time and sessional Arbitrators were re-appointed for a further twelve month term. In addition, as a short term measure, the Government agreed to the appointment of five additional sessional Arbitrators to assist with resolving the large number of applications on hand. On 5 August 2013, the Hon Linda Ashford, Gerard Egan, Robert Foggo, John Harris and Ross Stanton were appointed as sessional arbitrators for a one year term.

The 2012 amendments introduced wide ranging reforms to the suite of benefits available to injured workers. The amendments to the weekly compensation provisions generally apply to claims made on or after 1 October 2012. However, transitional arrangements apply to workers in receipt of weekly compensation payments immediately before 1 October 2012. The application of the transitional provisions and the precise meaning of some of the new legislative provisions were tested in a number of important cases.

The following selection of cases provides some insight into the issues arising during the year.

On 11 October 2013 the High Court granted leave to appeal the Court of Appeal decision in *Goudappel v ADCO Constructions Pty Ltd* [2013] NSWCA 94. The issue for determination concerns whether rights to the lump sum compensation under the provisions prior to the 2012 amendments are preserved by making any claim for compensation before 19 June 2012, or whether a prior claim for lump sum compensation is required. The matter is to be heard in the High Court on 1 April 2014. The outcome will have a significant bearing on future lump sum claims.

The transitional provisions (Sch 6, Pt 19H of the *Workers Compensation Act* 1987) provided that existing recipients of weekly payments remained entitled to weekly compensation as if the amendments had not been made, at least until such times as a work capacity decision is made by the insurer concerning a worker's entitlements. The meaning of the phrase "existing recipient of weekly payments" was considered in a number of Commission cases including *Komljenovic v Facility Management Solutions Pty Limited* [2013] NSWWCC 69 (Komljenovic), *Kilic v Kmart Australia Limited* [2013] NSWWCCPD 37 (Kilic) and *Lee v Bunnings Group Limited* [2013] NSWWCCPD 54 (Lee).

Senior Arbitrator Snell determined in *Komljenovic* that a worker was not an existing recipient of compensation unless the worker was actually in receipt of compensation payments at the relevant time.

The application of the transitional provisions to the quantification of weekly payments was considered by Deputy President Roche in *Kilic*. That case determined when the various compensation benefit periods commenced to run.

In *Lee*, I determined the extent of the Commission's jurisdiction to make an award for weekly payments of

PRESIDENT'S FOREWORD

compensation from 1 January 2013, in respect of workers who were not existing recipients of weekly payments immediately before 1 October 2012.

In *BP Australia Limited v Greene* [2013] NSWWCCPD 60, Deputy President Roche considered whether the transitional provisions introduced in 2002, which preserved the table of maims approach for assessing lump sum compensation for industrial deafness, with respect to pre-2002 injuries, was impliedly repealed by the 2012 amendments concerning claims made on or after 19 June 2012.

Sukkar v Adonis Electrics Pty Limited [2013] NSWWCCPD 59 involved the referral of a question of law arising in proceedings before an Arbitrator. The issue in that case concerned the aggregation of losses, with respect to hearing impairment claims arising both before and after the introduction of the 2012 amendments.

On a lighter note, in October 2013, the former Registrar, Sian Leathem, was appointed to the position of Principal Registrar of the newly formed NSW Civil & Administrative Tribunal (NCAT). I am extremely grateful to Sian for her dedication and commitment to the Commission during the six years that she was Registrar. I would also like to thank Deputy Registrars, Rod Parsons and Annette Farrell, for their contributions as Acting Registrars throughout the year whilst Sian was seconded to lead the NCAT project team

Judge Greg Keating
President

WHAT WE DO

Our Role

The Workers Compensation Commission (the Commission) is an independent statutory tribunal within the justice system of New South Wales. Our role, as part of a broader statutory scheme, is to resolve disputes about workers compensation claims between injured workers and employers.

The Commission was established under the *Workplace Injury Management and Workers Compensation Act* 1998 (the 1998 Act) and commenced operations on 1 January 2002.

Legislation relevant to the Commission's jurisdiction includes the following:

- the 1998 Act;
- *Workers Compensation Act* 1987 (the 1987 Act);
- *Workers Compensation Regulation* 2010, and
- *Workers Compensation Commission Rules* 2011.

The Hon Andrew Constance MP, Minister for Finance and Services, is the Minister responsible for the administration of workers compensation legislation, except for those parts concerned with the appointment and remuneration of members.

Our Objectives

The objectives of the Commission, set out in s 367 of the 1998 Act are to:

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

Our Functions

The Commission's non-adversarial process ensures that parties are directly involved in resolving disputes about workers compensation claims.

There are five main dispute types.

General Disputes

- weekly compensation payments;
- past medical and related treatment expenses;
- compensation to dependants of deceased workers;
- lump sum compensation for permanent impairment where liability is in dispute, and
- lump sum compensation for pain and suffering.

Medical Disputes

- lump sum compensation for permanent impairment where degree of permanent impairment is in dispute, and
- future medical and related treatment expenses.

Expedited Assessments

Common Law Mediations

Legal Costs Assessments

The Commission has an intermediate appellate jurisdiction which is a distinguishing feature of its operations. The Presidential Members of the Commission hear appeals against the decisions of the Arbitrators.

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

WHO WE ARE

Members

The Commission currently consists of the following members:

- President – Judge Greg Keating
- Deputy Presidents – Bill Roche and Kevin O'Grady
- Acting Deputy President – Lorna McFee;
- Registrar (vacant)
- Senior Arbitrators – Deborah Moore and Michael Snell
- nine full-time and four part-time Arbitrators (see Appendix 1)
- 20 sessional Arbitrators (see Appendix 1)

The Attorney General appoints the members of the Commission.

PRESIDENT AND DEPUTY PRESIDENTS

The President is the head of jurisdiction and works closely with the Registrar in the overall leadership of the Commission. The President is also responsible for the general direction and control of the Deputy Presidents and Registrar in the exercise of their functions.

The Presidential members hear and determine appeals from decisions of Arbitrators. The decisions of Presidential members may be appealed to the NSW Court of Appeal on questions of law only.

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

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 and case management strategies.

Deputy Registrars, Ms Annette Farrell and Mr Rod Parsons and the 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 Arbitrators in the exercise of their functions.

SENIOR ARBITRATORS AND ARBITRATORS

Arbitrators work with the parties to explore settlement options and where possible, reach an agreed resolution of the dispute. Arbitrators manage disputes through to finalisation, utilising a series of conferences, including either teleconferences and/or conciliation conferences. Unresolved disputes proceed to a formal arbitration hearing, following which a final binding decision is made.

In addition to undertaking the work of an Arbitrator, Senior Arbitrators assist the Commission in professional development, peer review, mentoring and appraisal of Arbitrators and the development of practice and procedure.

WHO WE ARE

Service Partners

APPROVED MEDICAL SPECIALISTS

There are 141 Approved Medical Specialists located throughout New South Wales holding appointments with the Commission. Approved Medical Specialists are appointed by the President.

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 NSW guidelines to assess whole person impairment and their application must have undergone a rigorous assessment for impartiality. Approved Medical Specialists appointed for the assessment of general medical disputes must also be in clinical practice or teaching.

The Commission refers medical disputes, such as the degree of permanent impairment of the worker as a result of an injury, to an Approved Medical Specialist for assessment.

A schedule of Approved Medical Specialists appears in Appendix 2

MEDIATORS

The Commission is supported by 27 contracted Mediators. Mediators are appointed by the President.

All Mediators 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 dispute 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.

Staff

The Commission's staff consists of 103 full-time equivalent positions, in a number of business units in the Commission, who are employed to carry out its functions.

PRESIDENTIAL UNIT

Presidential Unit staff work closely with the Presidential members, providing high level administrative support, legal research assistance and case management of arbitral appeals. Research Associates also assist in the conduct of appeal hearings as required.

The Presidential Unit prepares and publishes 'On Appeal', an electronic publication of headnote summaries of Presidential and Court of Appeal decisions. (refer to page 22)

The unit also coordinates and provides secretariat support for the Commission's User Group and organises the annual Inter-Jurisdictional Workers Compensation Dispute Resolution Tribunal meeting.

ORGANISATIONAL STRATEGY BRANCH

The Organisational Strategy Branch is responsible for planning, strategy and organisational development. The Branch comprises of 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 NSW and stakeholder inquiries, the management of complaints against Arbitrators, Mediators, Approved Medical Specialists and staff and the coordination of presentations to internal and external audiences, including visiting delegations.

WHO WE ARE

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, risk management and audit functions and the management of requests under the *Government Information (Public Access) Act* 2009.

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 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 Unit

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

Registry Services manage the call centre, mailroom, registration of dispute applications and information exchange processes and concierge functions for the Commission's hearing rooms in its Oxford Street, Darlinghurst premises.

Dispute Services Unit

Dispute Services staff are responsible for the administrative case management of applications for dispute resolution and applications for mediation, from the end of the information exchange period to closure of the matter, excluding appeals.

As delegates of the Registrar, staff refer medical disputes for assessment by an Approved Medical Specialist and determine interlocutory applications in accordance with the Commission's Rules. Staff also draft Certificates of Determination for the Registrar in relation to permanent impairment compensation awards.

Operations Support Unit

The Operations Support Unit initiates and undertakes service improvement projects across the Registry Services and Dispute Services units.

The Unit's staff develop and maintain business processes and procedures and undertake audit and risk management functions within the operational areas.

Business Services Unit

The Business Services Unit manages a number of business support functions including in the finance area, purchasing and invoice processing. In the area of records management, the Unit oversees the archive and audio processes for the Commission.

The Unit is also responsible for the management of facilities, including the Commission's premises in Sydney and the sourcing of venues in regional and rural NSW for hearings.

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 online lodgment facility, e-Screens.

WHO WE ARE

LEGAL AND MEDICAL SERVICES BRANCH

The Legal and Medical Services Branch comprises five units: a Legal Unit, Legal and Medical Support Unit, Expedited Assessments Unit, Arbitrator Support Unit and Research and Information Unit.

The Branch performs a wide range of legal and administrative functions, including providing legal advice to members and staff, responding to legal inquiries from the public and legal profession, undertaking various legal and quasi-legal functions and the ongoing professional development of Arbitrators and Approved Medical Specialists.

The Branch also maintains a number of publications, including the Arbitrator Practice Manual, Approved Medical Specialist Practice Manual, 'On Review' and 'Decisions of Medical Appeal Panels'.

Legal Unit

The Legal Unit is mainly responsible for managing and determining applications for:

- medical appeals;
- costs orders and assessments;
- defective pre-filing statements;
- disputes regarding access to information and premises, and
- determination of conduct money/production fees.

Administrative support staff are responsible for the case management and administration of various applications and provide support to projects managed within the Legal and Medical Services Branch.

Legal and Medical Support Unit

The Legal and Medical Support Unit is responsible for developing ongoing education programs for Arbitrators and Approved Medical Specialists, including annual conferences and periodic forums.

This work involves membership of the relevant reference groups, provision of professional development opportunities to Arbitrators, Approved Medical Specialists and Mediators and coordination of activities such as induction, mentoring and peer review.

Expedited Assessments Unit

This unit is responsible for resolving applications under the expedited assessment provisions including workplace injury management disputes, interim payment directions and small claims.

In addition, the Unit deals with applications for certification of amounts to be paid for the purpose of debt recovery in a court of proper jurisdiction.

Arbitrator Support Unit

The Arbitrator Support Unit provides legal and administrative support to full-time, part-time and sessional Arbitrators, including the proofreading of decisions and legal research. Staff may also assist in the conduct of hearings, as required.

Research and Information Unit

The Research and Information Unit is responsible for maintaining the Commission's research library.

The Unit works with members and staff to ensure access to significant sources of legal information. The Unit is also responsible for the publication of Commission decisions on AustLII and the Commission's website.

HOW WE DO IT

Dispute Resolution Processes

The process for resolving a dispute depends on the type of claim that is in dispute (see Appendix 5) . Parties are encouraged to settle their dispute at any time during the process.

The Registrar will refer general disputes to an Arbitrator for determination. Medical disputes are referred directly to an Approved Medical Specialist for assessment of permanent impairment or opinion on the need for medical and related treatment.

TELECONFERENCE

When an Application to Resolve a Dispute involves a general dispute, a proceedings timetable is issued to the parties advising of the date and time for teleconference. Teleconferences are scheduled for one and a half hours.

A teleconference is conducted by an Arbitrator and involves the worker, the insurer and their legal representatives. The employer may also participate, but is more commonly represented by its insurer.

During the teleconference, the Arbitrator will ensure all parties understand the process, identify the relevant issues and encourage the parties to reach an agreement. If the parties reach an agreement, the Arbitrator will record the agreement in consent orders to be issued to the parties by the Commission's registry.

Where the parties are unable to reach an agreement, the Arbitrator may determine the dispute on the basis of documents and information already provided, known as a determination 'on the papers'. A written decision will be issued to the parties at a later date.

Alternatively, the matter may be scheduled for a conciliation conference/arbitration hearing. The Arbitrator will also consider applications to issue directions for the production of documents.

CONCILIATION CONFERENCE

The conciliation conference is the first part of a two-stage process where the parties (and their legal representatives) meet face to face. If the worker lives in Sydney, the meeting will be held in the Sydney CBD. 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 issues in dispute. If the parties reach an agreement, the Arbitrator will record the agreement in consent orders to be issued to the parties by the Commission's registry.

If the parties are unable to reach an agreement about the dispute, the Arbitrator will terminate the conciliation conference. After a short break, the arbitration hearing will usually commence on the same day.

ARBITRATION HEARING

The arbitration hearing, which is open to the public, is the more formal phase of proceedings leading to a legally binding decision issued by the Arbitrator. Proceedings are sound-recorded and evidence may be taken under oath or affirmation.

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

At any time before the Arbitrator makes a decision, the parties may settle the dispute. The Arbitrator may inform the parties of the decision at the end of the hearing. More commonly, however, the Arbitrator will reserve his or her decision and issue a Certificate of Determination and Statement of Reasons, usually within 21 days of the hearing.

HOW WE DO IT

MEDICAL ASSESSMENTS

Where liability is not in issue, medical disputes are referred by the Registrar, or delegate, to an Approved Medical Specialist. Approved Medical Specialists are appointed by the President of the Commission to provide an independent medical assessment for a work-related injury.

Medical disputes may be about the degree of permanent impairment or whether medical and related treatment is reasonably necessary.

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

Where the dispute concerns a claim for permanent impairment, the following matters are certified by the Approved Medical Specialist and 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, and
- whether the degree of impairment is fully ascertainable.

If the dispute concerns whether medical and related treatment is reasonably necessary as a result of an injury, the dispute must be referred for the opinion of an Approved Medical Specialist. The resulting opinion of the Approved Medical Specialist is evidence, but not conclusive evidence, in proceedings.

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. The Commission is also responsible for resolving disputes relating to defective pre-filing statements, directions for access to information and premises and pre-filing strike out applications.

In most cases, a claimant must refer a claim for work injury damages for mediation to 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 endeavors 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.

COSTS ASSESSMENTS

Costs in workers compensation and common law claims are regulated. Parties may make application to the Registrar to assess costs where an agreement or order for costs has been made and the quantum of those costs cannot be resolved. Applications may be made for party/party costs, solicitor/client costs or agent/client costs and disputes as to apportionment between former and current legal representatives. Assessments are undertaken by delegates of the Registrar.

HOW WE DO IT

Appeals

ARBITRAL APPEALS

Decisions made by Arbitrators may be appealed to Presidential members. The President, or a Deputy President, sitting alone, hear and determine appeals from arbitral decisions.

An appeal against an Arbitrator's decision is limited to whether the decision was or was not affected by an error of fact, law or discretion, and the correction of any such error.

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. While 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. Decisions of the Court of Appeal are binding on the Commission and all parties to the proceedings.

MEDICAL APPEALS

A party may appeal against those parts of a Medical Assessment Certificate that are conclusively presumed to be correct.

A party who appeals may rely on any of following four grounds of appeal:

- deterioration of the worker's condition;
- availability of additional relevant information (where not available or reasonably obtainable before the medical assessment);
- incorrect criteria, and/or
- demonstrable error.

An appeal is made by application to the Registrar. The Registrar, or delegate, must be satisfied that a ground of appeal is made out before referring the matter to a Medical Appeal Panel. The delegate may refer the matter to an Approved Medical Specialist for further assessment or reconsideration as an alternative to an appeal.

Medical Appeal Panels are comprised of an Arbitrator and two Approved Medical Specialists. The matters to be determined by Medical Appeal Panels are restricted to the grounds of appeal on which the appeal was made.

In conducting the appeal, the Medical Appeal Panel reviews material available to the Approved Medical Specialist and documents filed in the medical appeal proceedings. Appeals may be dealt with 'on the papers' without further submissions from the parties. In some cases, the worker may be re-examined by an Approved Medical Specialist on the Medical Appeal Panel and/or an assessment hearing may be held where the parties may make oral submissions to the Medical Appeal Panel.

The Medical Appeal Panel may confirm the original Medical Assessment Certificate of the Approved Medical Specialist, or may revoke that certificate and issue a new Medical Assessment Certificate in its place.

Decisions of Medical Appeal Panels are binding in proceedings, subject only to judicial review in the Supreme Court.

QUESTIONS OF LAW

The President hears and determines questions of law. The President may grant leave for a question of law to be referred for his opinion, either by the Arbitrator's own motion or after an application by a party to the Arbitrator. The President is not to grant leave for the referral of a question of law unless he is satisfied that the question is novel or complex.

Despite a referral of a question of law to the President, the Arbitrator will, wherever possible, continue to progress the proceedings.

HOW WE DO IT

Expedited Assessments

Expedited assessments are divided into three categories:

- Interim Payment Directions
- Small Claims
- Workplace Injury Management Disputes

The expedited assessment process provides for faster resolution of disputes than the general dispute resolution process.

Teleconferences, convened by the Registrar, or delegate, are usually conducted approximately two weeks after registration of the application. Face-to-face conciliation conferences and arbitration hearings are not scheduled. Where the dispute does not settle at the teleconference, a decision will usually be issued to the parties following a determination by reference to documents lodged and submissions made at the teleconference.

Interim Payment Directions

Disputes concerning weekly compensation payments up to 12 weeks and/or medical expenses compensation up to $8,297.80 (as at 1 October 2013) are generally dealt with under the Interim Payment Direction provisions.

These provisions ensure early intervention where an insurer fails to commence payment of compensation or fails to determine a claim within the required time. The provisions may, however, also be utilised when an insurer disputes liability and a dispute notice has been issued.

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

Small Claims

In some cases, the Registrar, or delegate, may determine past weekly compensation benefits claims for a closed period of up to 12 weeks under the 'small claims' provisions. When doing so, the Registrar, or delegate, exercises arbitral functions and a dispute is determined by the issuing of a Certificate of Determination. The determination may be appealed to a Presidential Member.

Workplace Injury Management Disputes

Disputes regarding workplace injury management may be lodged in the Commission 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, and/or
- the worker's capacity to perform duties is in dispute.

A teleconference will usually be held by the Registrar, or delegate, in the first instance. The matter may be referred to an Injury Management Consultant or other suitably qualified person to conduct a workplace assessment. An Injury Management Consultant is a registered medical practitioner appointed by WorkCover NSW, who assists 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.

Where the matter is not resolved, the Registrar, or delegate, makes a recommendation to the parties for a certain course of action to be adopted. Whilst this usually concludes the dispute, a party may seek referral of the matter to an Arbitrator for determination.

GOVERNANCE

COMMITTEES AND FORUMS

The Commission utilises a variety of committees and forums to assist with decision-making and governance arrangements. The various committees and forums comprise a mixture of Commission members, staff, service partners and external users. They provide opportunities for information-sharing, consultation and the development of options in relation to the operations of the Commission. A brief summary of several of the forums is outlined below.

Executive Committee

The Executive Committee is the strategic decision-making forum in the Commission. The Committee, chaired by the President, meets bi-monthly and includes the Registrar and Deputy Registrars.

Unit Managers Meeting

The Registrar meets bi-monthly with the Deputy Registrars and Unit Managers to provide a channel for input from and discussion with the various business units in the Commission.

Work Health & Safety Committee

The Work Health and Safety Committee is chaired by a nominated staff member, selected from six staff representatives and includes a representative of management. The Committee reviews work health and safety issues in the Commission and makes recommendation on these issues to management.

Arbitrator Practice Meetings

Bi-monthly practice meetings with Arbitrators, chaired by the Registrar, are open to all full-time, part-time and sessional Arbitrators.

The practice meetings provide regular information to Arbitrators and seeks their input on operational matters in the Commission.

Approved Medical Specialist Reference Group

The Reference Group is an advisory and consultative forum that provides information and seeks feedback from Approved Medical Specialists. Meetings are chaired by the Registrar, usually on a quarterly basis

User Group

The User Group, chaired by the President, meets three times per year. The Group includes representatives from the NSW Bar Association, the Law Society of NSW and WorkCover NSW.

The User Group provides a forum for discussion and feedback on operational and procedural issues affecting the Commission.

During 2013, the membership was as follows:

Chair: President Judge Greg Keating
Secretariat: Presidential Unit
Deputy President Bill Roche
Deputy President Kevin O'Grady
Senior Arbitrator Deborah Moore
Senior Arbitrator Michael Snell
Deputy Registrar Annette Farrell
Deputy Registrar Rod Parsons
Mr Greg Beauchamp, barrister
Mr Steve Harris, solicitor
Ms Roshana May, solicitor
Mr Brian Moroney, solicitor
Ms Penny Waters, solicitor

GOVERNANCE

ACCESS AND EQUITY SERVICE CHARTER

The Access and Equity Service Charter sets out standards to ensure the provision of accessible and equitable services to all members of the community. To achieve these standards, the Commission has developed a range of practices, policies and procedures including:

- free services for all parties;
- information resources on the internet;
- outreach services for self-represented workers;
- interpreter services at no charge;
- hearings in regional and rural locations;
- Codes of Conduct for Arbitrators and Approved Medical Specialists, and
- ongoing education and training seminars.

COMPLAINT HANDLING

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

Complaints can be made about the actions of Commission members, staff, Approved Medical Specialist or Mediators. Dissatisfaction with the outcome of a dispute is not a matter that is dealt with through the complaint handling process. There are statutory rights of appeal and reconsideration for parties who are not satisfied with a decision of a Commission member or Approved Medical Specialist.

During the reporting year, the Commission received a total of 11 complaints, that is, three less than in 2012. Complaints lodged continue at less than 0.1% of applications registered in the Commission.

Of these complaints, four concerned medical assessments conducted by Approved Medical Specialists and seven complaints concerned an Arbitrator.

RISK MANAGEMENT

The nature of the Commission's business operations results in exposure to a wide range of risks. As a key element of good governance, the Commission has developed and implemented a risk management framework, compliant with the Australian Standard AS/NZS ISO 31000:2009 – Risk management – Principles and guidelines.

The risk management framework incorporates:

- management documentation;
- communication/training;
- risk assessment/review, and
- monitoring and reporting

The aim is to ensure that the Commission has in place an appropriate framework to identify, assess and mitigate risks in line with its risk tolerance. Risk tolerance is determined through the development of a matrix that incorporates operational risks, financial risks, reputation, fraud, legal and people impact criteria.

The Commission's Risk Committee assesses and addresses identified risks and maintains currency of the Business Continuity Plan

In 2013, the Risk Committee met on two occasions to evaluate and manage the risks associated with the increasing workloads and time delays in the dispute resolution model.

GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 2009

The *Government Information (Public Access) Act* 2009 (GIPA Act) requires agencies to report on their obligations under the GIPA Act. In compliance with s 7(3) of the GIPA Act, the Commission reviewed the information released to the public through the design and implementation of a new website.

During 2013, the Commission received three applications to release information under the GIPA Act.

2013 WORKLOAD DISCUSSION

Total Registrations

In 2013, the Commission registered 10,314 applications as detailed below. This represents a 41 per cent decrease in registrations over the 2012 year, resulting primarily from significant decreases in Applications to Resolve a Dispute (Form 2).

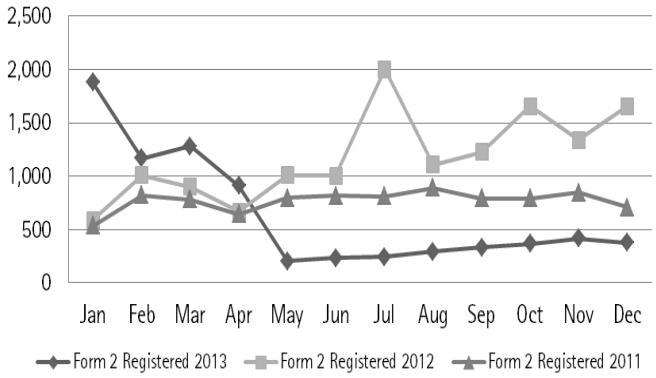
Application Type	2011	2012	2013
Application to Resolve a Dispute (Form 2)	9,225	14,164	7,702
Expedited Assessments (Form 1)	505	700	293
Workplace Injury Management Dispute (Form 6)	112	142	40
Registration for Assessment of Costs (Form 15)	171	173	127
Commutations (Form 5A) and Redemptions (Form 5B)	220	252	145
Mediations (Form 11)	1,207	1,266	1,280
Arbitral Appeals (Form 9)	69	80	72
Medical Appeals (Form 10)	567	599	655
TOTAL	12,076	17,376	10,314

Applications to Resolve a Dispute (Form 2)

REGISTRATIONS

Registrations in the 2013 calendar year were marked by two distinct periods. Up until 2 April 2013, registrations continued at the levels experienced in the second part of 2012, at an average of 1294 new matters per month. Following the changes to the legal costs provisions effective from 3 April 2013, the average monthly registrations decreased to 273 per month for the remainder of 2013.

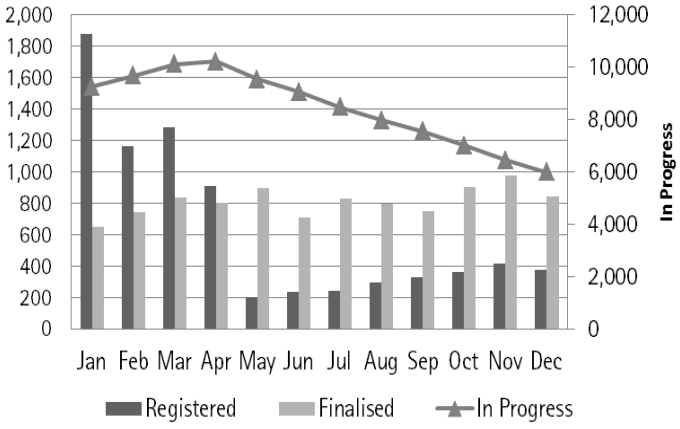
Form 2s Registered by Month (2013)



WORK IN PROGRESS

The Commission's work in progress reached a high of just over 10,600 matters on hand in mid April 2013. Since that time, the number of matters on hand has been falling steadily, as more matters are finalised each month than new matters registered

Applications to Resolve a Dispute (2013)



2013 WORKLOAD DISCUSSION

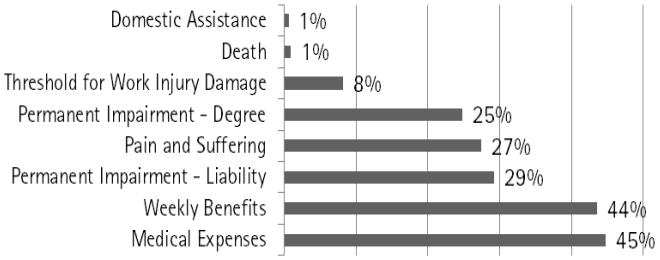
ISSUES IN DISPUTE

Form 2s usually involve a dispute over more than one claim. For example, the dispute may involve a claim for weekly benefits and a claim for medical expenses.

During the reporting year, the proportion of disputes involving a claim for weekly benefits increased to 44 percent (up from 41 percent) of Form 2s.

Form 2s that included a claim for permanent impairment compensation reduced from 65 per cent to 54 per cent, whilst those including a claim for pain and suffering compensation reduced from 40 per cent to 27 per cent.

Issues in Dispute 2013

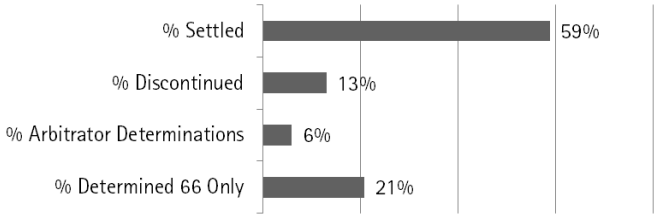


OUTCOMES

Seventy-three per cent of Form 2s in 2013 (75 per cent in 2012) were resolved without the need for determination by the Commission. Of these, 59 per cent were settled and 13 per cent were discontinued.

The settlement rate for Form 2s remained stable at 59 per cent in 2013 (58 per cent in 2012). Seventy four per cent of the determined matters involved the issuing of a Certificate of Determination by the Registrar, finalising a worker's entitlement to permanent impairment compensation following a medical assessment by an Approved Medical Specialist.

ARD Outcomes 2013



Other Applications (excluding appeals)

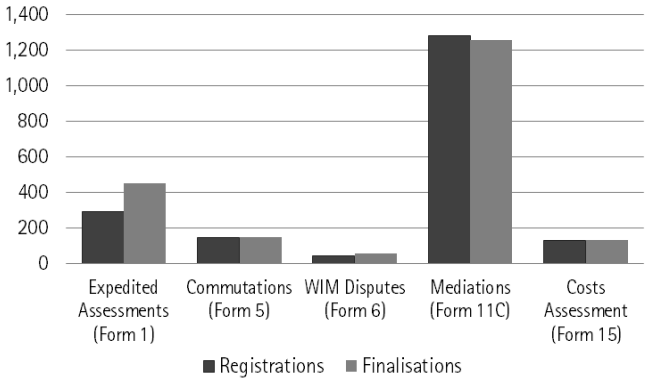
As a further consequence of the legislative amendments, Applications for Expedited Assessment (Form 1) experienced a significant decrease in the latter part of 2013 compared to previous years. Applications for the second half of 2013 were down 74 per cent over the same period in 2011, prior to the legislative amendments.

Applications for Workplace Injury Management Disputes (Form 6) also decreased by 84 per cent compared to 2011.

Cost Assessments (Form 15s) continued what has been a long term decrease in applications.

Applications for Mediation (Form 11C) are unaffected by the legislative amendments and remained comparable to 2012

Registrations vs Finalisations 2013 (excluding ARDs and Appeals)



2013 WORKLOAD DISCUSSION

Outcomes for the various applications are shown in the tables below:

Form 6 – WIM Disputes	
% Recommendation Issued	57%
% Discontinued	15%
% Other	17%
% Recommendation Refused	11%

Form 11C – Mediations	
% Settled	60%
% Certificate of Final Offer	28%
% Wholly Denied Liability	9%
% Other	3%

Form 1 – Expedited Assessments	
% IPD Issued	42%
% Discontinued	20%
% Refused	12%
% Settled	19%
% Other	7%

Form 15 – Costs Assessments	
% Determination Issued	59%
% Discontinued	37%
% Other	4%

Medical Appeals

There were 655 Applications to Appeal Against a Decision of an Approved Medical Specialist (Form 10) registered in 2013, an increase of nine per cent from the 599 registered in 2012. The decrease in Medical Assessment Certificates issued (down from 5,054 to 4,590), has resulted in an increase in the medical appeal rate from 12 per cent to 14 per cent.

Of the 688 medical appeals finalised, 506 were finalised by Medical Appeal Panels. Fifty-two per cent of those matters determined by a Medical Appeal Panel resulted in revocation of the Medical Assessment Certificate, similar to the 2012 rate of 53 per cent. The overall revocation rate, measured as the proportion of revoked certificates over the total Medical Assessment Certificates issued increased to six per cent for the 2013 year (four per cent in 2012).

Arbitral Appeals

In 2013, the Commission registered 72 Appeals Against the Decision of an Arbitrator (Form 9), with 73 applications finalised by Presidential members. This represents a 10 per cent decrease in the number of appeals registered when compared to 2012. However, with the increase in the number of determinations issued by Arbitrators, the overall revocation rate, expressed as the proportion of revoked decisions over the total appealable decisions, remains constant at six per cent.

The Arbitrator's decision was confirmed in 53 per cent of matters, with 32 per cent revoking the Arbitrator's decision. The remaining 15 per cent were discontinued or rejected for procedural non-compliance.

There were 20 appeals in progress at the end of 2013.

2013 WORKLOAD DISCUSSION

Key Performance Indicators

Timeliness	Target	Actual
% of Dispute Applications resolved (no appeal):		
3 months	45%	6%
6 months	85%	32%
9 months	95%	67%
12 months	99%	91%
% of Dispute Applications resolved (with appeal):		
3 months	40%	5%
6 months	80%	30%
9 months	94%	64%
12 months	98%	88%
Average days to resolution for Dispute Applications with no appeal	105	233
Average days to resolution of Arbitral Appeals	112	88
Average days to resolution of Medical Appeals	100	110
% of Expedited Assessments resolved with 28 days	90%	15%
Durability	**Target**	**Actual**
% of determined Dispute Applications revoked on appeal[1]	< 15%	4%
% of Medical Assessment Certificates revoked on appeal[2]	< 15%	6%

[1] This KPI represents the number of arbitral decisions revoked, expressed as a percentage of the total number of appealable arbitral decisions (ie. excluding s 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. \

The Commission continues to monitor its performance against a series of key performance indicators (KPIs). The KPIs are intended to track the Commission's progress in the delivery of a number of its statutory objectives including timeliness

.In previous years, the Commission has generally met or exceeded all KPIs. However, the impact of the *Workers Compensation Legislation Amendment Act* 2012 resulted in an extraordinary year in the Commission's history.

During the latter part of 2012 and until 2 April 2013, the significant increase in registrations resulted in a threefold escalation in the work on hand. Notwithstanding some limited additional resources, the increase workload has inevitably led to delays in the timeframes for resolution of disputes.

As the number of applications on hand has substantially diminished, the Commission is now making inroads into the listing timeframes and expects to return to normal listing timeframes in June 2014.

Judicial Review of Registrar and Medical Appeal Panel Decisions

Parties who are aggrieved by decisions of the Registrar or Medical Appeal Panels may seek review of these decisions in the Supreme Court, pursuant to the *Supreme Court Act* 1970.

The Supreme Court registered nine judicial review applications against decisions of the Registrar and/or Medical Appeal Panels and a further two applications were made to the Court of Appeal against judicial review decisions of the Supreme Court during 2013. This represents a judicial review rate of less than one per cent of all decisions made.

In 2013, the Supreme Court handed down nine decisions. Five matters were dismissed and four decisions were quashed. A further matter was discontinued. The Court of Appeal issued one decision, dismissing the application

Appeals to the Court of Appeal from Presidential Decisions

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

In 2013, the Court of Appeal determined seven appeals. Of the appeals that proceeded to determination, four were dismissed and three were upheld. One new application has been filed in the High Court of Australia and will be heard in 2014. There is a further matter still pending before the High Court from 2012.

EDUCATION AND COLLABORATION

National 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, Commonwealth and New Zealand tribunals. Prior to commencement of the conference, a national workers compensation inter-jurisdictional meeting is convened and chaired by the President. Its purpose is to promote information-sharing and collaboration across the various tribunals in Australia and New Zealand managing workers compensation disputes.

The meeting in 2013 discussed the following issues:

- the newly established Merit Review Service (NSW);
- proposed changes to the Motor Accident Scheme in NSW;
- the parliamentary enquiry into workers compensation (QLD);
- the Medical Assessment Tribunal's move to a 100 per cent electronic database (QLD);
- Separation of the conciliation and arbitral services (WA) and changes in the appeal process;
- the binding nature of medical assessment panel decisions in South Australia;
- the impact of the 2010-2011 legislative reform package in Tasmania;
- the "Scheduling Project" undertaken by the Dispute Resolution Service Ltd, New Zealand, including internal process change, stakeholder engagement and technology reforms;
- the formation of the NSW Civil and Administrative Tribunal (NCAT);
- the establishment of the WorkCover Independent Review Office (WIRO) and the establishment of the Independent Legal Assistance and Review Service (ILARS), and
- the 2012 NSW legislative amendments.

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. The President is a member of the Executive Committee of the NSW Chapter of COAT

During 2013, members and staff of the Commission participated in various activities organised by COAT, including the National Conference hosted by COAT and the AIJA, which was held in Brisbane in June, and the NSW State Conference held in Sydney in September 2013.

Stakeholder Presentations

Over the course of the reporting year, members and staff delivered a number of presentations to stakeholders including:

Judge Keating – President
31 October 2013 – Self Insurers Association

Bill Roche – Deputy President
20 March 2013 – UNSW Faculty of Law Centre for Continuing Legal Education

Annette Farrell – Deputy Registrar
27 June 2013 - The College of Law

Rod Parsons – Deputy Registrar
12 June 2013 - Administrative Decisions Tribunal

EDUCATION AND COLLABORATION

Stakeholder and Client Publications

Bulletins

The Commission publishes a number of bulletins to disseminate information periodically to various stakeholders including:

- e-Bulletin – for the legal profession;
- Arbitrator Bulletin – for full-time, part-time and sessional Arbitrators;
- AMS Bulletin – for Approved Medical Specialists, and
- Medical Appeal Panel Bulletin – for Arbitrators and Approved Medical Specialists who sit on Medical Appeal Panels.

On Appeal

Issued monthly to Arbitrators and published on the Commission's website, 'On Appeal' is a publication that summarises the decisions of Presidential members in the preceding month and provides a brief overview of relevant Court of Appeal decisions.

On Review

'On Review', available on the Commission's website, is a publication that lists relevant and significant judicial review and appeal decisions of the Supreme Court and the Court of Appeal in relation to medical assessments, medical appeals and administrative decision-making functions of the Registrar.

Arbitrator Practice Manual

The Arbitrator Practice Manual provides guidance to Commission members on a range of procedural and ethical issues. The manual also contains a number of chapters on substantive legal issues relevant to the Commission.

Approved Medical Specialist Practice Manual

The Approved Medical Specialist Practice Manual assists Approved Medical Specialists to understand the dispute resolution model and the relationship between their functions and those of Arbitrators. The manual includes chapters on practical issues such as conducting examinations and legislative issues such as the deduction for previous injuries or pre-existing conditions.

Decisions of Medical Appeal Panels

Medical Appeal Panel decisions on specific areas of the medical assessment process including adequacy of reasons, assessment methodologies and fresh evidence. are summarized and provided to Medical Appeal Panel members and Registrar's delegates undertaking the gatekeeper function for medical appeals.

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DEVELOPMENTS IN THE LAW

Legislative Amendments

The *Workers Compensation Legislative Amendments Act* 2012, enacted in June 2012, introduced reforms to the New South Wales workers compensation scheme which have significantly impacted on the work and workload of the Commission.

The main changes to the Commission's jurisdiction resulting from the 2012 amendments are discussed below.

WEEKLY PAYMENTS OF COMPENSATION

The 2012 amendments apply to claims made on or after 1 October 2012. Transitional arrangements apply to workers in receipt of weekly compensation payments immediately before 1 October 2012.

Except for "seriously injured workers", under the 2012 amendments, an injured worker's work capacity is assessed by the employer's workers compensation insurer. A work capacity decision may be reviewed by internal review by the insurer, merit review by WorkCover NSW, or procedural review by the WorkCover Independent Review Officer. The Commission is excluded from reviewing work capacity decisions and may not make a decision in respect of a dispute that is inconsistent with a work capacity decision.

There have been a number of cases where the Commission has been required to determine whether the 2012 legislative amendments apply or not. Significant decisions in respect of weekly benefits involving issues of "existing recipient", "immediately before" and "jurisdiction of the Commission" include:

- *Komljenovic v Facility Management Solutions Pty Ltd* [2013] NSWWCC 69
- *Mohammadi* v *Chandler Macleod Group t/as Ready Workforce Pty Ltd* [2013] NSWWCC 75
- *De Carvalho Soares* v *Maxitherm Boilers Pty Ltd* [2013] NSWWCC 425
- *Kilic v Kmart Australia Ltd* [2013] NSWWCCPD 37
- *Lee v Bunnings Group Limited* [2013] NSWWCCPD 54

LUMP SUM COMPENSATION

The 2012 amendments provide that only those workers who receive an injury that results in a degree of permanent impairment of greater than 10 per cent are entitled to receive compensation for that permanent impairment. The interpretation of this new provision has led to significant disputation, which is and has been the subject of appeal to the Court of Appeal and High Court.

The most significant issue for the Commission arising out the lump sum amendments is the application of the "greater than 10 per cent" threshold for entitlement to lump sum compensation.

Other issues in relation to lump sum compensation claims include the application of the 2012 amendments to further claims for lump sum compensation resulting from the same injury, further claims for hearing loss and claims for injuries received before 1 January 2002.

Significant decisions in respect of entitlement to lump sum compensation include:

- *Goudappel v ADCO Constructions Pty Limited & anor* [2013] NSWCA 94
- *Sukkar* v *Adonis Electrics* [2013] NSWWCCPD 59
- *BP Australia Ltd* v *Green* [2013] NSWWCCPD 60
- *Halloran* v *Rail Corp NSW* [2013] NSWWCC 85
- *Di Matteo v RDM Ceramics Pty Limited* [2013] NSWWCCPD 27
- *Spinelli* v *Integrated Labour Network Pty Ltd Limited* [2013] NSWWCCPD 31

MEDICAL AND RELATED EXPENSES

Section 59A(1) of the *Workers Compensation Act* 1987 has been introduced to limit the entitlement to medical and related expense to 12 months after a claim for compensation in respect of an injury is first made, unless a worker is in receipt of weekly benefits. For workers in receipt of weekly compensation payments, the entitlement to medical and related expenses continues until 12 months after the

entitlement to weekly compensation ceases. For claims made before 1 October 2012, where the worker was not in receipt of weekly benefits, the 12 month period commenced on 1 January 2013 (Sch 8, Pt 1, Cl 5 of the *Workers Compensation Regulation* 2010). The 12 month period for payment of compensation for medical and related treatment ended for some workers on the 31 December 2013.

The jurisdiction of the Commission is retained in relation to disputes regarding entitlement to medical, hospital and related expenses, subject to the time limit imposed by s 59A. Disputes concerning police officers, paramedics and fire fighters are also dealt with in the Commission without the limits imposed by s 59A.

The 2012 amendments further provide that a worker's employer is not liable to pay the cost of any treatment or service without the prior approval of the Insurer. The Commission is excluded from this new provision and may determine any claim for medical, hospital and related expense incurred by a worker.

The Commission has also retained its jurisdiction to determine disputes regarding entitlement to a proposed medical treatment or service.

AWARD OF LEGAL COSTS

Section 341(2), as amended by the 2012 amending Act, provides that each party is to bear their own costs and the Commission has no power to determine by whom, to whom or to what extent costs are to be paid.

Transitional arrangements initially allowed for any matters registered in the Commission by 31 December 2012 to be finalised in accordance with the old costs provisions. By the *Workers Compensation Amendment (Further Transitional) Regulation* 2012, the awarding of costs in proceedings commenced in the Commission, in relation to a claim for compensation made before 1 October 2012, was extended to proceedings commenced before 31 March 2013. By s 36 of the *Interpretation Act* 1987, this date effectively became on or before 2 April 2013.

The Commission is unable to order costs or complexity increases for matters lodged after 2 April 2013, with the exception of proceedings brought by police officers, paramedics and fire fighters.

EXEMPT WORKERS

The Commission has retained its jurisdiction to resolve disputes concerning police officers, paramedics and fire fighters under the workers compensation legislation as it existed prior to the 2012 legislative amendments. All other workers who lodge a dispute in the Commission are subject to the 2012 legislative amendments

DEVELOPMENTS IN THE LAW

New Commission Rules

The *Worker Compensation Commission Rules* 2011 have been amended with effect from 7 June 2013.

The main amendment is to r 17.7, which sets out procedures in relation to a defective pre-filing statement in work injury damages claims. Rule 17.7 has been re-drafted in response to the decision of *Wilkinson v Perisher Blue Pty Ltd* [2012] NSWCA 250 in which the Court reviewed the rule making power and determined that a lacuna existed with respect to making rules for the Registrar to extend time. Rule 17.7 has been re-drafted consistent with the decision of the Court of Appeal. The 2011 Rules have also been amended so as to be consistent with the legislative amendments introduced by the *Workers Compensation Legislation Amendment Act* 2012 with respect to the Commission's power to order costs.

A summary of the substantive amendments to the Rules is available on the Commission's website.

Medical Appeal Panels

On 11 December 2013 a decision was delivered in *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792 that clarified the role of a medical appeal panel.

In that decision Justice Davies considered s 328(2) of the 1998 Act, as amended in 2010. In particular his Honour considered what was meant by "grounds of appeal on which the appeal is made" in that section. His Honour noted a distinction between "grounds of appeal" in s 328(2) with the words "grounds for appeal" in s 327. Because of that distinction and the use of the words "on which the appeal is made", his Honour was of the view that a medical appeal panel is limited to considering the specific grounds which have been raised by the parties on appeal.

The decision is in contrast to the Court of Appeal decision in *Siddik* v *WorkCover Authority of NSW* [2008] NSWCA 116 where the Court held that a medical appeal panel is prima facie confined to the grounds the Registrar has allowed to proceed on appeal, however it can consider other grounds capable of coming within one or other of the grounds of appeal in section 327(3) if it gives the parties an opportunity to be heard.

His Honour, Justice Davies, also considered the power of the medical appeal panel to undertake a re-examination of the worker before the panel determined whether there was a demonstrable error on the face of the medical assessment certificate. At the preliminary stage, the panel had some doubts regarding the history taken by the approved medical specialist and the classes assigned by him. Before determining whether there was a demonstrable error, the panel referred the worker for assessment by a medical specialist member of the panel. His Honour found that the medical appeal panel had no power to make that referral because no demonstrable error had been found. The medical appeal panel's function was either to confirm the medical assessment certificate or revoke it and issue a new certificate (s 328(5)).

DEVELOPMENTS IN THE LAW

Significant Presidential Member and Court of Appeal Decisions

Appeals relating to the interpretation of the 2012 legislative amendments and the application of transitional provisions were determined by Presidential Members and the NSW Court of Appeal.

A brief summary of a number of important cases decided in 2013 follows.

Goudappel v ADCO Constructions Pty Limited & anor [2013] NSWCA 94

The Presidential decision of *Goudappel v ADCO Constructions Pty Limited & anor* [2012] NSWWCCPD 60, which was reported in the 2012 Annual Review, was appealed to the Court of Appeal under s 353 of the *Workplace Injury Management and Workers Compensation Act* 1998.

The Court of Appeal granted leave to appeal and set aside the Presidential decision finding that:

> "The amendments to Division 4 of Part 3 of the *Workers Compensation Act 1987* introduced by Schedule 2 of the *Workers Compensation Legislation Amendment Act 2012* do not apply to claims for compensation pursuant to s 66 which are made before 19 June 2012 in respect of an injury that results in permanent impairment, whether or not the claim specifically sought compensation under s 66 or s 67 of the 1987 Act."

Current status: On 11 October 2013 the High Court granted special leave to appeal the Court of Appeal's decision. The High Court appeal has been listed for hearing on 1 April 2014.

Chep Australia Limited v Strickland [2013] NSWCA 351

Ms Strickland was employed by Chep as a machine operator/factory worker. In 2008, she began experiencing pain in her right elbow, left shoulder and left wrist. These symptoms continued and on 19 August 2010 her treating doctor prescribed Mobic, an anti-inflammatory drug (Mobic can cause an elevation of blood pressure; a known risk factor in aneurysmal haemorrhage).

On 7 October 2010, Ms Strickland ceased taking Mobic, complaining of symptoms of hypertension and headache to her general practitioner. On 28 October 2010, Ms Strickland resumed taking Mobic due to an increase in the pain to her wrist, elbow and shoulder. On 17 November 2010, Ms Strickland suffered a ruptured aneurysm. She was incapacitated from 17 November 2010 until 4 November 2011. A claim for weekly workers compensation benefits and medical expenses was declined by Chep's insurer.

The Arbitrator held that the rupture of the aneurysm resulted from the ingestion of Mobic which had been prescribed as treatment for the work-related injury. The decision of the Arbitrator was appealed.

On appeal to a Presidential Member, Chep relied on a number of grounds which challenged the fact-finding of the Arbitrator and sought to rely on fresh evidence which had not been tendered before the Arbitrator. The evidence in question consisted of two medical reports and clinical notes. The President declined to admit the evidence sought to be tendered on the basis that the first report and the clinical notes added nothing to the evidence already before the Arbitrator and the second report was of no probative value The President confirmed the Arbitrator's determination.

Chep appealed the decision of the President. Under the first ground of appeal it was submitted that the President misdirected himself by substituting for the test of "substantial injustice" (s 352(6) of the *Workplace Injury Management and Workers Compensation Act* 1998) for the question whether the admission of the clinical notes would have led to a different result.

The Court of Appeal found that the President was entitled to concentrate on the second threshold question (s 352(6)), that is, whether failure to grant leave to introduce the clinical notes into evidence "would cause substantial injustice in the

case", as there was no dispute that the clinical notes were available and could reasonably have been obtained during the arbitration.

On the second threshold question, the task is to decide whether absence of the evidence "would cause" substantial injustice in the case. There must therefore be a decision as to the result that "would" emerge if the evidence were taken into account and the result that "would" emerge if it were not. The President had expressly analysed the fresh evidence and its possible effect if taken into account. The President was satisfied that the medical notes "add[ed] nothing to the evidence already before the Arbitrator". This was a finding of fact which was open to the President.

The second ground of appeal involved an attempt by Chep to demonstrate that an expert medical opinion, upon which the Arbitrator had relied, lacked probative value. This ground also failed as the President had satisfied himself that the specialist doctor based his opinion on his "review of the documentation that was forwarded to him" and that finding was not open to challenge.

The appeal to the Court of Appeal was dismissed. It was held that the grounds of appeal were misconceived and that they failed to come to grips with the need to identify a decision which was erroneous in a point of law.

Zanardo & Rodriguez Sales & Services Pty Ltd v Tolevski [2013] NSWCA 449

The worker suffered a fall while working for Zanardo & Rodriguez Sales & Services Pty Ltd (employer) and injured his left knee. His claim for workers compensation was accepted. The worker began to experience symptoms in both hips which he claimed was precipitated by the fall. The condition of the workers hips deteriorated to the point where hip replacement surgery was recommended by his orthopaedic surgeon. The insurer denied liability for the surgery on the basis that there was no causal connection between the condition of his hips and the accepted knee injury.

A Commission Arbitrator found that the worker had not discharged the onus of proving that he suffered from a consequential condition in his hips as a result of the original injury to his knee. He found in favour of the employer.

The worker appealed. The question on appeal was whether it was mandatory under s 60(5), to refer the dispute to an Approved Medical Specialist (AMS) under Part 7 (Medical Assessment) of Chapter 7 of the *Workers Compensation Act* 1987, for a non-binding assessment because the dispute concerned a claim for future medical treatment. The President concluded that referral is mandatory in such cases. The Arbitrator's decision was revoked and the matter was remitted for referral to an AMS in accordance with s 60(5).

The employer appealed to the Court of Appeal. It alleged that the President erred in holding that it was mandatory to refer the dispute to an AMS before determining the causation issue with respect of the hip condition.

The Court of Appeal dismissed the appeal and held that s 60 (5) is mandatory in cases concerning a dispute about proposed medical treatment.

As a matter of statutory construction, the starting point must be the text. "Any such dispute" in the second sentence of sub-s (5) is a reference to the class of disputes identified in its first sentence, namely, the new class of disputes concerning proposed treatment, which were formerly beyond the Commission's jurisdiction.

Justice Leeming (Beazley P and Tobias AJA agreeing) held that the disputes with respect to proposed medical treatment may arise in a number of different ways. It may concern the treatment or the cost of the treatment or, as in this case, whether the treatment is causally connected with the injury. However the statutory language does not discriminate as to the various reasons for the dispute, it merely asks whether there is a dispute which "concerns" "any" proposed treatment.

In dismissing the appeal, the Court of Appeal held that the President was correct to proceed on the basis that the starting point is the ordinary and grammatical sense of the statutory words having regard to their context and legislative purpose.

Roche v Australian Prestressing Services Pty Ltd [2013] NSWWCCPD 7

On 8 July 2008, the worker injured his left ankle and left wrist when he fell in the course of his employment for the respondent. He entered a complying agreement with the respondent under s 66A of the *Workers Compensation Act* 1987 which it was agreed that he suffered a six per cent whole person impairment (WPI): two per cent due to his left ankle injury and four per cent due to his left wrist injury.

The worker later claimed additional lump sum compensation on a deterioration in his ankle. A second Approved Medical Specialist assessed the worker to have a nine per cent WPI as a result of the condition of his left ankle and hind foot, but a nil impairment as a result of the condition of his left wrist.

The Commission ordered the respondent pay the worker lump sum compensation in respect of three per cent further permanent impairment resulting from injury on 8 July 2008. The worker sought a reconsideration of that determination, claiming compensation for an additional seven per cent WPI as a result of the condition of his left ankle (which he argued could be added to the previous four per cent assessment of the wrist to meet the threshold – s 67), and compensation for pain and suffering.

The Arbitrator held that the complying agreement was not an order of the Commission and could not give rise to an estoppel. The Arbitrator confirmed the Medical Assessment Certificate and that the worker had no entitlement to compensation for pain and suffering. The worker appealed.

The principal issue, on appeal, was whether the employer was estopped from denying the percentage assessments upon which the complying agreement was based. It was submitted that the complying agreement gave rise to an admission and an estoppel and the earlier agreed percentage assessment for the wrist injury (four per cent) could be added to the increased impairment due to the deterioration in the ankle injury (seven per cent) to meet the threshold for compensation for pain and suffering.

On appeal the Presidential member noted that the doctrine of estoppel does not apply to a changing situation and an assessment of WPI is such a situation. As the assessment of permanent impairment involved a prediction for the future, and as a physical condition or impairment is a "state of things which is capable of subsequent alteration", there could be no estoppel from the complying agreement.

The Presidential member agreed with the Arbitrator that impairments that result from more than one injury arising out of the same incident are to be assessed together to determine the degree of permanent impairment of the injured worker (s 322(3) of the *Workplace Injury Management and Workers Compensation Act* 1998). As the worker suffered two injuries (an injury to his ankle and an injury to his wrist) in the one incident (the fall on 8 July 2008), his impairments (and his entitlement to lump sum compensation) had to be assessed together, not as separate injuries.

Having previously been assessed to have a six per cent WPI as a result of the incident on 8 July 2008 and having then been assessed by an AMS to have a nine per cent WPI as a result of that incident, the worker was only entitled to receive compensation for the difference between the two figures.

DEVELOPMENTS IN THE LAW

Kilic v Kmart Australia Ltd [2013] NSWWCCPD 37

This appeal concerned the application of the amendments to the 1987 Act, introduced by the *Workers Compensation Legislation Amendment Act* 2012 (the 2012 amending Act), to a claim for weekly compensation made before 1 October 2012, in circumstances where the worker was not an "existing recipient of weekly payments" immediately before 1 October 2012 and was not a "seriously injured worker".

The Arbitrator made an award that the employer pay the worker weekly compensation for a period up to 31 December 2012 under s 40 of the *Workers Compensation Act* 1987 (the 1987 Act), as it was prior to the amendments introduced by the 2012 amending Act. The Arbitrator also determined that the worker's entitlements from 1 January 2013 fell to be determined under the second entitlement period set out in s 32A of the 1987 Act. The quantum of weekly compensation payable was determined by applying the formula in s 37 appropriate for a worker with a current work capacity and it was found that the worker's entitlement to compensation under that section would expire on 26 July 2013, 130 weeks after weekly compensation was first paid or payable to her. The worker appealed.

The issue on appeal was whether the Arbitrator erred in determining when the entitlement period in s 32A commenced to run and in finding that the second entitlement period would expire on 26 July 2013. The worker did not challenge the quantum of the award from 1 January 2013 or the Commission's jurisdiction to make an award for the payment of weekly compensation from 1 January 2013.

The Presidential member held that before the quantum of weekly compensation payable to a worker can be determined under the weekly payments amendments, it was necessary to determine, among other things, into which entitlement period the claim falls. There are three categories of claimant/worker with different dates for the commencement of the weekly payments amendments depending on the category the worker comes within:

(a) for claims made on or after 1 October 2012, the weekly payments amendments apply from the date on which the claim is made;
(b) for existing recipients of weekly compensation immediately before 1 October 2012, the weekly payments amendments apply on a date three months after the insurer makes a work capacity decision. A work capacity decision arises from a work capacity assessment, which assessment must be done within 18 months of 1 October 2012, and
(c) for claims made before 1 October 2012, but where the worker is not an existing recipient of weekly compensation, the weekly payments amendments and the relevant transitional arrangements do not apply to the "compensation payable" in respect of the injury until 1 January 2013.

The worker in this matter fell within the third category of worker/claimant. Though it had been conceded that such workers were not existing recipients, there was no valid reason why cl 9(4) of Pt 19H of Sch 6 (which relates to the application of the weekly payments amendments to the compensation payable in respect of any period of incapacity after the commencement of the amendments) would not apply to them.

The entitlement periods are defined in s 32A by reference to the words used in cl 9(4). For the purpose of the application of the weekly payments amendments to weekly compensation payable to the worker after 1 January 2013, a reference in Div 2 of Pt 3 of the 1987 Act to "a period in respect of which a weekly payment has been paid or is payable" includes such a period that occurred before 1 January 2013. The reference in cl 9(4) to the period "in respect of which a weekly payment has been paid or is payable" is a reference to the words used in s 32A in defining the first and second entitlement periods.

The combined effect of s 32A and cl 9(4) is that the entitlement periods commence at the time when weekly compensation has been paid or is payable and includes periods before the commencement of the amendments, that is, in this case, before 1 January 2013.

The weekly payments amendments apply to workers in the worker's circumstances from 1 January 2013. The Arbitrator's determination was correct. The worker's "accrued rights" were not affected. She received weekly compensation under the 1987 Act, unamended, up to 31 December 2012 and under the weekly payments amendments after that date.

Sukkar v Adonis Electrics Pty Limited [2013] NSWWCCPD 59

In 1996 Mr Sukkar claimed lump sum compensation in respect of noise induced hearing loss, which resulted in an agreement that recorded that the worker suffered 12.9 per cent binaural hearing loss, at the time of the agreement, for which he was paid compensation.

On 19 June 2012, the worker claimed additional compensation based on the report of an ear, nose and throat specialist dated 18 June 2012, who had assessed the worker to suffer a whole person impairment of 16 per cent. After adjustment for the prior claim the remaining hearing loss equated to a nine per cent whole person impairment.

It was not disputed that the respondent employed the worker in employment which had the tendencies, incidents and characteristics to give rise to a real risk of occupational noise induced hearing loss by a gradual process (industrial deafness) and it was agreed that the deemed date of injury in respect of the worker's second claim was 19 June 2012 (s 17 (1)(a)(i)).

The insurer rejected the second claim on the basis that the whole person impairment claimed (nine per cent) did not meet the impairment threshold of "greater than 10%" in s 66(1), as amended by the *Workers Compensation Legislation Amendment Act* 2012 (the amending Act).

The Arbitrator noted that there was a dispute between the parties as to whether the applicant was entitled to aggregate the impairments due to the same pathology in order to satisfy the s 66(1) threshold or whether the claim was in substance two separate claims, with two different dates of injury as prescribed by s 17 of the *Workers Compensation Act* 1987.

The Arbitrator considered those issues raised questions of law that were novel and complex and sought leave to refer two questions of law to the President for determination under s 351 of the *Workplace Injury Management and Workers Compensation Act* 1998.

Question one

> Do the amendments to Div 4 Pt 3 of the 1987 Act introduced by Sch 2 of the amending Act apply to claims for permanent impairment compensation for hearing loss (to which s 17 of the 1987 Act has application) made on or after 19 June 2012 when a worker has made a previous claim for permanent impairment compensation for hearing loss prior to 19 June 2012?
>
> Answer: Yes

The amendments introduced by the amending Act included the introduction of s 66(1) and s 66(1A) into the 1987 Act. Section 66(1) provides that a worker who has received an injury that results in a degree of permanent impairment greater than 10 per cent is entitled to receive compensation for that impairment. Section 66(1A) provides that only one claim can be made under the Act for permanent impairment compensation in respect of permanent impairment that results from an injury.

Section 17 proceeds on a number of assumptions for the critical purposes of fixing a date to determine the law applicable to calculating the quantum of an entitlement to compensation and to determine by whom that compensation is payable. Even where the subsequent losses arise from the same pathology (sensorial hearing loss), "for the purposes of" s 17(1)(a) of the 1987 Act, the injury is deemed to happen on the date the worker gives notice of the injury. In this case the deemed date of injury was 19 June 2012, the date of notification of the worker's further loss of hearing. That was also the date of claim.

It followed that the law applicable to calculating the quantum of the worker's entitlement to lump sum compensation for his further loss of hearing was the law introduced by the amending Act, which applies to a claim made on or after 19 June 2012.

Question two

> If yes to the first question, whether in claims for compensation pursuant to s 66 of the 1987 Act, including hearing loss claims (to which s 17 of the 1987 Act has application), involving the same pathology of injury arising from multiple injurious events of injury, the multiple injuries can be aggregated for the purpose of determining whether or not the worker's claim exceeds the s 66(1) threshold?
>
> Answer: No, in circumstances where a worker has made a prior claim for compensation pursuant to s 66 of the 1987 Act.

Compensation under s 66(1) of the 1987 Act is only payable "as provided by this section". The reference to "this section" includes s 66(1A) and the limitation on the number of claims that can be made. It followed that, irrespective of whether 'injury' referred to in s 66 refers to an injurious event or the same pathological condition, the one claim that may be made under the Act, as amended, must satisfy the 10 per cent threshold before whole person compensation is payable under the section. The worker did not meet the new threshold unless the impairment in his 1996 claim was added to the impairment in his 2012 claim. That was not permitted.

Current status: An application for leave to appeal the President's decision has been filed in the Court of Appeal. The Court of Appeal will hear the application and the appeal concurrently on 13 June 2014.

APPENDIX 1

Arbitrators

SENIOR ARBITRATORS

Deborah Moore
Michael Snell

ARBITRATORS

Full-time

Brett Batchelor
Elizabeth Beilby
Garth Brown
Glenn Capel
Grahame Edwards
Kerry Haddock
Michael McGrowdie
Jane Peacock
Paul Sweeney

Part-time

Ross Bell
Marshal Douglas
Richard Perrignon
Josephine Snell

Sessional

A/Judge Linda Ashford
Robert Caddies
Janice Connelly
William Dalley
Gerard Egan
Robert Foggo
John Harris
John Hertzberg
Carol McCaskie (MAP)
Bruce McManamey (MAP)
Peter Molony (MAP)
Annemarie Nicholl
Dennis Nolan
Jeffrey Phillips SC
Faye Robinson
Carolyn Rimmer
Jennifer Scott
Natasha Serventy
Ross Stanton
John Wynyard

The Registrar may exercise all the functions of an Arbitrator by operation of s 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 Peter Anderson
Dr John Ashwell
Dr Mohammed Assem
Dr John Baker
Dr Michael Baldwin
Dr John Beer
Dr Neil Berry
Dr Trevor Best
Dr Graham Blom
Dr James Bodel
Dr Anthony Bookallil (deceased)
Dr Kenneth Brearley
Dr Robert Breit
Dr Frank Breslin
Dr David Bryant
Dr Peter Burke
Dr Mark Burns
Dr Greggory Burrow
Dr William Bye
Dr Lionel Chang
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
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 Margaret Gibson
Dr Dolores Gillam
Dr John Glass
Dr Michael Gliksman
Dr Nicholas Glozier
Dr David Gorman
Dr John Moore Greenaway
Dr Richard Haber
Dr Scott Harbison
Dr Henley Harrison
Dr John Harrison
Dr Philippa Harvey-Sutton
Dr Mark Hermann
Dr 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 Mark Jones
Dr Sornalingam Kamalaharan
Dr Hari Kapila
Dr Gregory Kaufman
Dr Peter Klug
Dr Edward Korbel
Dr Lana Kossoff
Dr Damodaran Prem Kumar
Dr Sophia Lahz
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 Michael McGlynn
Dr David McGrath
Dr Ian Meakin
Dr Allan Meares
Prof George Mendelson
Dr Patrick John Morris
Dr Paul Christopher Myers
Dr Steven Ng
Dr Paul Niall
Dr Brian Noll
Dr Chris Oates
Dr David Daniel O'Keefe
Dr John O'Neill
Dr Kim Ostinga
Dr Julian Parmegiani
Dr Brian Parsonage
Dr Robert Payten
Dr Roger Pillemer
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 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 Phillip Truskett
Dr John P H Stephen
Dr J Brian Stephenson
Dr Harry Stern
Dr Geoffrey Stubbs
Dr Stanley Stylis
Dr Nicholas A Talley
Dr Stuart Taylor
Dr Forest Waddell
Dr Harold Waldman
Dr William Walker
Dr Tai-Tak Wan
Dr George Weisz
Dr Kalev Wilding
Dr Peter Sydney Wilkins
Dr Brian Williams
Assoc Prof Siu Wong

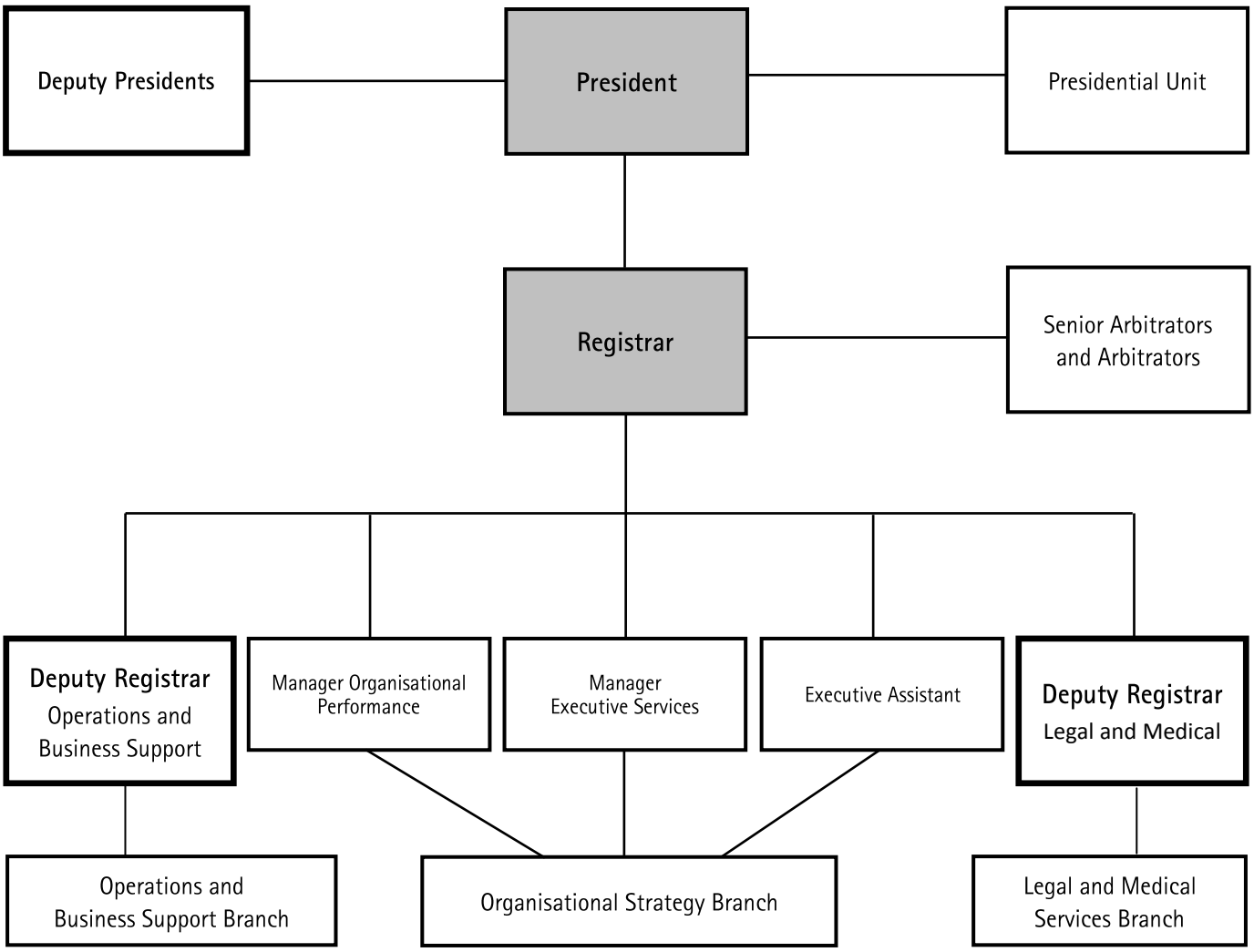
APPENDIX 3

Mediators

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

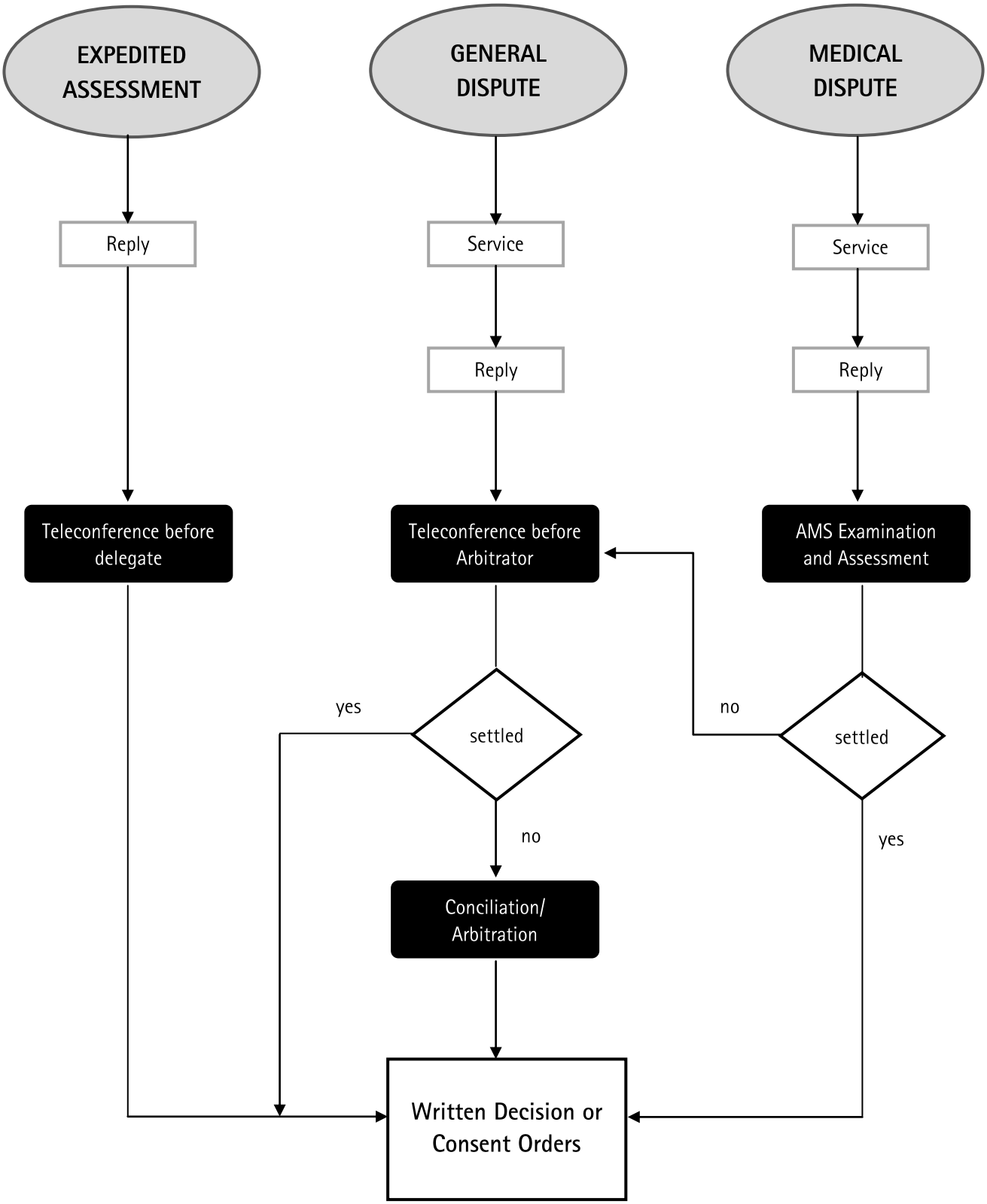
APPENDIX 4

WCC Organisational Chart



APPENDIX 5

Process Flowchart



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MARCH 2014

WORKERS COMPENSATION COMMISSION