

WORKERS COMPENSATION COMMISSION

Annual Review 2009

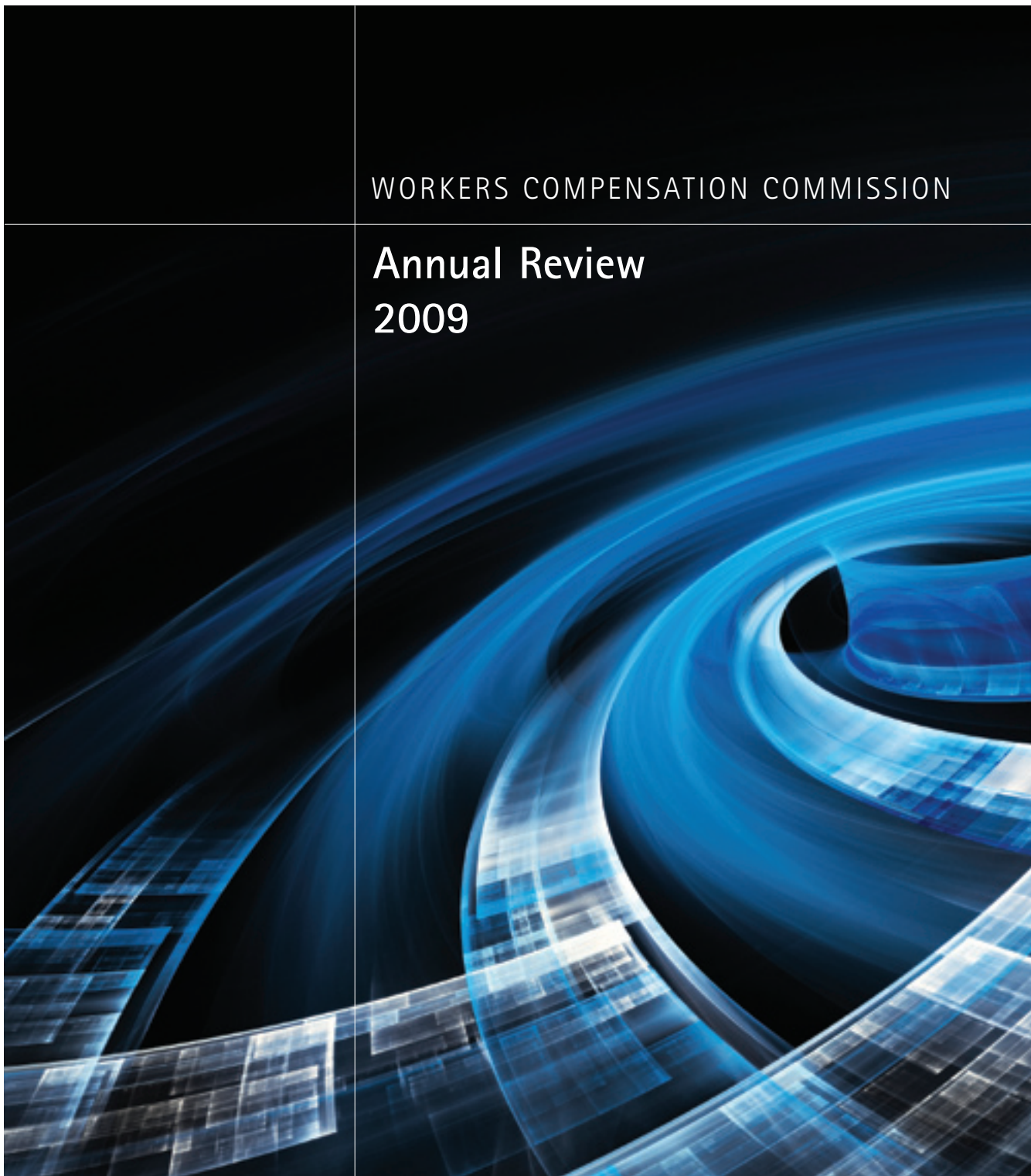
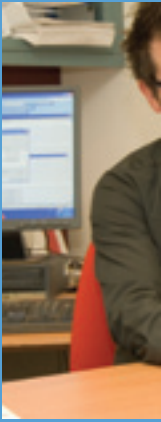


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President's Foreword

During 2009, the Commission implemented some of the most significant reforms to its internal structure and dispute resolution model since its inception. In this year's foreword, I propose to discuss some of these reforms.

In 2008, the Commission received a report from independent management consultants, Bendelta, who were engaged to independently review the Commission's structure and operational framework.

One of the major recommendations arising from the review involved a suggested realignment of the Commission's internal resources, with a view to achieving greater operational efficiency. This led to the formation of a Review and Recommendation Committee, comprising the President, the Registrar and senior management, to oversee the reform process. The committee drew upon advice provided by an advisory committee and representatives of sub-committees. After broad consultation with the staff at all levels, the Commission has now endorsed a transition to a revised structure, which broadly creates three new distinct units:

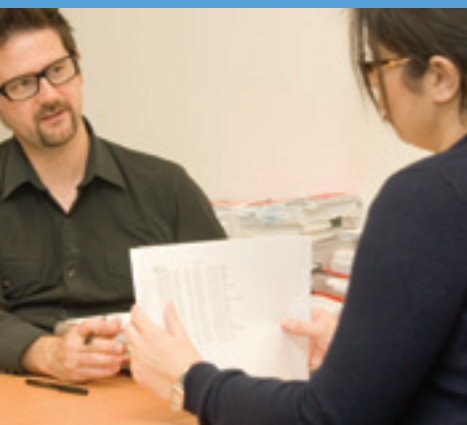
- A policy research and planning unit under the direct management of the Registrar
- A consolidated legal and medical services unit under the management of the Deputy Registrar (Legal and Medical)
- An operations unit, incorporating the business support services under the management of the Deputy Registrar (Operations).

Some new positions have been established to support the revised structure. The position descriptions for existing positions have been redrafted to accommodate the more flexible working arrangements. After a broad-ranging recruitment process, the three units should be fully staffed and operational by early 2010.

Reform of the Arbitration Process

One of the other central recommendations from the Bendelta report concerned a transition from the existing group of part-time, sessional Arbitrators to a smaller group of full-time, or substantially full-time, Arbitrators. The rationale for this significant reform was to enhance the consistency and durability of arbitral decisions. The Review and Recommendation Committee also endorsed this recommendation, and we are now in the implementation phase. The recruitment process will begin early next year, with a view to appointing full-time Arbitrators commencing duties from 1 July 2010. The full-time Arbitrators will be supported by the appointment of sessional Arbitrators to assist with peaks in metropolitan demand and regional work.

This year saw the publication of the eagerly anticipated Arbitrator Practice Manual. The manual provides guidance and assistance to Arbitrators on a range of procedural and substantive law issues. The manual, with over 600 pages, is provided to all Arbitrators and an electronic version is available on the intranet. This was a very time-consuming project, with contributions from Presidential members, Acting Presidential members, Arbitrators and staff. I would like to express my appreciation to all those who contributed, but I particularly acknowledge Deputy Registrar Rod Parsons for his stewardship of the project and Sue Duncombe, the interim Senior Arbitrator, for her contribution.



In recognition of this important project, and his work in producing this very valuable resource, the Law Society of NSW awarded Rod the Excellence Award in Government Legal Services in September 2009.

This year also saw the completion of the first Arbitrator Professional Development Cycle. The program is aimed at providing Arbitrators with the opportunity to improve their performance through a combination of self assessment, planning, peer review, participation in professional development opportunities, review of qualitative and quantitative reports, and appraisal. Whilst the Commission is currently evaluating the effectiveness of the Professional Development Framework, the results so far are particularly encouraging.

Organisational Performance

In keeping with the Commission's commitment to high standards of organisational performance, a series of key performance indicators (KPIs) has been set to assess our performance over a range of measures, particularly concerning the timeliness of the resolution of disputes. This year, between 40 and 50 per cent of disputes referred to the Commission were resolved within three months and around 85 per cent were resolved within six months. The Commission's results against KPIs are published in this review and I am pleased to say that, in general, they either meet, or exceed, the targets set.

Items of Interest

Throughout the year, the Commission provided briefings on its dispute resolution model to a number of groups, including a delegation of Thai judges and representatives from the New Zealand Accident Compensation Commission. The Commission was also selected as one of the tribunals with whom the President of the Victorian Civil and Administrative Tribunal (VCAT), Justice Kevin Bell, consulted in conducting his wide-ranging review of the VCAT's operations on behalf of the Victorian Government.

The Commission again convened and chaired the annual inter-jurisdictional meeting of workers compensation tribunals from around the country and New Zealand. This was undertaken in conjunction with our participation in the Australian Institute of Judicial Administration Tribunal conference.

Mr Kevin O'Grady was appointed a Deputy President of the Commission in April 2009. Kevin has extensive experience as a barrister specialising in personal injury and workers compensation law.



Acknowledgments

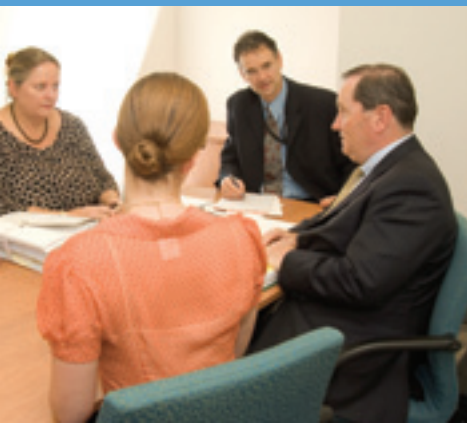
In late 2009, Acting Deputy President, Robin Handley, was appointed Deputy President of the Administrative Appeals Tribunal. I express my gratitude to Robin for his contribution to the Commission and, in particular, for his role and assistance in bringing the backlog of arbitral appeals under control in 2006 and for his work on the Arbitrator Professional Development Framework. We wish him well in his new role.

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

Conclusion

This year, the Commission successfully resolved almost 10,000 disputes and we expect a similar number of disputes to be lodged in the coming year. With the internal reforms almost complete, and the dispute resolution model reforms to be completed by July next year, the Commission is extremely well placed in the year ahead to meet its statutory objectives efficiently and expeditiously.

His Hon Judge Greg Keating
President
December 2009



Registrar's Report

It has been a year of significant change for the Commission in 2009, with the implementation of many of the recommendations emerging from the 2008 organisational review. Substantial progress has now been made transitioning into the Commission's new internal structure, including the physical refit of our accommodation. I would like to acknowledge the patience, dedication and goodwill demonstrated by staff during this time of change. I am confident that the new structure will provide the Commission with the flexibility and capacity to continue providing a high level of service to our users and service partners.

During 2009, we conducted a selection process for Approved Medical Specialists (AMS), resulting in the appointment of 41 new AMS to meet the Commission's requirements over a range of specialities and regions. An induction was held in November 2008, with the new AMS now available to undertake assessments. The expanded panel should ensure that the Commission is able to arrange medical assessments in a timely fashion and effectively manage the medical appeal process.

This year we continued to build upon our commitment to staff development and training, with a further cohort of staff completing a Certificate III in Government Services. I am also pleased that the new internal structure includes provision for the appointment of a permanent Organisational Performance Officer to manage and coordinate a comprehensive program of professional development for staff.

For the first time in 2008, we devised and reported on a number of key organisational performance indicators. This Annual Report contains the 2009 results against the key performance indicators and continues our commitment to monitoring the Commission's progress in meeting its obligations to provide a timely and cost-effective dispute resolution service. I am pleased to report that we have managed to meet or exceed those targets in most instances.

Priorities for 2010 include conducting a selection process for Arbitrators and Mediators, including the appointment of a number of in-house Arbitrators. The Commission has also identified several internal projects for attention in 2010, including development of a performance management system for staff and updates to our website, intranet and extranet services.

I would like to take the opportunity to thank the President, Deputy Presidents, Deputy Registrars, staff and our service partners for their support and professionalism throughout the year.



Sian Leathem
Registrar



The Commission

WHO WE ARE

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

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

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

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

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

Section 373 brings into effect Schedule 5 of the 1998 Act. Schedule 5 contains provisions that relate to members of the Commission, including Arbitrators. Pursuant to clause 4 (1) of Schedule 5, the remuneration of an Arbitrator (including travelling and subsistence allowances) in respect of work done as a member of the Commission is as the Minister determines.

Legislation

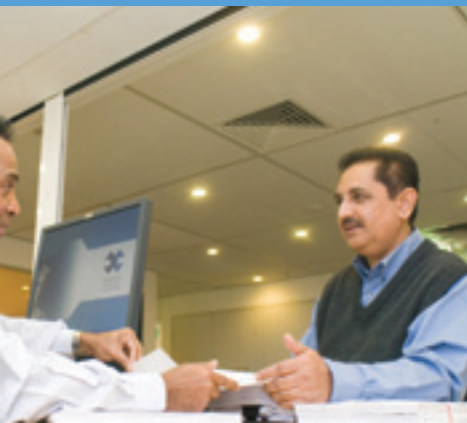
The legislation governing the Commission includes:

- *Workplace Injury Management and Workers Compensation Act 1998*
- *Workers Compensation Act 1987*
- *Workers Compensation Regulation 2003*
- *Workers Compensation Commission Rules 2006.*

Objectives of the Commission

Section 367 of the 1998 Act charges the Commission with the following objectives:

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



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

WHAT WE DO

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

There are several different paths that applications can travel before they reach resolution eg Arbitration, Medical Assessment, Mediation, and Expedited Assessment. The path selected depends on the issues in dispute and the steps involved vary according to the complexity of the matter.

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

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

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

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

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



HOW WE DO IT

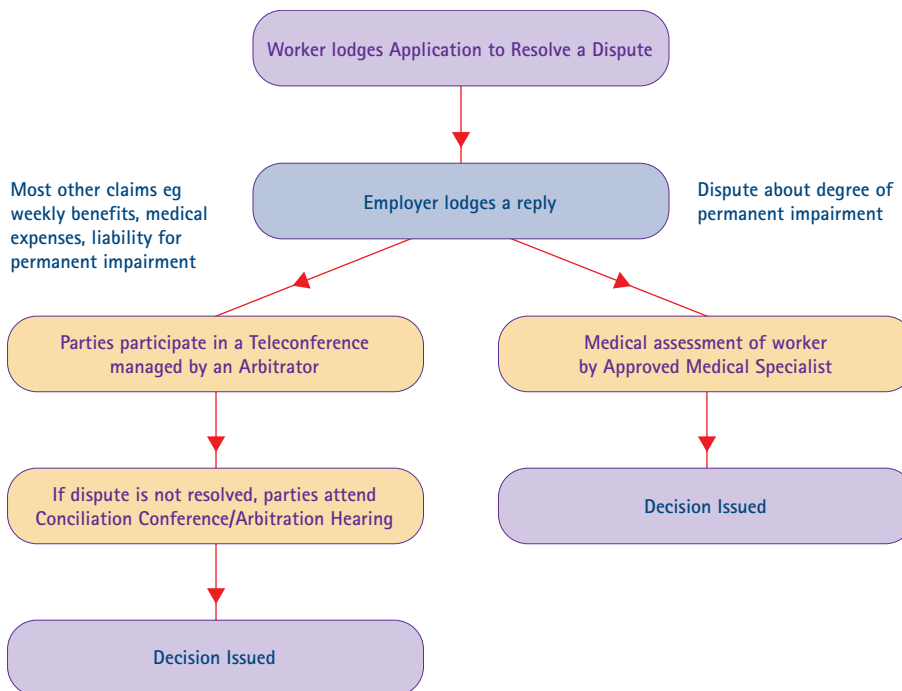
How the Process Works

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

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

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

The following simple guide shows how the process works:



If a dispute is referred to an Arbitrator, a Telephone Conference (Teleconference) will initially be held. If the dispute does not resolve, or the parties do not settle at the Teleconference, the Arbitrator may set the matter down for a face-to-face conference meeting called the Conciliation Conference/Arbitration Hearing.

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

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

Teleconference

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

The timetable contains the Teleconference date. The Commission schedules Teleconferences for 35 days after the date of registration.

The Commission books the Teleconference using the details provided by the parties in the application and the reply. Written confirmation of the date and time for the Teleconference is sent to all the parties.

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

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

During the Teleconference, the Arbitrator will confirm:

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

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



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

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

Conciliation Conference

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

Conciliation Conferences are typically scheduled to occur within 21 days of the Teleconference, unless the Arbitrator permits the issuing of directions to produce documents. If directions to produce documents were issued, the Conciliation Conference will be scheduled to occur after the directions have been dealt with and completed.

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

If the worker lives in Sydney, the meeting will be held in the metropolitan area. If the worker and/or their legal representative live in regional NSW, the Commission will arrange the Conciliation Conference according to its venues policy.

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

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

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

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

If the parties are unable to reach an agreement about the dispute, the Arbitrator will terminate the Conciliation Conference and call for a short intermission. After the break, the Arbitrator will commence the Arbitration Hearing.

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

Arbitration Hearing

If the dispute fails to settle at the face-to-face Conciliation Conference, then it moves into a more formal phase - the Arbitration Hearing.

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

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

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

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

If the parties are unable to come to agreement, the Arbitrator will make a legally-binding decision about the dispute. The Arbitrator may advise the parties of the decision at the end of the hearing. More commonly, however, the Commission will send to the parties the Certificate of Determination and a Statement of Reasons for the decision shortly after the hearing.

The Arbitration Hearing results in the Arbitrator making a legally-binding decision about the dispute.

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

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



Case Study:

Ms Johnston was involved in a motor vehicle accident on the way home from work on 30 October 2007. She alleged injury to the neck, right shoulder and lower back with pain radiating into the neck, right arm and right leg. The employer did not dispute liability and Ms Johnston received certain benefits pursuant to the provisions of the Workers Compensation Act 1987.

The Applicant's employment was terminated on or about 10 June 2009. The Insurer, by way of letter dated 24 June 2009, disputed liability in respect of weekly, medical and lump sum compensation from 24 June 2009. Essentially, the Insurer disputed that Ms Johnston was incapacitated for employment and argued that she did not require medical treatment as a result of any work related injury.

The Applicant lodged an 'Application to Resolve a Dispute' (Application) in the Workers Compensation Commission, claiming for weekly benefits from 10 June 2009 and payment of medical and related expenses.

The matter was the subject of a Teleconference. The parties were unable to reach agreement at the conference and the matter proceeded to a Conciliation Conference/Arbitration Hearing.

The parties were unable to resolve the dispute during the informal conciliation period of the conference.

The Arbitrator formally heard the matter where she considered the evidence attached to the Application and the Reply. The Arbitrator also allowed the parties to make oral submissions. The Arbitrator reserved her decision.

Seven days after the Arbitration Hearing, a written decision was provided to the parties.

The Arbitrator determined that Ms Johnston continued to suffer incapacity arising from the injury and required ongoing medical treatment.

Ms Johnston was awarded section 40 payments of weekly compensation from 24 June 2009 to date and continuing. In addition, Ms Johnston was also awarded section 60 compensation for the cost of physiotherapy and hydrotherapy treatment subsequent to 24 June 2009.

Arbitral Appeals

The President is responsible for the operation of the Commission's internal arbitral appeal process.

Appeals from decisions of the Commission constituted by an Arbitrator are made to Presidential members pursuant to section 352 of the 1998 Act.

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

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

If the Presidential member is satisfied that he or she has been provided with sufficient information, the appeal can be determined on the documentary material without holding a conference or formal hearing. 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 (see section 353 of the 1998 Act).

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

Common Law – Mediation

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

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

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

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

Medical Assessments

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

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

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

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

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



Appeals Against Medical Assessments

Parties to a medical dispute may appeal against an assessment of permanent impairment by an Approved Medical Specialist, pursuant to section 327 of the 1998 Act. Following registration of the appeal and the exchange of submissions between the parties, the Registrar as "gatekeeper" considers whether a ground of appeal has been made out. The "gatekeeper" determinations are made by legal officers under the delegation of the Registrar.

There are four grounds of appeal on which an Appellant may rely. The majority of appeals assert the ground that there is a "demonstrable error" contained in the Medical Assessment Certificate.

If the appeal is made on the ground that either the assessment was made using incorrect criteria (section 327(3)(c)) or that the Medical Assessment Certificate contains a demonstrable error (section 327(3)(d)), or both, the appeal must be made within 28 days after the issuing of the certificate. If the Registrar is satisfied that a ground of appeal is made out, the Registrar may refer the matter for further assessment or reconsideration, as an alternative to an appeal, or refer the matter to a Medical Appeal Panel.

In 2009, 606 appeals against medical assessments were lodged. There were 605 medical appeals finalised.

The rate of the number of medical assessment appeals lodged against the number of Medical Assessment Certificates issued in 2009 averaged 13 per cent per month, which represents a reduction of 6.6 per cent in the medical appeal rate from 2008. The number of medical appeals lodged in 2009 was less than the Key Performance Indicators set for this measure.

Medical Appeal Panels

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

A list of Medical Appeal Panel members may be found in Appendix 3.

Following recent reviews of the medical appeals process, changes were made to restrict the number of appointed Arbitrators and Approved Medical Specialists that perform Medical Appeal Panel work. The measures resulted in the enhanced consistency and quality of decision-making by Medical Appeal Panel members.

The changes also effected a timely and vastly improved delivery of medical appeal decisions, consistent with Key Performance Indicators established for medical appeals on timeliness and durability of decisions.

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

The Medical Appeal Panel reviews material available to the Approved Medical Specialist and documents filed in the appeal proceedings, including any additional information relied upon by the Appellant. The Medical Appeal Panel may deal with the appeal "on the papers" without further submissions from the parties; or, where the Medical Appeal Panel considers it appropriate, it may conduct a re-examination of the Worker. It may also hold an assessment hearing where the parties may make oral submissions.

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

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

Case Study: Reasons of the Medical Appeal Panel

On 7 July 2009, the NSW Court of Appeal handed down a significant judgment relating to the obligation of Medical Appeal Panels to provide sufficient reasons in determining whether to conduct re-examinations or to hold assessment hearings.

Markovic v Rydges Hotels Limited & Anor [2009] NSWCA 181 (Allsop P, Handley AJA, Hoeben J, 7 July 2009)

The employer appealed a Medical Assessment Certificate (MAC) on the basis that the Approved Medical Specialist (AMS) incorrectly combined the assessments from the two separate injury dates in contravention of section 322 of the 1998 Act.

The worker conceded the error in the MAC and initially consented to the appeal being determined by the Medical Appeal Panel on the papers without a further medical examination. In an initial preliminary review, the Medical Appeal Panel determined to deal with the matter on the papers, noting the parties' consent. The Medical Appeal Panel was subsequently reconstituted.

In a further preliminary review before the reconstituted Medical Appeal Panel, the worker withdrew her previous consent to having the matter dealt with on the papers and requested a further medical examination. The new Medical Appeal Panel determined that the circumstances of the matter did not warrant a further examination of the worker, and subsequently revoked the AMS's MAC. The worker sought relief of the Medical Appeal Panel's decision by way of judicial review at the Supreme Court.

The Supreme Court dismissed the worker's summons, finding that the Medical Appeal Panel carried out its review in accordance with the principle of a "de novo review" set out in Campbelltown City Council v Vegan [2004] NSWSC 1129. The worker appealed to the Court of Appeal.

The Court of Appeal upheld the worker's appeal, finding that the reconstituted Medical Appeal Panel failed to consider the worker's subsequent submissions for a further medical examination and assessment hearing because they did not consider whether or not the appeal was capable of determination on the papers in accordance with the WorkCover Medical Assessment Guidelines 45 and 46. His Honour Handley AJA stated it was not clear in the Medical Appeal Panel's reasons if they made such a consideration, and that they mistakenly relied on the previous consent of the parties and failed to note that the worker's consent had been subsequently withdrawn.

The decision reiterated the Medical Appeal Panel's obligation to provide reasons that sufficiently reflect their consideration of all the submissions made in determining how the matter will be dealt with, according to the WorkCover Guidelines for Medical Assessment.

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

Case Study: A 100 per cent deduction for pre-existing condition is not determining causation

On 10 July 2009, the Supreme Court of NSW considered whether the AMS, by making a 100 per cent deduction for previous injury or pre-existing condition or abnormality, is determining the question of causation or merely attributing the totality of the assessed permanent impairment to a non-work-related condition.

Zeineddine v Matar [2009] NSWSC 646 (Price J, 10 July 2009)

The Commission determined that the worker suffered loss of use of the sexual organs as a result of a psychological injury. The employer sought and was granted leave to appeal the decision of the Arbitrator. The Deputy President dismissed the appeal and remitted the matter to the Registrar for referral to an AMS for medical assessment.

The worker appealed the MAC of the AMS who assessed the worker as suffering 0 per cent loss of use of the sexual organs and that the proportion of permanent impairment due to pre-existing condition was 100 per cent. The Medical Appeal Panel confirmed the MAC, finding no demonstrable errors.

The worker lodged judicial review proceedings in the Supreme Court, asserting that the Medical Appeal Panel and the AMS were bound in law to determine that the worker suffered a permanent loss of sexual function due to the injury as determined by the Arbitrator and the Deputy President. The Court identified that the worker's main complaint was that the AMS and the Medical Appeal Panel wrongly exercised their jurisdiction in determining the question of causation, which had previously and appropriately been determined by the Arbitrator and the Deputy President.

The Court affirmed the decision in Haroun v Rail Corporation New South Wales & Ors [2008] NSWCA 192, considering the distinct roles of the AMS and the Medical Appeal Panel (comparably with the Arbitrator's) to assess the worker's degree of permanent impairment arising from the injury. (at [50])

The Court also distinguished the matter from Wikaira v Registrar of the Workers Compensation Commission of NSW & Anor [2005] NSWSC 954, holding that the AMS in this case was merely determining the extent of permanent impairment arising from a pre-existing condition and was not determining the question of causation. In making this conclusion, the Court rejected the worker's argument that the meaning of the word "proportion" is "a portion or part in its relation to the whole" (at [59]), stating that such a construction would produce "a peculiar result" of preventing an AMS from making all of the deduction, if necessary.

The decision arguably negates the contention that a 100 per cent deduction made by an AMS or a Medical Appeal Panel for pre-existing condition is a finding of causation. While it is open to the AMS or the Medical Appeal Panel to make a 100 per cent deduction for pre-existing condition, the distinctive powers and roles of an AMS (to determine the degree of permanent impairment) and the Arbitrator/Commission (to determine injury or causation) remain.

Expedited Assessments

The expedited assessment process is limited to disputes that are relatively small in terms of the amount of compensation at issue. Expedited assessments may be divided into three categories:

- **Interim Payment Directions**
- **Small Claims**
- **Work Injury Management Disputes.**

As the name suggests, the expedited assessment process provides for faster resolution of disputes than the standard dispute resolution process. Matters are generally set down for a Teleconference with the parties. Teleconferences are usually conducted approximately two weeks after lodgement of the dispute application. Conciliation Conference/Arbitration Hearings are not scheduled and there are no provisions to issue directions for production.

Expedited assessments are dealt with by Expedited Assessment Officers, who conciliate and determine these disputes under delegation of the Registrar.

1. Interim Payment Directions

Disputes concerning weekly payments of compensation up to 12 weeks, or medical expenses compensation up to \$7,500, are generally dealt with under the Interim Payment Direction provisions (sections 297 to 304 of the 1998 Act).

If a dispute fails to resolve at the Teleconference, the delegate of the Registrar will determine the dispute by reference to the papers lodged in the proceedings. If the dispute is determined in favour of the worker, the delegate of the Registrar will direct payment by the insurer, referred to as an Interim Payment Direction. An Interim Payment Direction is intended to ensure early intervention where an insurer fails to commence payment of compensation or fails to determine a claim within the required time, although an Interim Payment Direction may also be made 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.

Case Study:

Charles G was working for a sporting club for many years when in 2009 he developed contractures in his hands. The worker was diagnosed as suffering Dupuytren contracture, which is an abnormal thickening of the tissue just beneath the skin of the palm. The worker claimed compensation for medical treatment. The insurer denied liability as the insurer's medical expert was of the opinion that Dupuytren's contracture was an inherited condition and was not related to the worker's duties as a gardener and handyman.

An expedited assessment application was lodged with the Commission and a Teleconference was held before an Expedited Assessment Officer. The parties failed to reach agreement by conciliation.

The Expedited Assessment Officer then determined the dispute on the evidence presented by the parties. The Expedited Assessment Officer was satisfied that the medical evidence established that Dupuytren's contracture was a disease, and that the work undertaken by Charles G caused an aggravation of the disease. The Expedited Assessment Officer also held that the evidence established that the worker's symptoms and restrictions increased and became more serious as a result of his work activities, mainly caused by the repeated use of power tools, and that the employment was a substantial contributing factor to the aggravation. The claim for medical expenses compensation was approved.

2. Small Claims

In some cases the delegate of the Registrar may determine past weekly compensation claims for a closed period up to 12 weeks under the "small claims" provisions in sections 304A and 304B of the 1998 Act. Under the "small claims" provisions the delegate of the Registrar is exercising arbitral functions and a dispute is determined by the issuing of a Certificate of Determination.

3. Work Injury Management Disputes

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

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

A Teleconference will usually be held in the first instance. A matter is usually concluded by the Expedited Assessment Officer making a recommendation to the parties for a certain course of action intended to resolve the dispute. If the dispute fails to resolve at the Teleconference, the Expedited Assessment Officer may also refer the matter to an Injury Management Consultant to conduct a workplace assessment, prior to the making of a recommendation.

Case Study:

Brendan M was injured while working for a transport company. Liability was initially accepted and workers compensation payments were commenced. Some time later, the insurer suspended compensation payments as it was alleged that Brendan M was not complying with a rehabilitation plan that had been implemented by the insurer.

A dispute was lodged with the Commission and a Teleconference was convened.

At the Teleconference it became clear that the failure to comply with the rehabilitation plan resulted from a breakdown in communication between the worker, the employer and the insurer. The Expedited Assessment Officer recommended that a case conference be held between the parties and the worker's nominated treating doctor. Before the Teleconference was concluded it was confirmed that the nominated treating doctor would participate in the case conference. The aim of the case conference was to clarify what treatment was required to enable Brendan M to resume his duties.

Weekly compensation payments were reinstated retrospective to the date of the suspension.

Costs Assessments

When a dispute is resolved in favour of a worker, the insurer is usually ordered to pay the worker's legal costs. Failing agreement regarding the extent of those costs, an application may be made to the Commission to assess the costs entitlement.

Delegates of the Registrar assess costs. There are currently six costs assessors performing this work for the Commission (see Appendix 2).

The Commission may assess costs in relation to workers compensation disputes or work injury damages claims.

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

Internal Committees and Reference Groups

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

Practice and Procedure Committee

Chair: President Judge Greg Keating

Deputy President Bill Roche

Deputy President Kevin O'Grady

Registrar Sian Leathem

Deputy Registrar (Operations and Business Support)

Annette Farrell

Deputy Registrar (Legal and Medical Services) Rod Parsons

The Practice and Procedure Committee held five meetings during 2009. The Committee operates as a deliberative and decision-making forum for a range of issues affecting practice and procedure in the Commission. During the reporting year, the Committee dealt with a range of matters, including:

- review and update of the Workers Compensation Rules 2006
- procedure for managing claims for further loss
- amendment of the Commission's publication policy
- modification of the Commission's forms.

Registrar's Consultative Forum

Each month the Registrar chairs a meeting of senior members of staff from each of the Commission's functional units. The Forum is an opportunity to discuss any issues relating to workload, budget, staffing and operations and to hear about any significant projects being undertaken within the Commission.

Change Management Group

The Change Management Group (CMG) was established in early 2009 to provide a centralised avenue for meaningful consultation to occur about the transition to a revised Commission structure. It was established as a cross-functional committee, incorporating representatives from the Commission's management, Commission staff and WorkCover Human Resources.

The CMG met several times between March and July 2009 to assist in the following tasks:

- **Transitioning to a new structure**
- **Considering expressions of interest for possible voluntary redundancy**
- **Establishing a process for appointment to positions in the new structure**
- **Considering options for management of any displaced staff**
- **Agreeing on a timetable for implementation**
- **Devising a communication strategy.**

The initial members of the CMG were:

Suzanne Wilks	Staff representative
Darren Moore	Staff representative
Stephen Patterson	Staff representative
Lyn Doherty	WorkCover Authority Human Resources
Annette Farrell	Workers Compensation Commission Management
Sian Leatham	Workers Compensation Commission Management and Chair

The CMG was wound up in July 2009 following the transition into the new structure.

Arbitrator, AMS and Mediator Reference Groups

During 2009, the Commission continued to host Arbitrator, AMS and Mediator Reference Groups. Each of the Reference Groups meets quarterly and operates as an advisory and consultative forum through which the commission can communicate information and obtain feedback from Commission members and service partners in relation to a variety of issues. Membership of the Committees is revamped on an annual or bi-annual basis.

Arbitrator Reference Group

Chair: Registrar Sian Leatham
Secretariat: Organisational Performance Unit

Sue Duncombe, Interim Senior Arbitrator
John McDermott, Arbitrator
John McGruther, Arbitrator
Bruce McManamey, Arbitrator
Carolyn Rimmer, Arbitrator
Natasha Serventy, Arbitrator
Annette Simpson, Arbitrator
Craig Tanner, Arbitrator
Ross Whitelaw, Arbitrator
John Wynyard, Arbitrator

AMS Reference Group

Chair: Registrar Sian Leatham
Secretariat: Legal & Medical Support Unit

Dr Geoffrey Boyce, AMS
Dr Peter Burke, AMS
Dr Mark Burns, AMS
Dr Drew Dixon, AMS
Dr John Dixon-Hughes, AMS
Dr Hunter Fry, AMS
Dr Philippa Harvey-Sutton, AMS
Dr Ross Mellick, AMS
Dr Roger Pillemer, AMS
Dr Brian Williams, AMS

The Registrar gratefully acknowledges the efforts of outgoing AMS Reference Group members, including: Dr Mohammed Assem, Professor Michael Fearnside, Dr Lorraine Jones, Dr Ross Mills and Dr Thomas Silva. Their commitment to the Groups over the previous years is much appreciated.



Mediator Reference Group

Chair: Registrar Sian Leathem

Secretariat: Organisational Performance Unit

Garth Brown, Mediator

Jennifer David, Mediator

Sue Duncombe, Mediator

Geri Ettinger, Mediator

Leo Gray, Mediator

John Ireland, Mediator

John McDermott, Mediator

John McGruther, Mediator

Jennifer Scott, Mediator

Natasha Serventy, Mediator

The Registrar gratefully acknowledges the efforts of outgoing Mediator Reference Group members, including: Raymond Brazil, Katherine Johnson, Ross McDonald, Derek Minus, Greg Rooney and Ross Whitelaw. Their commitment to the Groups over the previous years is much appreciated.

User Group

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

During 2009 the membership was as follows:

President Judge Greg Keating (Chair)

Deputy President Roche

Deputy President O'Grady

Registrar Leathem

Deputy Registrar Farrell

Deputy Registrar Parsons

Mr Rob Thomson, General Manager of the Workers Compensation Division

Mr Greg Beauchamp, Barrister

Mr Steve Harris, Solicitor

Ms Roshana May, Solicitor

Mr Howard Harrison, Solicitor

Mr David Jones, Solicitor

Mr Brian Moroney, Solicitor

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

Issues discussed during the 2009 meetings included the following:

→ **Legislative Reform**

→ **Review of the *Workers Compensation Rules* 2006**

→ **Consolidation of regional hearings**

→ **Appointments of Approved Medical Specialists**

→ **Pagination of documents attached to Forms 2 and 2A.**

Decisions Evaluation Committee

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

The purpose of the Decisions Evaluation Committee is to:

→ **provide feedback to Arbitrators on their written decisions as part of the Arbitrator Professional Development Program**

→ **contribute towards improving the quality and consistency of written decisions in the Commission by establishing a regular audit program.**

The Committee comprises a Presidential member, the Registrar, the Deputy Registrar Legal and Medical Services, and the Manager Legal and Medical Support.

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

Collaboration with Other Organisations

Inter-jurisdictional Meeting

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

In 2009 the conference was held in Sydney and consequently the Commission took responsibility for organising the meeting, with the President Judge Keating as Chair. Issues discussed included:

- variations within and across jurisdictions in the approved version of the American Medical Association (AMA) Guides used to assess permanent impairment
- strategies to appraise and improve the performance of tribunal members
- the collection and reporting of performance data in various tribunals.

The 2010 meeting is scheduled to be held in Brisbane.

Council of Australasian Tribunals

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

During 2009, members and staff of the Commission participated in various activities organised by COAT, including: the inaugural Registrar's Conference held in Melbourne in February 2009; the design of a training package to assist in dealing with difficult people; and the running of the Annual Conference organised by the NSW Chapter in May 2009. The Registrar is currently a member of the Executive Committee of the NSW Chapter.

Law Society's Government and Administrative Law Accreditation Working Group

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

In order to develop this new area, the Law Society has established a working party which consists of knowledgeable and experienced practitioners currently working in the area, both within the public and private sector.

The working party is responsible for setting the curriculum and deciding on the appropriate assessment modes. It is anticipated that the accreditation will be offered for the first time in 2011. The Registrar of the Commission is a current member of the working party.

Visiting Delegations

Victorian Civil and Administrative Tribunal

In August of 2009, the Commission had the pleasure of hosting a visit from The Honourable Justice Kevin Bell, President of the Victorian Civil and Administrative Tribunal (VCAT). VCAT has a wide-ranging jurisdiction, dealing with matters covering civil, administrative and human rights areas. With over 85,000 applications lodged each year, VCAT is the largest tribunal in Australia. The Commission had the opportunity to brief Justice Bell on our dispute resolution model and our Arbitrator Professional Development Framework.

Administrative Courts of Thailand

On 18 February 2009, the Commission hosted a visit from a delegation of 35 Thai Judges and officials as part of an AusAID funded program to assist in the strengthening of administrative law in Thailand. The delegation, led by the Vice-President of the Supreme Administrative Court of Thailand, Mr Akarawit, was particularly interested in the Commission's combined conciliation/arbitration model and its adoption of key performance indicators.

Access and Equity

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

Cost:	Services to all parties are free.
Self-representation:	Information on the processes and procedures are made available to all parties either via the Internet or in hard copy. A DVD is available for download and information leaflets are available in 11 languages. An e-bulletin is available on a quarterly basis.
Outreach:	To assist the self-represented worker, information is available either over the counter or by telephone once an application has been lodged.
Disability Access:	All conference and meeting rooms are accessible to everyone, hearing loops are available in all rooms, and a TTY (Text Telephone) service is available.
Interpreters:	Upon request, interpreters can be provided free of charge in the language or dialect requested.
Regional Communities:	Arbitrators have been appointed in regional and rural areas in an effort to allow hearings to be heard close to where workers reside.
Equity:	The Commission has put in place strategies to ensure the making of equitable, fair, consistent and well-reasoned decisions. These include implementing the Code of Conduct and providing training to Arbitrators and Mediators.
Effective Relationships:	The Commission offers ongoing education and training seminars for key interest groups including employers, insurers, medical practitioners, trade union personnel and the legal profession.

Complaints Handling

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

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

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

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

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

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

- Consider what, if any, prompt action may resolve the complaint and, where appropriate, institute or recommend such action
- Consult with a staff or Commission Member who is the subject of the complaint
- Contact the complainant personally to attempt informal and speedy resolution of the complaint

- Refer the complaint to the President for consideration in relation to reviewing the performance of an Arbitrator, Mediator or Approved Medical Specialist
- In the case of Commission staff, recommend that some action be taken in accordance with public sector procedures
- Initiate changes to practices or procedures to address the issues arising in the complaint.

Complaints received in 2009

During the reporting year, the Commission received a total of eight complaints, which is 11 less than the number received during 2008. Five of the complaints concerned medical assessments conducted by Approved Medical Specialists. The remaining three complaints concerned a practice or procedure of the Commission.

All of the complaints were acknowledged in writing within seven days of receipt and received a full written response within 28 days.

THE ORGANISATION

Members

The Commission consists of the following Members:

- The President – Judge Greg Keating
- Two Deputy Presidents – Bill Roche and Kevin O'Grady
- Five Acting Deputy Presidents
- The Registrar – Sian Leathem
- 51 Arbitrators

The Minister appoints the members of the Commission, other than the Arbitrators who are appointed by the President.

President and Deputy Presidents

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

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

Mr Bill Roche is the senior Deputy President, having held the position since his appointment in 2007.

On 1 April 2009, the Attorney General appointed Mr Kevin O'Grady, Deputy President, for a seven-year term. Mr O'Grady replaces Deputy President Byron who retired in late 2008.

During 2009, the Commission was greatly assisted in maintaining its timely resolution of appeals by Acting Deputy Presidents Mr Robin Handley, Mr Anthony Candy, Ms Deborah Moore and Mr Michael Snell.

On 10 December 2009, Ms Moore, Mr Candy and Mr Snell were each reappointed for a further 12 months. Given Mr O'Grady's appointment to the full-time position, and Mr Handley's appointment to the Administrative Appeals Tribunal, the Commission sought the appointment of an additional Acting Deputy President and the Attorney General appointed Ms Lorna McFee of counsel. Ms McFee has been a member of the NSW Bar since 1984 and has previously held appointment as an Acting Judge of the former Compensation Court of NSW and as a member of the Dust Diseases Tribunal.

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

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

The decisions of Presidential members may be appealed to the NSW Court of Appeal on questions of law only.

Registrar

The Registrar is responsible for the administrative management of the Commission and is the functional Head of the Commission's Services.

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

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

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

Arbitrators

During 2009, 51 Arbitrators, located throughout NSW, held appointments with the Commission. Our Arbitrators are engaged on an independent contractual basis and are appointed by the President.

The majority of the Commission's Arbitrators are legally qualified. Those who are not legally qualified are highly experienced in workplace injury management and workers compensation law. All the Arbitrators are trained and experienced in alternative dispute resolution.

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/Arbitration Conferences. These proceedings are conducted with as little formality and technicality as the proper consideration of the matter requires. If the parties are unable to reach an agreed resolution, the Arbitrator determines the dispute.

A full list of current Members appears in Appendix 1.

Service Partners

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

Approved Medical Specialists

There are approximately 150 Approved Medical Specialists holding appointments with the Commission located throughout NSW.

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

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

Mediators

The Commission is responsible for mediating work injury damages claims referred to it under the 1998 Act, before court proceedings for such claims can be commenced.

To this end the Commission currently has 37 Mediators who hold appointments from the President. The Mediators use their best endeavours to bring the parties to a negotiated settlement.

A schedule of the Approved Medical Specialists and Mediators appears in Appendix 2.

Medical Appeals

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

To maintain the timeliness and quality of the determinations in Medical Appeals, 16 Arbitrators and 42 Approved Medical Specialists hold appointments to sit on Medical Appeal Panels.

A list of the Arbitrators and Approved Medical Specialists who hold appointments to hear medical appeals is at Appendix 3.

Staff

There are approximately 101 staff, in a number of units in the Commission, who are employed to carry out its functions. The staff range in grade from Grade 1 Clerks through to Senior Officers (Grade 2), as well as Legal Officers.

Presidential Branch

The Presidential unit has five full-time staff members in addition to the Presidential members.

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

In addition to supporting the Presidential members, particularly in their decision-making capacity, the research associates undertake research, prepare papers, and maintain an electronic index of presidential decisions as a resource for staff and members.

In 2009, the Presidential unit initiated and developed an additional resource for Commission members and staff. In January 2009, the unit published the first edition of 'On Appeal', a monthly electronic publication of head note summaries of Presidential and Court of Appeal decisions issued in the preceding month.

The Presidential unit also co-ordinates and provides secretariat support for the Commission's User Group and for the 'Inter-jurisdictional Personal Injury Dispute Resolution Services' annual meeting, chaired by his Honour Judge Keating and held in conjunction with the AJA/COAT national conference.

Melanie Curtin and Marie Johns were also members of the COAT NSW Education and Training Subcommittee, which initiated the project to develop training programs for tribunal members and for registry staff, to equip them with skills and strategies for responding to unreasonable conduct by parties in a tribunal context.

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

Organisational Strategy Branch

The Organisational Strategy Branch is responsible for planning, strategy and organisational development.

Operations and Business Support Branch

The Operations and Business Support Branch consists of five units:

Registry Unit

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

Dispute Services Unit

Dispute Services staff are responsible for the case management of applications after registration, through to the closure of the matters (excluding appeal periods).

Operations Support Unit

This unit provides service improvement initiatives across Registry/ Dispute Services, case management of practice and procedures, and undertakes audit and review for the operational areas.

Business Support Unit

This unit has two streams:

- **Information Services:** which provides support for customised Commission database as well as project management of information systems
- **Business Services:** which provides the management of finance processing and purchasing, facilities, and records.

Legal and Medical Services Branch

This Branch provides legal advice to members and staff, manages medical appeals, costs and expedited assessment applications, and provides support and development to Arbitrators and other service partners.



2009 Workload Discussion

REGISTRATIONS

During 2009, the number of applications received by the Commission amounted to a total of 11,436. This is a remarkably stable figure when compared to 2008, in which total applications amounted to 11,432.

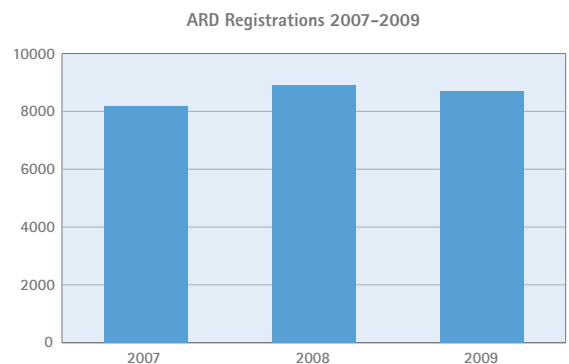
While there were some moderate upward and downward trends across different application types, the overall annual total was virtually identical.

Application Type	2009	2008
Application to Resolve a Dispute (Form 2)	8,707	8,898
Interim Payment Directions (Form 1) and Revocation of an IPD (Form 1A)	586	558
Workplace Injury Management dispute	124	154
Registration for Assessment of Costs	256	245
Commutations (Form 5A) and Redemptions (Form 5B)	267	163
Mediations (Form 11)	705	598
Arbitral Appeals (Form 9)	185	161
Medical Appeals (Form 10)	606	655
TOTAL	11,436	11,432

APPLICATIONS TO RESOLVE A DISPUTE

Applications to Resolve a Dispute (ARD) or Form 2 registrations have seen some moderate fluctuations over the past three years, with an increase in applications from 2007 to 2008 (nine per cent), and a small decrease in 2009 (two per cent).

Monthly trends observed during 2007, 2008 and 2009 suggest that while the Commission continues to experience seasonal variations, Form 2 applications tend to average around 750 per month. We anticipate that this broad trend will continue in 2010.

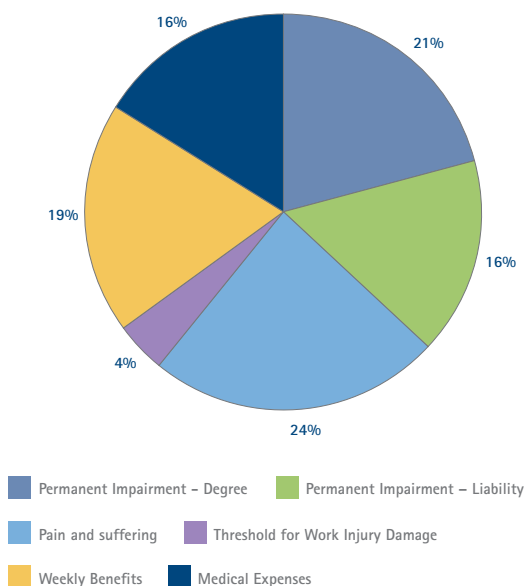




Issues in dispute

ARDs may involve one or more issues. During 2009, 37 per cent of Form 2 applications involved a claim for permanent impairment compensation (liability, quantum or both). 24 per cent of matters involved a claim of compensation for pain and suffering. 19 per cent of matters included a claim for weekly benefits and 16 per cent of applications included a claim for medical expenses.

ARD Issues In Dispute 2009

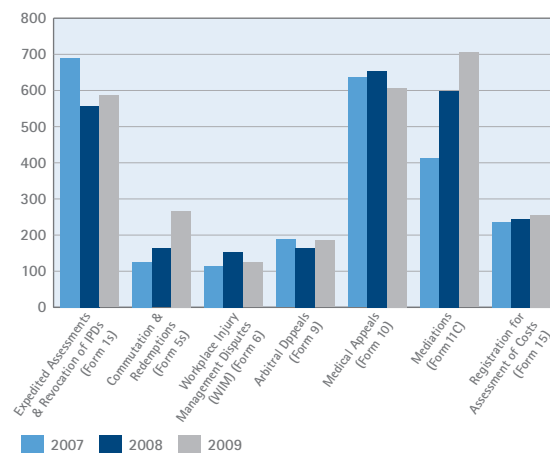


Other Applications

The number of Form 1 (IPD) and Form 1A (Revocation of IPD) applications increased slightly during 2009, as did the number of Form 5A (commutations), Form 5B (redemptions), Form 9 (arbitral appeals) and Form 15 (costs assessments).

There was a slight decline in the number of Form 6 (workplace injury management disputes) and Form 10 (medical appeals) applications.

Registrations by Form 2007-2009 (excluding ARDs)

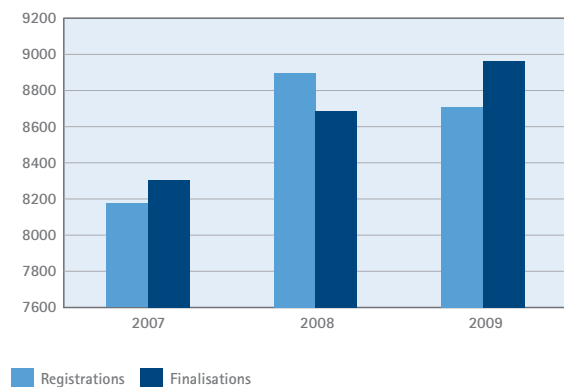


Form 11 (mediations) applications have continued to increase steadily over the past three years, with another marked increase of 18 per cent from 2008 and a cumulative increase of 71 per cent from 2007 levels.

In early 2009, the Commission refreshed its Mediator Panel by adding an additional five Mediators. This has ensured that there are sufficient Mediators available to handle matters as expeditiously as possible.

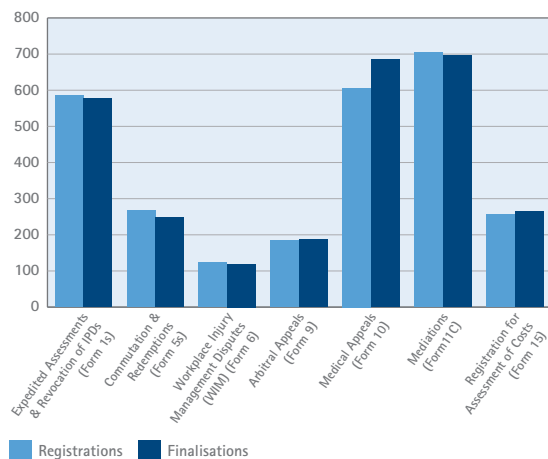
FINALISATIONS

ARD Registrations vs Finalisations 2007-2009



During 2009, the Commission finalised more applications to resolve disputes (Form 2) than it received (257 applications). This represents a reversal of the position in 2008 when the Commission finalised 209 matters less than it received. Significantly, the elimination of the backlog was achieved even though the Commission effectively reduced its staffing numbers during the reporting year.

Registrations vs Finalisations 2009 (excluding ARDs)



During 2009, the Commission finalised more of the following types of applications than it registered during the year:

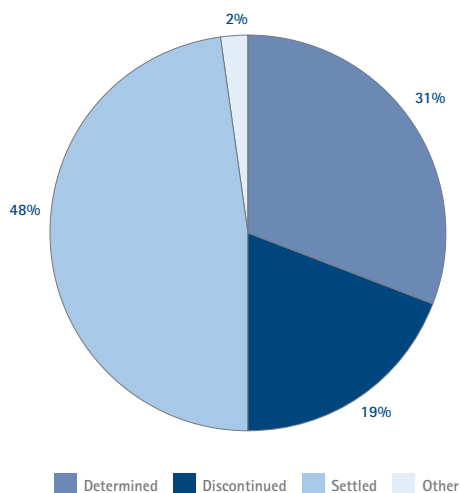
- Arbitral Appeals (Form 9)
- Medical Appeals (Form 10)
- Costs Assessments (Form 15).

OUTCOMES

Applications to Resolve a Dispute

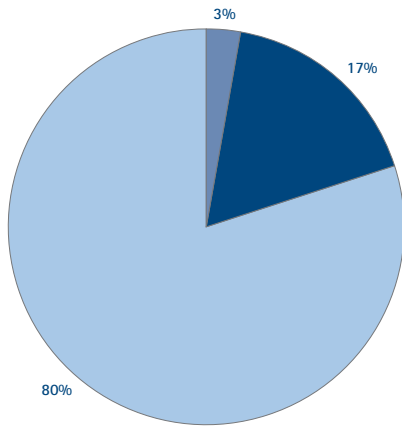
Consistent with the 2008 outcomes, approximately 69 per cent of Form 2 matters were finalised without the need for a written determination, with 48 per cent being resolved through a settlement between the parties.

ARD Issue Outcomes



Approximately 31 per cent of ARDs (2,800 applications) were finalised by a formal determination. However, of those determinations, more than 80 per cent (2,245 applications) involved a Medical Certificate of Determination issued by the Registrar to finalise a section 66 entitlement, following a medical assessment by an Approved Medical Specialist.

ARD Determined Outcomes



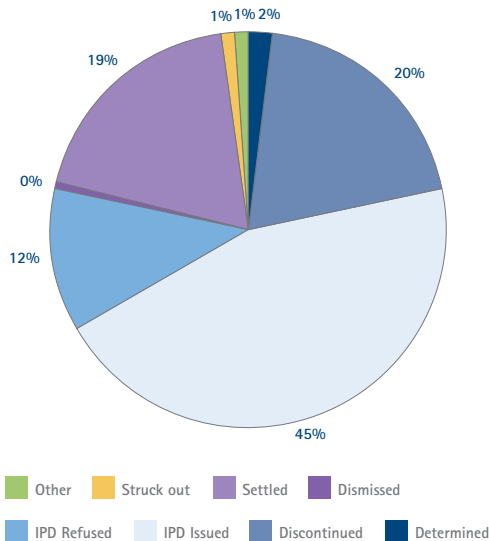
■ Determined Ex-Tempore ■ Determined Written ■ Determined s 66only

In 2009, 17 per cent (468 applications) were finalised by a written determination issued by an Arbitrator, and 3 per cent were finalised by an ex-tempore decision by an Arbitrator.

Expedited Assessments

In 2009, 45 per cent of Applications for Expedited Assessment resulted in an interim payment direction (IPD) being issued. A further 19 per cent were settled, while 20 per cent were discontinued. In 12 per cent of applications, an IPD was refused.

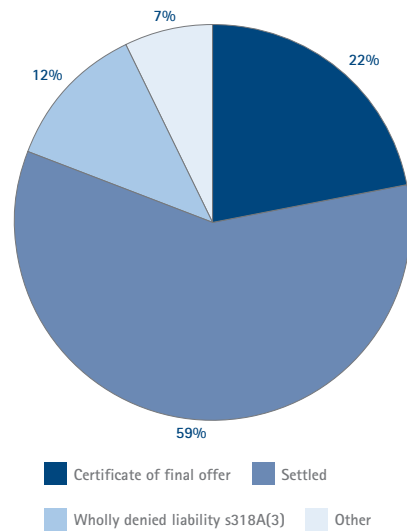
Expedited Assessment Outcomes



Mediations

During 2009, 59 per cent of all applications to mediate resulted in a settlement. However, when those that did not proceed to mediation are excluded from the data (ie where the defendant wholly denies liability or where the matter is discontinued or struck out), the proportion of matters settled during the period increases to 67 per cent.

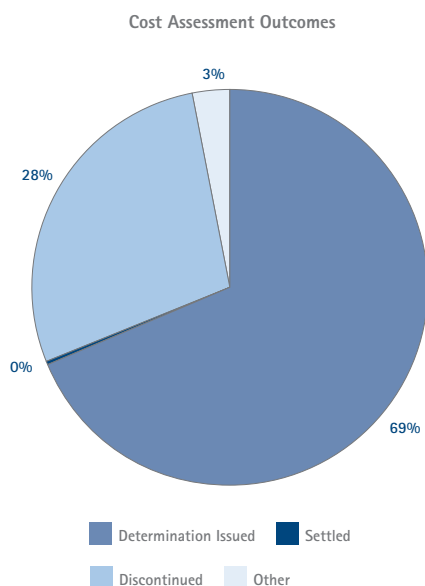
Mediation Outcomes



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

Costs Assessments

During 2009, 181 costs determinations were issued, representing 69 per cent of all the costs assessment applications registered. A further 28 per cent of applications were discontinued.



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

Medical Appeal Outcomes

Of the 685 medical appeals finalised in 2009:

- 38 appeals *did not proceed* as the Registrar was not satisfied that a ground of appeal was made out
- Nine appeals were *referred for further assessment or reconsideration*
- 248 appeals resulted in Medical Assessment Certificates being confirmed by Medical Appeal Panels
- 323 appeals resulted in Medical Assessment Certificates being *revoked* by Medical Appeal Panels. This represents a seven per cent revocation rate of all Medical Assessment Certificates issued by the Commission. This is also significantly less than the projected revocation rate target for 2009.

Timeframes

In 2009, medical appeals took an average of 91 days, or approximately three months, to resolve.

The average period for resolution of medical appeals is within the accepted benchmark of 100 days or less.

KEY PERFORMANCE INDICATORS

During 2009, the Commission continued to monitor its performance against a series of key performance indicators (KPIs) first developed in 2007. The KPIs are intended to track the Commission's progress in the delivery of a number of our statutory objectives, including timeliness and durability of decisions:

KEY PERFORMANCE INDICATORS	
Timeliness	Target (if applicable)
% of Dispute Applications resolved within:	
→ 3 months	45% (excluding appeals) 40% (including appeals)
→ 6 months	85% (excluding appeals) 80% (including appeals)
→ 9 months	95% (excluding appeals) 94% (including appeals)
→ 12 months	99% (excluding appeals) 98% (including appeals)
Average days to resolution for Dispute Applications with no appeal	105
Average days to resolution of Arbitral Appeals	112
Average days to resolution of Medical Appeals	100
% of Expedited Assessment Applications resolved within 28 days	90%
Durability	Target (if applicable)
% of determined Dispute Applications revoked on appeal ¹	Less than 15%
% of Medical Assessment Certificates revoked on appeal ²	Less than 15%
% of Presidential decisions revoked on appeal ³	Less than 2%

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

- 1 This KPI represents the number of arbitral decisions revoked, expressed as a percentage of the total number of appealable arbitral decisions (ie 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.
- 3 This KPI represents the number of appeals from Presidential decisions that are revoked on appeal, expressed as a percentage of the total number of Presidential decisions.

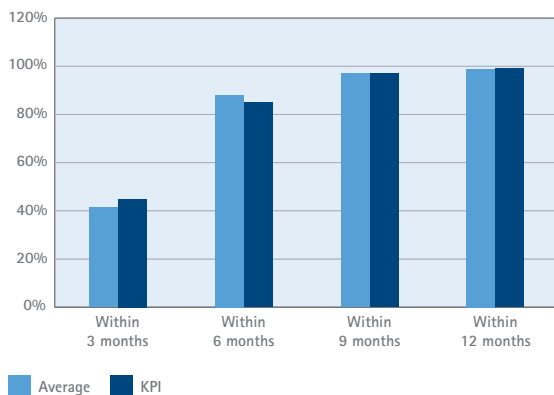
TIMELINESS

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

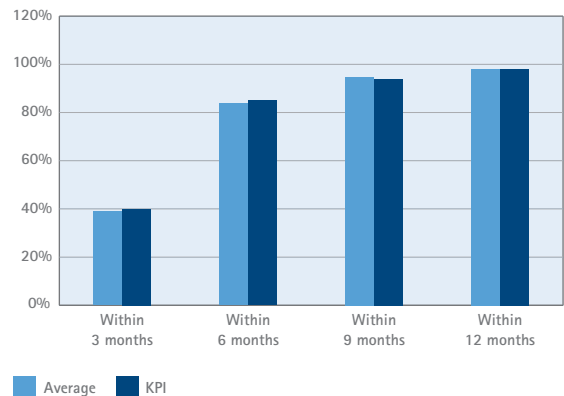
In most cases, the Commission was close to meeting or exceeding its KPIs during 2009, finalising approximately 41 per cent of all ARD applications (excluding appeals) in three months or less, with a total of 88 per cent being finalised within six months.

Only 2 per cent of matters remain open for a period in excess of 12 months. In most cases, this is due to the matter being subject to a medical, arbitral or Supreme Court appeal.

Time Taken to Finalise ARD Applications – Excluding Appeals



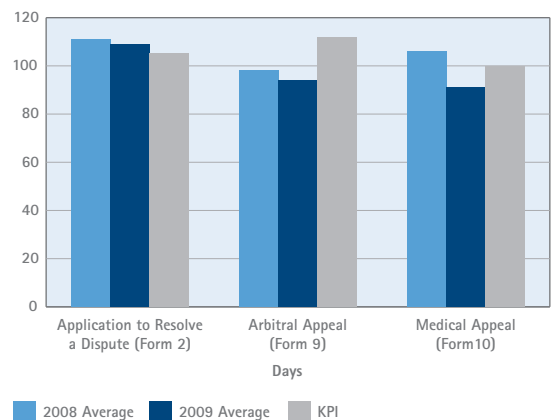
Time Taken to Finalise ARD Applications – Including Appeals



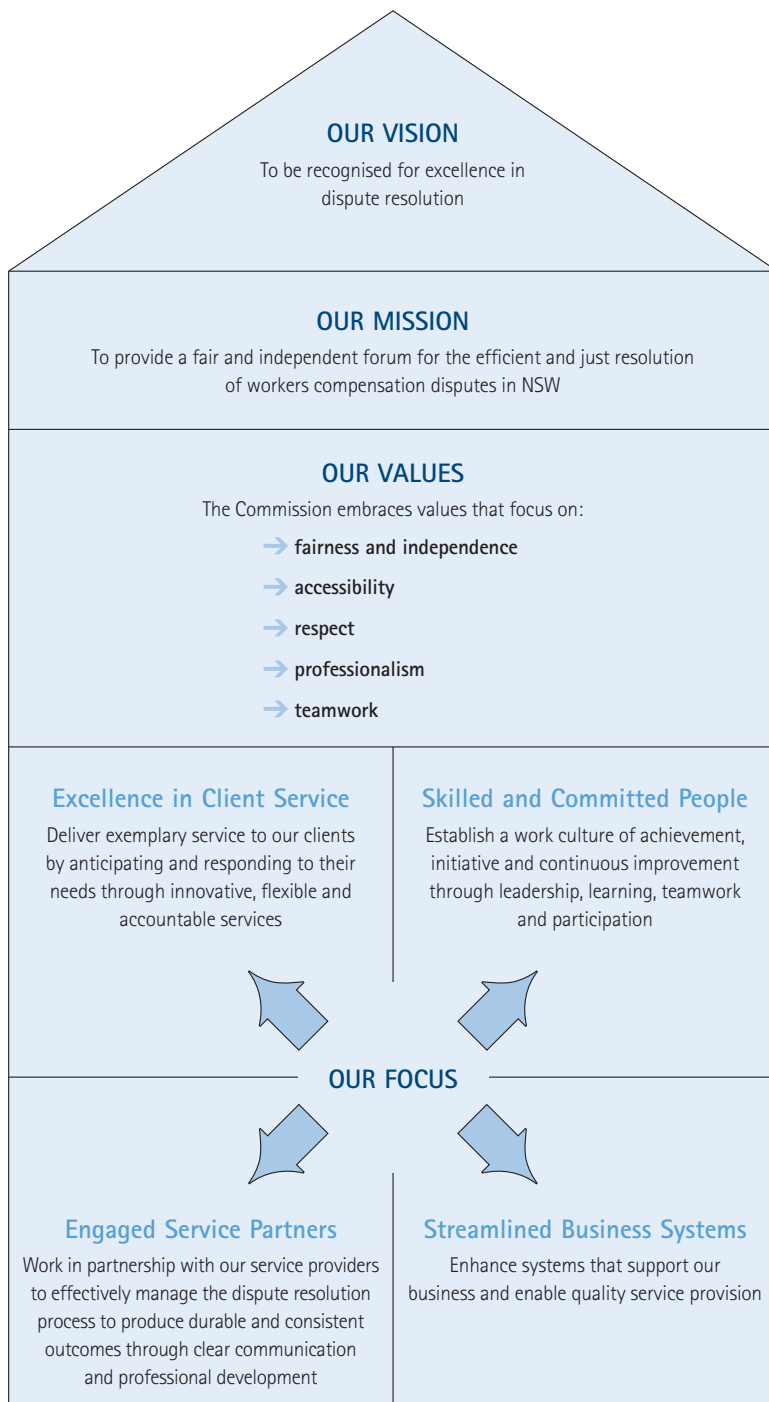
The Commission has also set KPIs for the average days required to finalise applications, being 105 days for an ARD, 112 days for an Arbitral Appeal and 100 days for a Medical Appeal.

The actual average days achieved during the reporting year were 109 days for an ARD, 94 days for an Arbitral Appeal and 91 days for a Medical Appeal. Compared to our inaugural results in 2008, this represents an improvement in timeliness across each of these applications.

Average Days Taken to Finalise Matter



Strategic Plan 2008-2011



HIGHLIGHTS FOR 2009

The overall number of applications received by the Commission during 2009 (11,436) was almost identical with the number received in 2008 (11,432).

While there was a modest decrease in the number of Applications to Resolve a Dispute (Form 2), this was offset by an increase in Applications to Mediate a Work Injury Damages Claim (Form 11) and Applications for Costs Assessment (Form 15). Further details about the number of lodgements and finalisations during 2009 appear in the Workload Discussion section in this report.

In addition to managing a range of applications during 2009, the Commission finalised a number of significant projects, including:

- launch of the inaugural Arbitrator Practice Manual
- installation of new audio recording equipment in all Oxford Street hearing and conference rooms
- completion of the appointment process for Approved Medical Specialists
- induction of new Approved Medical Specialists
- launch of *Positive Behaviours Guide* for Commission staff
- transition into the new organisational structure
- review and update of all position descriptions
- supporting staff in completion of the Certificate III in Government
- review of the *Workers Compensation Commission Rules* 2006
- introduction of 'On Appeal', a monthly summary of Presidential decisions.

PRIORITIES FOR 2010

The Commission's Corporate Plan identifies a number of priorities for 2010, including:

- completion of the accommodation refit to support the new structure
- finalisation of the transition to the new Arbitral model
- completion of the appointment process for Mediators
- induction of new Arbitrators and Mediators
- implementation of the e-Screen lodgement facility.

ACHIEVEMENTS UNDER THE CORPORATE PLAN

1. Excellence in Client Service

Privacy Compliance

Privacy Compliance has been a focus for the Commission in the past year. During 2008, a project was undertaken to ensure compliance with the requirements of the *Privacy and Personal Information Protection Act* 1998 (NSW).

As part of the Commission's compliance with the privacy legislation, the Commission has maintained the following in place:

- A Privacy Statement is on the Commission's Internet, Extranet and Intranet sites concerning the accessing of information contained on the Commission's sites
- The *Policy on Publication of Decisions in WCC* is available on the Internet, Intranet and Extranet informing that all decisions are published and how a request can be made to suppress the publication
- All of the Commission's forms include a "Privacy of Personal Information" statement informing users of the Commission's collection, use, accessibility and storage of personal information
- The *Privacy Management Plan* will be reviewed every three years – the next review is due in 2011.

There were no complaints received by the Commission in 2009 under Part 5 (section 53) of the *Privacy and Personal Information Protection Act* 1998 (NSW).

e-Bulletin

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

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

Other Client Services

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

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

2. Skilled and Committed People

New Organisational Structure

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

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

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

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

During the reporting year, the Minister and the Attorney General approved the engagement of 18 full-time equivalent in-house Arbitrators, together with appropriate administrative support staff. This new model will be implemented when the current appointments expire between April and June 2010.

The Bendelta report made broad recommendations concerning an internal restructure. The recommendations required further consideration and evaluation prior to the Commission making a final decision about whether or not to implement them.

The Commission established the following committees to govern the implementation of the project:

A **Review and Recommendations Committee (RRC)** to oversee the progress of the findings and recommendations contained in the Beldelta report.

An **Advisory Committee (AC)** to assist the RRC by undertaking further evaluation of some of the findings and recommendations contained in the Beldelta report.

Four **Sub-Committees**, made up of staff from across the whole organisation, to advise on various options in particular areas.

Following this extensive evaluation process in April 2009, the RRC announced its proposed organisational structure and consulted with staff and the Public Service Association via the Commission's Joint Consultative Council (JCC). Following receipt of a number of submissions and responses, the JCC endorsed the organisational structure, with the RRC subsequently approving the proposed structure in late June 2009.

A Change Management Group (CMG) was established to provide a centralised avenue for meaningful consultations about the transition to the revised structure. The CMG was a cross-functional committee which incorporated representatives from management and staff of the Commission and the WorkCover Authority's Human Resources Branch.

The new organisational structure delivers on a range of key objectives contained in the Bendelta report, including:

- increasing the flexibility of task allocation within, and the level of collaboration between, dispute management and registry functions
- centralising the role of data analysis and reporting
- incorporating business support functions within a broader Business Support unit
- reducing the number of direct reports to the Registrar
- providing enhanced career paths for staff.

The process of matching current staff to the positions under the new structure took place in August and September 2009. Some new or unfilled positions were the subject of recruitment activity, due for completion by April 2010.

The new structure was officially launched by the President and the Registrar on 1 October 2009.

OHS Committee

The Commission's OHS Committee systematically manages issues to ensure that the workplace is, as far as practicable, safe and without risks to the health of employees and others.

The Commission's OHS Committee has carried out quarterly inspections of the Commission's work environment and produced reports for management, identifying some of the items that require urgent and routine remedial action. The reports focus on hazard identification, risk assessment, and risk control, with the emphasis on elimination or minimisation of risk.

To improve safety and deal with security issues, all conference rooms in the Commission have been fitted with electronic emergency devices. Arbitrators have also been issued with security pendants, which can be worn when they are using the Commission's premises.

To provide greater safety for all stakeholders including Commission staff, and to create a safer environment for all parties to resolve their issues, the Commission's OHS Committee recently drafted a visitor policy, which has been endorsed by management of the Commission. The final version of the visitor policy will be released shortly.

The Commission's OHS Committee has also been involved in the 2009 office fit out of Levels 19 and 20 and ensured that the building works posed no danger to staff and caused minimum disruption to business operations.

The Commission's OHS Committee has been successful in dealing with all OHS issues due to the support of staff and management. The committee's success in the delivery of its objectives is also attributed to the active participation of all of its members in pursuing a safe and hazard-free working environment.

Positive Behaviour Guide (Change Champions)

The Commission is committed to supporting its people and making the workplace a positive environment. The Commission's culture can be summarised as a 'high-performance culture that collaborates within and across teams'.

As part of the process of moving to the new structure, staff were engaged in the development of the 'Positive Culture Guide'. Staff from all levels of the organisation volunteered to be 'Change Champions' in a working party that identified the issues to address in regards to the Commission's culture. They also determined practical or effective means of addressing the issues resulting in the development of the 'Positive Culture Guide' booklet and posters. The Change Champions also took responsibility for the design, distribution and launch of the 'Positive Culture Guide' booklet and provided input into the design and placement of the associated posters.

The 'Positive Culture Guide' booklet has been developed to provide clear and practical guidelines about the types of behaviour that promote and foster the achievement of the cultural agenda, and those that hinder it. In the development of the Positive Culture Guide, the Commission sought to recognise the impact on, and the importance of individual behaviour and interactions to, the culture and performance of the organisation.

The booklet was distributed to all staff and has become part of the Induction Package for new starters at the Commission.

Capability Framework and New Position Descriptions

In line with the development of a NSW Public Sector Capability Framework by the Department of Premier and Cabinet, the Commission positioned itself at the forefront of adopting and implementing new recruitment models and practices.

The Department describes the Framework as a tool "to provide a common and consistent basis for the capabilities of staff" across all NSW government agencies.

The Framework describes in detail the knowledge, skills and abilities required and expected of anyone who aims to work in the public sector. It uses a model that allows NSW government agencies to describe jobs in the same language and to specifically seek out the types of behaviour that job applicants need to demonstrate at varying levels in filling those jobs.

The Framework is central to the NSW Government recruitment process and is integral to e-recruitment.

The Commission is one of the first NSW government agencies that embraced the Framework and applied its provisions in recruitment practice. The new organisational restructure provided the opportunity to review all the Position Descriptions up to Clerk Grade 11/12 and to meet the new framework. The new Position Descriptions were developed in consultation with staff and the union, and assessed using the Cullen Egan Dell methodology.

e-Recruitment

The new e-Recruitment program was launched in late August 2009. It covers the full recruitment process from the approval to fill a vacancy to the recording of the outcome of a recruitment drive. All records are now created and stored electronically, reducing the amount of paper used and the time involved in the recruitment process. There are several agencies currently trialling the systems and processes prior to broad-based implementation across all NSW government agencies.

The Commission is involved with the trial under the umbrella of WorkCover. It is anticipated that further extensive training and an increased use of the new system will be undertaken in 2010.

A new website www.jobs.nsw.gov.au has been implemented for the recruitment of staff by all NSW government agencies. The Commission has now been advertising all external positions on this website since November 2009.

Staff Awards

The Staff Awards have been presented on a quarterly basis throughout 2009 to acknowledge the high standards of service provided by staff. Feedback from staff had identified some areas of improvement, and suggested new categories for the awards. The feedback will be incorporated in a review of the staff awards which will be undertaken in 2010.

Certificate III in Government

The Commission continued to sponsor staff in undertaking the Certificate III in Government training as part of their professional development. In 2009, 11 staff participants commenced and completed their studies within a two month period.

WorkCover Training (Corporate Calendar)

WorkCover provides Commission staff with the opportunity to participate in a variety of training programs via its Learning Services Unit. Programs are designed to build on existing skills and knowledge and to improve the capability of teams in areas covering areas such as business skills, computer skills, and people and management skills. In 2009, 22 staff attended WorkCover-organised trainings in any of these areas.

Leadership Development Programs

The Commission participated in the Leadership Development Program designed and co-ordinated by WorkCover. There were two managers who participated in the program in 2009.

Individual Development Plans

Staff have been encouraged to participate in Individual Development Plans throughout 2009 with one member of staff completing the short program, the Public Sector Management Course.

Summer Clerkships

In partnership with the University of Western Sydney, the Commission provided two summer clerkships in 2009. This program has been in operation for four years.

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

3. Engaged Service Partners

Professional Development Activities

A program of mandatory conferences and voluntary short forums was conducted in 2009 for Arbitrators, Approved Medical Specialists and Mediators.

Arbitrator Professional Development activities included forums on a broad range of topics such as demystifying mental illness, transitional provisions, the preparation and delivery of ex-tempore decisions, and discussion groups on particularly relevant decisions of Presidential members and the Court of Appeal. An annual Arbitrator Conference was conducted in July 2009 with topics including decision writing, working with interpreters, the launch of the Commission's award-winning Arbitrator Practice Manual and feedback from the Peer Review process.

The annual AMS Conference was conducted in May 2009 and covered topics including decision writing, bias and medical decision-making, and updates on the law affecting AMS. Bi-monthly forums were also conducted throughout the year focusing on areas of clinical and legal interest and complexity.

A Mediator Forum was conducted on the topic "Making Mediation work – accreditation, standards, research and quality", a topic of some relevance following the release of the Attorney General's Department's ADR Blueprint.

Review of the Professional Development Program

The project commenced in late 2009, with the objective of evaluating and reviewing the Arbitrator Professional Development Handbook, covering areas such as:

- Arbitrator competencies
- the professional development (seven step) cycle
- the enhancement of the Arbitrator Professional Development Handbook.

The project had a target completion date of 31 March 2010.

Discussions with key stakeholders, including the Registrar, senior Arbitrators, and external professional development specialists, resulted in an online survey circulated to Arbitrators to gather their feedback on the existing framework and suggestions for its improvement. The survey contained 47 questions. The views and suggestions are now currently being analysed, and will require deliberations by the Registrar and the President to determine whether the responses will result in any amendments to the Arbitrator Professional Development Handbook.

Recruitment of Approved Medical Specialists (AMS)

Approved Medical Specialists (AMS) play a crucial role in the Commission's functions by undertaking assessments of permanent impairment and providing opinions arising in general medical disputes. AMS come from a diverse range of medical specialities and are able to conduct medical examinations across a number of locations throughout NSW.

On 27 May 2009, the Commission sought expressions of interest (EOIs) from qualified medical practitioners who wished to seek appointment as an AMS. A total of 178 EOIs were received. Successful applicants were appointed on 13 October 2009 following a four stage selection process comprising the following:

Stage one: Applicants were assessed against the relevant selection criteria and classified by reference to their specific area of expertise.

Stage two: The Commission verified the medical practitioner's qualifications and good standing with the relevant professional regulating bodies.

Stage three: The applications were referred to the Occupational Health and Safety and Workers Compensation Council for consideration.

Stage four: The President made the final decisions on the new appointments.

The recruitment was particularly beneficial for the Commission for the following reasons:

- It gave the Commission an opportunity to increase its pool of AMS generally.
- The Commission was able to address the difficulty of providing service to remote or rural locations by appointing new AMS as allocated service partners in those locations.
- The Commission minimised the difficulty of allocating matters in highly-specialised clinical fields by broadening the scope of medical specialities and increasing the number of existing specialities (eg cardiology and gastroenterology).

Following the recruitment, the Commission now has 140 AMS, 99 of which were reappointments and 41 being new appointments.

The new appointments include:

- nine psychiatrists
- nine orthopaedic surgeons
- five occupational medicine specialists
- five general surgeons
- two dermatologists
- two plastic surgeons
- two ear, nose and throat specialists
- two rheumatologists
- two general physicians
- one urologist
- one respiratory physician
- one ophthalmologist.

The full list of appointments is available via the Commission's website: www.wcc.nsw.gov.au

Arbitrator Practice Manual

At the end of 2008, the President and members of the Executive Committee identified a need for a practice and procedure manual to improve the quality, durability and consistency of decision-making. In 2009, the Arbitrator Practice Manual was designed, developed, and implemented to assist in first-instance decision-making and to reduce the number of appeals against arbitral decisions.

This was a major project managed and co-ordinated by Rod Parsons, and his substantial work was recognised and acknowledged by The Law Society of NSW through an Excellence Award in Government Legal Service.

The Arbitrator Practice Manual is innovative and serves two purposes. First, it provides guidance on a range of procedural and ethical issues. Second, it contains a number of chapters on substantive legal issues of particular relevance to the work of the Commission. It is well recognised that workers compensation law is extremely complex. The chapters on legal issues provide a substantial body of case law and legal principles to assist Commission decision makers. This has already proven extremely useful as a reference source, providing access to up-to-date information and greatly reducing research time. For the first time, members of the Commission have ready access to relevant and current information to assist in durable first instance decision-making.

A hard copy of the Arbitrator Practice Manual has been provided to all Arbitrators, Presidential Members, the Registrar and Registrar's delegates. It is also available electronically through the Commission's Intranet and Extranet. This makes it an even more valuable and accessible resource for Commission decision-makers, especially when they are situated away from the Commission's offices and attending a hearing in a regional area. The electronic version has a sophisticated search function, enabling searches to be conducted for particular words or phrases.

The Commission also has committed resources for the upkeep of the Arbitrator Practice Manual, and processes have been put in place to ensure that regular updates are distributed.

The Arbitrator Practice Manual is an asset to the Commission in that it greatly assists in achieving the Commission's statutory objectives of providing fair and cost-effective dispute resolution services.

Rules Review 2009

In June 2009, the Commission initiated a review of the *Workers Compensation Commission Rules 2006*.

As part of the review process, the Commission consulted with the legal profession, insurers and employer representatives, the Commission's service delivery partners, Commission staff and the WorkCover Authority.

A total of 21 potential amendments were identified by the Commission and its stakeholders for review. Of these 21 potential amendments, seven items were identified and approved by the Practice and Procedure Committee as requiring amendment to the Rules with a view to commencement in June 2010.

A number of items involve minor amendments to ensure consistency between the Commission Rules and the legislation. A number of more substantive amendments seek to incorporate an approach adopted in the *Uniform Civil Procedure Rules 2005*, and apply this approach in the Commission. For example, amendments are proposed regarding:

- the appointment and removal of tutors, and to protect the interests of persons under legal incapacity (Part 6, Rule 6.2)
- the requirement that an appealing party, upon lodging an appeal to a Presidential Member of the Commission, file a chronology of events with the appeal (Part 16, Rule 6.2(4))
- clarification that the service of a document upon a legal representative or agent of a party to proceedings in the Commission is taken to be sufficient service on the relevant party (Part 8, Rule 8.3)
- clarifications in applications involving the death of a worker, as to who is to be joined as a respondent to the proceedings and the manner in which those parties are to be joined to the proceedings (Part 9, Rule 9.10).

The proposed amendments are currently under consideration by the WorkCover Authority with a view to commencement in June 2010.

4. Streamlined Business Excellence

Accommodation

A review of the Commission's accommodation needs was undertaken during 2009 to maximise functional efficiency and to align with the new staff structure and in-house Arbitrators as a result of the organisational review.

Refitting of the accommodation on Levels 19 and 20, 1 Oxford Street, Darlinghurst, has provided space for accommodation of in-house Arbitrators in 2010. The new fitting also provided for the relocation of the Commission's Registry and all the other units under the Operations and Business Support Branch to one common floor space on Level 20.

Arbitration Recording System

The Commission records all proceedings during the Arbitration Hearing phase of dispute resolution. Until mid-2009, all hearings were recorded on portable digital sound recorders.

Due to ongoing issues with the supply of sound cards and inferior quality of recordings, the Commission has installed new voice recording technology in the conference and hearing rooms in the Sydney CBD. Table-mounted microphones are installed and connected to PCs in each room, enabling hearings to be recorded directly onto the Commission's IT network.

Arbitrators access these recordings through a secure Internet access module of the Commission's case management system.



Developments in the Law

APPEALS TO THE COURT OF APPEAL

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

At the beginning of the year there were seven appeals from decisions of Presidential members pending in the Court of Appeal. In 2009, six appeals were filed in the Court of Appeal against decisions from Presidential members and seven appeals from decisions of Presidential members were finalised as follows:

Outcomes of Appeal	Number of Outcomes
Consent Orders/Discontinued	3
Appeal Dismissed	1
Appeal Upheld and matter remitted	3

In 2009 the appeal rate from Presidential decisions to the Court of appeal was four per cent.

The durability of Presidential determinations is measured by the number of Presidential decisions revoked on appeal expressed as a percentage of the total number of Presidential decisions. The target KPI for 2009 was for the Commission to achieve a revocation rate of less than 2 per cent.

In 2009, there were no Court of Appeal determinations from 2009 Presidential decisions. The three appeals upheld by the Court of Appeal in 2009 and remitted to the Commission for re-determination were all appeals from Presidential determinations made in 2008. In 2008, the Court of Appeal did not determine any appeals from 2008 Presidential decisions.

Therefore, the revocation rate of Presidential decisions in 2009, expressed as a percentage of the total number of Presidential decisions made in 2008 (166), was two per cent.

Court Of Appeal

Sapina v Coles Myer Limited [2009] NSWCA 71

Allsop P,
Beazley JA,
Hoeben J

Ms Sapina, a delicatessen manager at Coles, brought proceedings in the Commission seeking compensation for a psychological injury as a result of performance counselling.

At first instance, an Arbitrator entered an award for the employer. Ms Sapina appealed to a Presidential member under section 352. She complained that the Arbitrator had omitted to state her understanding of the "whole or predominant cause" as required under section 11A and that the Arbitrator's findings of fact could not satisfy the relevant causation test.

The Deputy President dismissed the appeal and also entered an award in favour of Coles.

Ms Sapina appealed to the Court of Appeal. Her grounds of appeal were that the Deputy President erred in law in failing himself to:

- address whether Ms Sapina's psychological injury was "wholly or predominantly caused by" Coles' performance appraisal of her on 8 January 2007



- decide whether the true and correct view was that Ms Sapina's psychological injury was "wholly or predominantly caused by" Coles' performance appraisal of her on 8 January 2007
- conduct a proper review.

Held: Appeal Upheld And Remitted

It was clear from the way in which the Deputy President approached the grounds of appeal that he regarded the identification of error in the Arbitrator's reasoning as a precondition to intervention, and that was the way in which he performed his function. This was an incorrect test for the task of reviewing of a decision under the Act.

At no time was it apparent that the Deputy President exercised his own judgment or reached his own conclusions as to the evidence, and whether or not it satisfied the section 11A causation test of whether Ms Sapina's injury was wholly or predominantly caused by reasonable action taken by the employer with respect to performance appraisal.

The Court set out the history of the word "review" and the phrase "appeal ... by way of review" and confirmed that "... error (or lack of it) by the Arbitrator will or may be relevant to the task of the Presidential member but it does not define the task" (at [57]).

The Court held that the task of a Presidential member is to decide for himself or herself what is the true and correct decision. The Presidential member had a wide choice available as to how he or she undertook the task.

JUDICIAL REVIEW OF REGISTRAR AND MEDICAL APPEAL PANEL DECISIONS

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

In 2009, the number of judicial review applications lodged in the Supreme Court against decisions of the Registrar and Medical Appeal Panels significantly increased, compared to that in 2008. There were 15 applications lodged in 2009, more than twice the number in 2008 (six applications). This represents a judicial review rate of approximately one per cent of all decisions made.

Decision Maker	Number of Applications Lodged
Medical Appeal Panel	9
Registrar	3
Medical Appeal Panel and Registrar	3
Total	15

Additionally, in 2009 there was 1 appeal lodged to the Court of Appeal against the decision of a single Judge of the Supreme Court, relating to decisions made in respect of medical assessments.

Outcomes

In 2009, the Supreme Court and Court of Appeal handed down a total of eight decisions in matters relating to decisions made by the Registrar and Medical Appeal Panels.

Of the eight judgments combined, six were judicial review decisions of the Supreme Court and two were appeal determinations of the Court of Appeal.

Decision Maker	Dismissed	Upheld	Discontinued	Total
Medical Appeal Panel	4	2	0	6
Registrar	1	0	1	2
Medical Appeal Panel and Registrar	0	0	0	0
Total	5	2	1	8

In 2009, there were approximately 1100 reviewable decisions issued by the Registrar and Medical Appeal Panels. Accordingly, approximately 0.18 per cent of all reviewable decisions were successfully reviewed in the superior courts.

Arbitral Appeals to Presidential Members

Romanous Constructions Pty Ltd v Arsenovic [2009] NSWWCPCPD 82

Section 65A of the 1987 Act; psychological injury; whether worker received a primary psychological injury or a secondary psychological injury.

Roche DP

Facts:

Mr Arsenovic sustained multiple injuries in a car accident on his way home from work in 2002. In 2004 he settled a claim for lump sum compensation in respect of the injury to his back sustained in the car accident. In 2008 he made claims for lump sum compensation in respect of an injury to his right upper extremity and in respect of a primary psychological injury allegedly resulting from the car accident. GIO denied liability for the latter claims.

The Arbitrator determined that Mr Arsenovic injured his right upper extremity and suffered a primary psychological injury, referring the claims to an AMS.

The issues on appeal were whether the Arbitrator erred in finding that the Worker suffered a primary psychological injury; and as the Worker had already received lump sum compensation for his physical injuries, whether he was precluded from receiving lump sum compensation for a primary psychological injury.

Held: Arbitrator's Decision Confirmed

1. Whether a worker has sustained a primary psychological injury depends on an assessment of all the evidence. Although the medical evidence is of great importance, it is not the only evidence to be considered.
2. The worker's uncontested evidence was that he was referred to a psychiatrist as a consequence of his preoccupation with the accident, his panic attacks and nightmares, not because of his pain. The evidence established that he suffered from PTSD as a result of the accident, and his recorded symptoms of anxiety, depression and hyper vigilance were consistent with that diagnosis.
3. For unexplained reasons, the employer only tendered a supplementary report which presumably was a supplement to a more detailed report. In the absence of any history or findings on examination, the supplementary report was of little or any weight because it provided a bare conclusion (*Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705).
4. Section 65A(4) does not act to exclude workers from claiming compensation to which they are otherwise entitled, but merely limits the recovery of compensation in certain specified circumstances.
5. Section 65A(4)(a) and (b) make it clear that the impairments resulting from the psychological injury and from the physical injury must be assessed separately. A worker "is entitled" to receive lump sum compensation for whichever injury results in the "greater amount of compensation being payable" and is not entitled to compensation for the impairment resulting from the other injury. In respect of the primary psychological injury, the assessment must be at least 15 per cent WPI for compensation to be payable.
6. The 1987 Act acknowledges that workers' conditions change over time and, as a result, workers are entitled to claim additional compensation in the event of a deterioration in a previously compensated condition or injury (see sections 66(2A) and (2B) of the 1998 Act).

McDonald v North Coast Area Health Service [2009] NSWWCCPD 50

Meaning of "unreasonable", sections 40(2A) and (2B) of the 1987 Act.

Keating P

Arbitrator's Decision:

In respect of the claim for weekly compensation benefits, the Arbitrator made an award for the Respondent because the worker had been provided with suitable duties and, by reason of his voluntary resignation, he had unreasonably refused suitable employment (sections 40(2A) and (2B)).

Appeal:

Mr McDonald appealed. The grounds of appeal included that the Arbitrator erred:

- a. in law in considering section 40(2B) in the absence of a pleading pursuant to it in the section 74 Notice
- b. in finding that the worker was in breach of section 40(2B) and in failing to properly apply section 40
- c. in finding that the worker had unreasonably refused suitable employment.

Held:

1. The meaning of "unreasonable" is not defined for the purposes of sections 40(2A) and (2B) of the 1987 Act. Cases considered as to the meaning of "unreasonable" in various circumstances include:
 - a. Voluntary redundancy – *Freight Corp v Duncan* [2000] NSWCA 309
 - b. Refusal to submit to surgery – *Fazlic v Milingimbi Community Inc* [1982] HCA 3; (1982) 150 CLR 345
 - c. Refusal to participate in a rehabilitation program – *Hines v WorkCover/HHH (Transfer Maintenance Pty Ltd) Corporation* [2000] SAWCT 171
 - d. Resigning – uncongenial employment plus oppressive working hours – *Joseph Marama v K Mart Australia Ltd* 13 November 2000 (unreported), Curtis CCJ.

2. The provisions of section 40(2A) were not triggered, because the worker's resignation was not "unreasonable" due to the following:
 - a. Adequate arrangements for appropriate childcare are recognised as a perennial problem confronting modern families.
 - b. There was no challenge to the worker's evidence that there was no other reasonable alternative to arrange for the childcare.
 - c. Before resigning, the worker explored with the employer all viable options to retain his job, including volunteering to make himself available to work any shift, provided it did not fall on a Monday or a Tuesday.
 - d. The worker was entitled to weekly compensation assessed under section 40(1) of the 1987 Act (unable to be determined on appeal due to deficiencies in evidence, and the remaining issues therefore remitted to a different Arbitrator).

Carrington Abrasive Cleaners Pty Limited v Standen [2009] NSWWCCPD 143

Change of circumstances – section 55 of the 1987 Act

Roche DP

Facts:

Mr Standen was a sandblaster/labourer for the employer, Carrington, from May 1978. On 20 February 1979 he suffered a back injury whilst lifting drums of wet sand. Shortly after surgery to his back in 1984, the then Workers Compensation Commission awarded Mr Standen weekly compensation at varying rates for partial incapacity from 3 May 1980 until 12 January 1984, and then on the basis of total incapacity from 1 April 1984 on a continuing basis.

From 1985 to 1994 Mr Standen worked intermittently for different employers as a console operator. In 1991 Mr Standen and his wife purchased a half share in the Shell Roadhouse where he worked as a console operator and did some managerial duties such as bookwork, ordering stock and talking to trade representatives, while delegating the heavy duties to employees.

In 1994, Carrington sought termination or reduction of the award. Neilson CCJ determined that Mr Standen's circumstances had changed, reducing the award to \$145.00 per week from 16 May 1993 on a continuing basis.

In April 2004, Mr Standen sold the Shell Roadhouse and purchased a café franchise which was unsuccessful. He then worked as a console operator at BP, doing work which aggravated his back, hips and neck. At this time he also started work as an interior house painter, starting his own painting business in May 2007.

In September 2007, Mr Standen sought weekly compensation at the rate of \$561.60 from 13 December 1994 (date of Neilson CCJ's decision) and lump sum compensation in respect of both legs and arms. He also alleged that he injured his neck and back in February 1979 but did not plead an injury to his neck in the subsequently filed ARD filed. Carrington disputed that there had been any change in circumstances to justify a section 55 review.

An Arbitrator determined the matter in May 2009 and ordered Carrington to pay Mr Standen the maximum statutory rate from 30 April 2004 (when he sold the Shell Roadhouse) to date and continuing with credit for payments made. The section 66 claim for the legs and arms was remitted to the Registrar for referral to an AMS.

Held:

1. The evidence was against a finding that Mr Standen injured his neck on 20 February 1979. There was no history in the medical evidence that Mr Standen experienced any neck symptoms until October 1989, and Mr Standen's statement made no mention of any neck symptoms until either 1986 or 1987.
2. The claim for lump sum compensation in respect of the arms could only succeed if it was a consequential loss due to the neck or back injury. As the neck injury did not occur at work and as there was no persuasive evidence that the arm symptoms resulted from the accepted back injury, there was no basis for referring the claim for the arms to an AMS for assessment. However, the claim in respect of the legs, as a consequential loss resulting from the accepted back injury, was remitted to the Registrar for referral to an AMS.
3. Although the word "may", as used in section 55 of the 1987 Act, generally indicates, if used to confer a power, that the power may be exercised or not (section 9 of the Interpretation Act 1987 (NSW)), the Commission would only decline to conduct a review in circumstances where the change of circumstances relied upon made no material difference to the award being reviewed. This was not the situation in the present case.
4. Roche DP quoted Acting Deputy President O'Grady's (as he then was) summary of the principles relating to a section 55 review in *NSW TAFE Commission – North Sydney Institute v Zuk* [2006] NSWCCPD 148 at [34]. Mills (at 481) also lists the various circumstances in which a review may be triggered.
5. Having regard to the evidence and the authorities, there were at least three relevant changes in circumstances:
 - a. Mr Standen sold his business in April 2004. His ability to earn had to then be assessed on the open labour market.
 - b. Wage rates changed significantly between 1994 and 2004.
 - c. The medical evidence suggested a change in Mr Standen's physical condition as a result of the work injury.
6. Applying *Mitchell v Central West Area Health Service* (1997) 14 NSWCCR 526:
 - a. Step 1: Probable earnings but for the injury (section 40(2)(a)) – Mr Standen started with Carrington at 20 years of age. Given the unchallenged evidence that Mr Standen reached "a full painter's wage" and was a leading hand on some contracts, Roche DP was satisfied that Mr Standen would have reached a supervisory level industrial spray painter earning \$1,172.00 per week.
 - b. Step 2: Actual earnings or ability to earn in some suitable employment (section 40(2)(b)) (complicated by the fact that since April 2004 Mr Standen had worked for his own companies for two periods). The methods used to calculate a self-employed worker's section 40(2)(b) earnings are discussed in *J & H Timbers v Nelson* [1972] HCA 12; (1972) 126 CLR 625 and *Cage Developments Pty Ltd v Schubert* [1983] HCA 37; (1983) 151 CLR 584.

Mr Standen's evidence of his actual earnings were not a proper measure of his ability to earn. It was therefore necessary to look to the vocational assessment report and have regard to the nature of injury, the restrictions, limited education, age, lack of formal retraining, ongoing pain, and disability. He was assessed as having an ability to work for 30 hours per week as a shop manager or in a similar position where he could adapt the requirements of the position to his disability. Allowing an hourly rate of \$20.65, the rate of \$620.00 per week was derived.

- c. Step 3: Deducting the figure in step 2 from step 1 results in \$552.00 per week. The parties agreed that the figures in steps 1 and 2 could be applied for the whole period without adjustment for movements in wage rates.
 - d. Step 4: The section 40(1) discretion – Although work as a painter would not have been suitable for Mr Standen in the long term having regard to his back injury, the neck and shoulder symptoms experienced as a console operator had also clearly affected his ability to perform that work and other similar work. As Mr Standen had not injured his neck or shoulders, the figure at step 3 was reduced by \$50.00 per week.
 - e. Step 5: The difference was \$502.00 per week.
7. Because the injury occurred before 30 June 1987, Mr Standen was not entitled to the 20 per cent increase in weekly compensation introduced by the *Workers Compensation (Benefits) Amendment Act 1991*. His compensation was calculated under the rates set in Schedule 6 Part 4 clause 4A(2)(b) of the 1987 Act (*Workers Compensation (Savings and Transitional) Regulation 1992*).
 8. The sum of \$502.00 exceeded the maximum compensation payable. Therefore the award was the maximum statutory rate of weekly compensation applicable for a worker with dependent children, until further order by the Commission.

MT Smith, JK Williams t/as Harris Wheeler Lawyers v Mason [2009] NSWWCPCD 106

Section 10 of the 1987 Act – periodic journey; deviation for a purpose connected with employment – material increase in risk of injury

Keating P

Facts:

Mr Mason was a solicitor employed by the Appellant. It was his usual practice to ride his bicycle to work each day. Mr Mason was a member of a bicycle club and, every Tuesday and second Thursday, various members of the club, including Mr Mason, participated in what was described as a 'training ride' from John Hunter Hospital at New Lambton Heights Newcastle to Swansea and return. The round trip was approximately 44 kilometres.

It was Mr Mason's usual practice after completing the training ride to Swansea to continue on to his place of employment in Newcastle. Occasionally he would stop for coffee with the other members of the club before proceeding to work.

On Tuesday, 11 December 2007, Mr Mason was on a training ride in a group of approximately 19 cyclists riding in the breakdown lane on the Pacific Highway at Blacksmiths, when he was fatally injured after being struck by a semi trailer. The driver of the semi trailer was under the influence of illegal drugs and veered off the highway, striking Mr Mason.

Mrs Mason claimed benefits under section 25 and/or section 26 of the 1987 Act.

The Arbitrator found at the time of his death that Mr Mason:

- a. was undertaking a periodic journey between his place of abode and place of employment
- b. was injured during a deviation of such journey
- c. the deviation was connected with his employment with the Appellant
- d. the deviation did not materially increase the risk of injury.

Appeal:

The issues in dispute in the appeal were:

- a. whether Mr Mason was undertaking a periodic journey between his place of abode and place of employment at the time of his death
- b. if Mr Mason was on a periodic journey, were the injuries sustained whilst on a deviation connected to his employment?
- c. if Mr Mason was on a deviation at the time of the accident, did it materially increase the risk of injury?

Held:

1. The facts in this case were strikingly similar to those in *Vetter v Lake Macquarie City Council* [2001] HCA 12 (*'Vetter'*). In *Vetter Kirby J* noted that:
 - a. the High Court had emphasised in a number of decisions that claims for compensation for injuries sustained on a journey as defined in the applicable Act may only succeed if the journey in question is properly classifiable as one between a specified origin and a specified destination (see also *Young v Commissioner for Railways* [1961] ALR 258).
 - b. the Act is intended to apply to employment journeys of workers in a great variety of employment and domestic situations. It provides a valuable benefit to such workers. *"This benefit should not be narrowly construed nor confined to journeys in which the employer has some direct or notional interest."*
2. There is no obligation upon a worker to take the shortest and most direct route from the worker's place of work to the worker's abode so long as the journey can be said to be a journey between the worker's place of abode and place of employment (*Vetter* per Gleeson CJ, Gummow and Callinan JJ at [29]).
3. Consistent with these authorities, his Honour found that Mr Mason was on a journey between his place of abode and place of employment within the meaning of section 10 of the 1987 Act at the time of his death. The journey being undertaken by the worker conformed to a periodic pattern. There was no compulsion for him to take the shortest and most direct route to work. There was no prohibition on him achieving an additional purpose, in this case the training ride, in addition to his purpose of cycling to work.
4. The fact that the worker included a training ride with his cycling club, which added approximately 35 to 45 km to the more direct route and which in part took him on a path opposite to the direct route, being undertaken before normal office hours, did not deprive the journey of the character of a periodic journey within the meaning of section 10 (3).
5. If his Honour's finding that Mr Mason was on a periodic journey was wrong, in the alternative, his Honour found that the interruption or deviation to the periodic journey on which Mr Mason was engaged at the time of his accident was for a reason connected with his employment, namely the promotion of Harris Wheeler through business networking in the cycling club (see *Napoli v Arthur H Stephens (NSW) Pty Ltd* [1970] 1 NSWLR 125 at [127]).
6. Further, in the alternative, his Honour held that the Employer failed to establish that the deviation materially increased the risk of injury. His Honour noted:
 - a. Once the employer has established that the worker was injured during an interruption or deviation to a journey, the worker bears the onus of negating a material increase in risk (see *Babcock Australia Ltd v Proudfoot* [1993] NSWCC 30; (1993) 9 NSWCCR 525).
 - b. Whilst the worker bears the onus of proving that there has been no material increase in risk, once the worker has led sufficient evidence from which, if accepted, the negative proposition may be inferred, the evidentiary onus shifts to the employer to adduce evidence that tends to show that the negative proposition is incorrect (see *Rockcote Enterprises Pty Ltd v FS Architects Pty Ltd; Carelli v FS Architects Pty Ltd* [2008] NSWCA 39 (28 March 2008) at [78]).
 - c. Whether the risk is likely to have been increased is a question of fact and degree requiring a comparison of the risk likely to arise had there been no interruption or deviation and the risk involved in or during the deviation or interruption.

- d. The material consideration is not whether the increase in the risk of injury resulting from the interruption or deviation actually caused the injury, but whether in fact there has been a material increase in the risk of injury generally by reason of the interruption or deviation (see *Scobie v K D Welding Company Pty Ltd* (1969) 103 CLR 314 (*'Scobie'*) at page 322).
- e. As Windyer J noted in *Scobie*, at 331 [par 10], the increased risk due to the additional time taken on the journey as a result of a deviation or interruption is not necessarily material.

Orders: Arbitrator's decision confirmed on appeal.

***Singh v Thompson Health Care Ltd* [2009] NSWCCPD 11**

Journey claim – section 10 of the 1987 Act – Nurse assaulted at KFC

Keating P

Facts:

Mr Singh, an assistant nurse at a Randwick nursing home, drove to work at about 9:00 pm and parked his car in the staff car park. He then walked to the KFC store to buy food, with the intention of returning to work to start his shift at 10:00 pm. When he was buying his meal Mr Singh was the victim of an unprovoked attack by two men and was injured in the attack.

The question for the Arbitrator was whether Mr Singh was still on a periodic journey to his place of employment (section 10 of the 1987 Act) when he was assaulted, and therefore his injuries were compensable, or that he had already completed the journey when he drove to work and parked his car.

The Arbitrator found that Mr Singh had completed his journey prior to the assault and therefore the injuries were not work-related.

Mr Singh appealed on the basis that the Arbitrator failed to properly apply the law in relation to journey claims.

Held: Arbitrator's decision revoked and matter remitted to a new Arbitrator for determination.

1. Mr Singh was injured during the course of a daily or other periodic journey between his place of abode and place of employment (section 10(3)(a) of the 1987 Act).
2. The worker's intention for making the journey was a primary factor (see *Mills NSW Workers Compensation* (Second Edition), page 199, and *Kerr v New South Wales Club* [1971] 45 WCR 13 (*'Kerr'*)).
3. Mr Singh's intended journey for the purposes of section 10 of the 1987 Act commenced when he set out from his place of abode, and would have ended had he not been assaulted when he returned to his employer's premises for the purpose of commencing his duties after consuming his evening meal at the nearby KFC store. His intention was to embark on a single journey between his place of abode and his place of employment, which included his attendance at the local shops to purchase his evening meal. Leaving his employer's premises after parking his car to go the local shops did not deprive it of the character of a daily or other periodic journey.
4. Parking his car in the space allocated for staff parking at his employer's premises, and thereafter accessing his locker for the purposes of depositing and retrieving certain belongings, did not destroy the character of the journey. Mr Singh merely utilised his employer's premises as a 'repository' for his personal belongings, and as a convenient place to park his car, during the course of his journey to his 'place of employment' via the local shops. He had no intention of commencing duties when he reached his employer's premises at about 9:00 pm. His intention in going there was collateral to ultimately reaching his place of employment for the purposes of commencing duties at 10:00 pm (*Kerr*).
5. The Arbitrator erred by deciding Mr Singh had undertaken two distinct journeys: one between his place of abode and place of employment, and another from his place of employment, for private purposes, to the local shops and return (*Kerr and Vetter*).

***Department of Ageing, Disability and Home Care v Vogel* [2009] NSWWCCPD 51**

Exposure to meningococcal disease – causation – proof on the balance of probabilities – expert evidence – worker coughed on by alleged infected person – cause and spread of infection

Roche DP

Facts:

Ms Vogel alleged that she contracted meningococcal septicaemia in the course of her employment, as a result of being coughed on by an infected resident of Sunshine Lodge. Her medical evidence concluded that "on the balance of probability" she contracted the disease in her work situation as her contact outside the workplace was relatively limited.

The Employer argued that the evidence did not support the conclusion that a resident had meningococcal disease and had spread it to Ms Vogel. The Public Health Unit investigation failed to find other cases of infection. In the absence of confirmatory cases or other proved facts, the Employer argued that it was a matter of speculation that the workplace was the cause of the infection.

Held: Arbitrator's decision confirmed

1. The worker's experts explained the basis for their conclusions, namely, that it is well known that meningococcal infection can be spread as nasopharyngitis between inmates in boarding situations and that the organism is spread by the transmission of small droplets.
2. Whilst epidemiological opinion evidence on general causation goes no further than establishing a possible connection between work exposure and the disease, *Seltsam v McGuinness* [2000] NSWCA 29; (2000) 49 NSWLR 262 concerned the strength of the association between asbestos exposure and renal cell carcinoma, aspects of the quality of epidemiological research, and inconsistencies between various studies. No such issues arose in Ms Vogel's case because the evidence established that meningococcal disease could be spread by the transmission of small droplets and that Ms Vogel had contracted the disease. The question was whether she had contracted it at work or from some other source (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452).

3. Whilst the burden of proof is not satisfied merely by evidence that it is possible that a causal relationship exists (*Seltsam v McGuinness* at [80]), the inference of causation may be drawn from all the evidence in the case, including expert evidence as to the possibility that the causal relationship exists (*Nguyen v Cosmopolitan Homes* [2008] NSWCA 246, McDougall JA at [64]).

***Yun Fu Wang v Botany View Hotel Limited* [2009] NSWWCCPD 63**

Reconsideration – section 350(3) of the 1998 Act – unrepresented worker – appeals to superior courts – public policy – Commission to ensure litigation does not proceed indefinitely

O'Grady DP

Facts:

Mr Wang, an unrepresented worker, requested a reconsideration of the Commission's decision in *Yun Fu Wang v Botany View Hotel Limited* [2008] NSWWCCPD 25 (dated 26 February 2008) ('Wang'), in which leave to appeal the Arbitrator's decision was refused.

Mr Wang had previously sought leave to appeal *Wang* to the NSW Court of Appeal. On 17 September 2008, the Court refused leave to appeal. Mr Wang then brought an application for special leave to appeal that decision to the High Court of Australia. That application was dismissed by the High Court on 1 April 2009.

The Employer in response to the reconsideration application noted the fact that prior to the Court of Appeal decision, Mr Wang had instituted a fresh application in the Commission, with allegations identical to those previously dealt with by the Commission, and that that application had been dismissed. It submits that Mr Wang had unsuccessfully pursued all avenues available to him with respect to his claim and that the reconsideration application should be declined.

Held: Application for reconsideration refused. No order as to costs.

1. None of the material produced in support of the reconsideration application could be described as "new evidence" (*Samuel v Sebel Furniture Ltd* [2006] NSWWCCPD 141). The voluminous material accompanying the application included much of the material considered on earlier occasions by both the Commission and the superior courts.

2. Mr Wang appeared to be seeking to re-agitate matters dealt with on earlier occasions before the Commission, and during the course of leave applications brought before the superior courts.
3. The Commission must ensure for reasons of public policy that litigation does not proceed indefinitely. Upon an analysis of the evidentiary material, the reconsideration application was without merit and the conduct of Mr Wang conflicted with public policy in respect of the need for finalising litigation.

Pre-Filing Strike Out Applications

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

Questions of Law

The President hears and determines Questions of Law referred by an Arbitrator by his or her own motion or on application by a party under section 351 of the 1998 Act. Leave to refer a Question of Law is granted only if the question is 'novel or complex'.

Case Summary

***Kajic v Hawker De Havilland Aerospace Pty Ltd* [2009] NSWWCPCD 136**

Novel or complex question of law – section 60AA(3) of the 1987 Act – gratuitous domestic assistance

Keating P

22 October 2009

Question of Law:

Whether section 60AA(3) of the 1987 Act constitutes more than an evidentiary threshold entitlement requirement and, if so, is it to be read in conjunction with the WorkCover Guidelines for the Provision of Domestic Assistance dated 15 October 2004, so as to impose a maximum level of compensation payable under section 60AA to a care provider, limited by the amount of any lost income or value of the forgone employment sustained by the care provider?

Determination:

1. Leave granted to refer the question because the construction of the statutory provision and the subordinate legislation constituted by the relevant WorkCover Guidelines was both novel and complex.
2. Workers compensation legislation is beneficial in nature and if any ambiguity exists it is to be construed beneficially. The true significance of the provision should not be strained or exceeded, but it should be construed so as to give the fullest relief, which the fair reading of its language will allow, (*Bull v Attorney General (NSW)* (1913) 17 CLR 378 per Isaacs J).
3. Consistent with the objects of the Workers Compensation Acts (the 1987 Act and the 1998 Act), and the Minister's stated intention of ensuring that the long-term care needs of seriously injured workers are met (see the second reading speech in the NSW Legislative Council, on 24 June 2004, in introducing the *Workers Compensation Legislation Amendment Bill* 2004), s 60AA should be seen in the context of ensuring appropriate remuneration for the provision of gratuitous care whilst at the same time ensuring that the provision of gratuitous care by family members does not result in a windfall gain to the employer or its insurer.
4. Pursuant to section 376(1), the Authority issued in the NSW Government Gazette No 166 the 'WorkCover Guidelines to the Provision of Domestic Assistance', providing for the regulation and verification of compensation for gratuitous domestic assistance.
5. Reading the Act and the Guidelines together as a scheme for the provision of compensation for gratuitous assistance, once an entitlement to compensation has been established, the amount of compensation payable is regulated by clause 7.4 which provides for an hourly rate by reference to the Australian Bureau of Statistics publication on average earnings ie dividing by 35 the amount estimated as the average weekly total earnings (full time adult ordinary time) of all employees in NSW. Clause 7.4 also sets a limitation on the total compensation payable by providing that compensation is not payable for more than 35 hours per week.

6. In the absence of a clear and unambiguous provision in clause 7.4, or anywhere else in the Act or Guidelines, that compensation for gratuitous domestic assistance is limited by the quantum of the carer's pre-accident earnings or forgone employment, a clear and unambiguous provision limiting the amount of compensation payable to the quantum of the lost or forgone income should exist, as a matter of statutory construction, (see *Bropho v The State of Western Australia* [1990] ALR 207), and given the beneficial nature of the legislation, there was no justification for concluding that the compensation for gratuitous domestic assistance should be limited by the quantum of the carer's pre-accident earnings or forgone employment.
7. The answer to the Question of Law in this matter was:
Section 60AA(3) of the 1987 Act constitutes an evidentiary threshold to the entitlement to compensation for gratuitous domestic assistance and must be read in conjunction with the 'WorkCover Guidelines for the Provision of Domestic Assistance' dated 15 October 2004. When so read, the subsection imposes a maximum level of compensation payable to a carer limited by clause 7.4 of the Guidelines, but the compensation is not determined by the amount of any lost income or the value of forgone employment sustained by the care provider.

Appendix 1:

MEMBERS OF THE COMMISSION

President

His Hon Judge Greg Keating

Deputy Presidents

Mr Bill Roche

Mr Kevin O'Grady

Acting Deputy Presidents

Mr Anthony Candy

Ms Lorna McFee

Ms Deborah Moore

Mr Michael Snell

Registrar

Ms Sian Leathem

Arbitrators (as at 31 December 2009)

Mr Geoffrey Adelstein

Mr Ross Bell

Mr Garth Brown

Mr Geoff Charlton

Ms Ruth Charlton

Ms Jennifer Conley

Ms Janice Connelly

Ms Margaret Dalley

Prof Jennifer David

Mr Marshal Douglas

Ms Christine D'Souza

Ms Sue Duncombe

Mr Robert Foggo

Mr Stavros Georgiadis

Ms Eraine Grotte

Ms Robin Gurr

Mr John Hertzberg

Mr John Ireland

Dr John Keogh

Ms Carol McCaskie

Mr John McDermott

Mr Michael McGrowdie

Mr John McGruther

Mr Garry McIlwaine

Mr Bruce McManamey

Mr Christopher Messenger

Mr Derek Minus

Mr Peter Molony

Ms Annemarie Nicholl

Mr Dennis Nolan

Mr Michael Oldfield

Mr Rory O'Moore

Ms Jane Peacock

Ms Carolyn Rimmer

Ms Faye Robinson

Mr Greg Rooney

Ms Jennifer Scott

Ms Natasha Serventy

Mrs Annette Simpson

Mr Craig Tanner

Mr Philip Theobald

Mr Leigh Virtue

Mr Ross Whitelaw

Mr John Wynyard

Appendix 2:

APPROVED MEDICAL SPECIALISTS

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

Dr David Gorman
Dr John Moore Greenaway
Dr John Harrison
Dr Richard Haber

Dr Paul Christopher Myers
Dr Steven Ng
Dr Paul Niall
Dr Brian Noll

Dr George Weisz
Dr Kalev Wilding
Dr Peter Sydney Wilkins
Dr Brian Williams

MEDIATORS

Mr Ross Bell
Mr Garth Brown
Mr Raymond Brazil
Mr Geoff Charlton
Ms Ruth Charlton
Ms Jennifer David
Ms Sue Duncombe
Mr Marshal Douglas
Ms Geri Ettinger
Mr Michael Fishburn
Mr David Francis
Ms Penny Goode
Mr Leo Grey

Ms Robin Gurr
Ms Nina Harding
Mr John Hertzberg
Mr John Ireland
Ms Katherine Johnson
Mr Larry King, SC
Mr John Keogh
Mr Stephen Lancken
Mr John McDermott
Mr Ross MacDonald
Mr John McGruther
Mr Russell McIlwaine, SC
Ms Janice McLeay

Mr Derek Minus
Mr George Newhouse
Mr Daniel O'Keefe
Mr Rory O'Moore
Mr Greg Rooney
Ms Jennifer Scott
Ms Natasha Serventy
Mr Peter Semmler, QC
Mr Paul Webb, QC
Mr John Weingarth
Mr Ross Whitelaw

Appendix 3:

MEDICAL APPEAL PANEL CONVENORS

Ms Ruth Charlton
Ms Jennifer Conley
Prof Jennifer David
Mr Marshal Douglas
Ms Sue Duncombe
Ms Eraine Grotte
Ms Carol McCaskie
Mr Bruce McManamey
Mr Peter Molony
Ms Annemarie Nicholl
Mr Rory O'Moore
Ms Carolyn Rimmer
Ms Natasha Serventy
Mr John Wynyard

MEDICAL APPEAL PANEL APPROVED MEDICAL SPECIALISTS

Dr John Beer
Dr James Bodel
Dr Robert Breit
Dr Peter Burke
Dr Mark Burns
Dr Joseph Scoppa
Dr Richard Crane
Dr David Crocker
Dr Michael Fearnside
Dr Robert Gertler
Dr Philippa Harvey-Sutton
Dr Kenneth Hume
Dr Peter Isbister
Dr Lana Kossoff
Dr Sophia Lahz
Dr William Lyons
Dr Gregory McGroder
Dr Ross Mellick
Dr Paul Niall
Dr Brian Noll
Dr Robert Oakeshott
Dr Julian Parmegiani
Dr Brian Parsonage
Dr Roger Pillemer
Dr Graham Vickery
Dr Brian Williams

MEDICAL APPEAL PANEL SUPPLEMENTARY APPROVED MEDICAL SPECIALISTS

Dr Peter Anderson
Dr Frank Breslin
Dr Michael Delaney
Dr John Duggan
Dr Antonio E L Fernandes
Dr Sylvester Fernandes
Dr John Garvey
Dr Michael Gliksman
Dr Gregory Kaufman
Dr Edward Korbel
Dr Keith Lethlean
Dr David Macauley
Dr Nigel Marsh
Dr Tommasino Mastroianni
Dr Ross Mills
Dr Graham Pittar
Dr Stuart Porges
Dr Thandavan Raj
Dr Tom Rosenthal
Dr Avtar Sachdev
Dr John Brian Stephenson
Dr Harry Stern
Dr Nicholas Talley
Dr Stuart Taylor
Dr William Walker



