



Workers Compensation Commission

ANNUAL REVIEW 2008

Disclaimer

This publication may contain occupational health and safety and workers compensation information. It may include some of your obligations under the Workers Compensation Act 1987 and the *Workplace Injury Management and Workers Compensation Act 1998*. To ensure you comply with your legal obligations you must refer to the appropriate legislation.

Information on the latest laws can be checked by visiting the NSW legislation website (www.legislation.nsw.gov.au) or by contacting the free hotline service on 02 9321 3333.

This publication does not represent a comprehensive statement of the law as it applies to particular problems or to individuals or as a substitute for legal advice. You should seek independent legal advice if you need assistance on the application of the law to your situation.

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President's Foreword

The Commission's primary objectives are to provide a dispute resolution service that is fair, cost effective and timely. With more than 10,000 applications being lodged in the Commission each year, we need to remain focused on ensuring that the dispute resolution mechanisms we use, meet our statutory objectives.

To achieve the desired outcomes our systems support a process, which encourages the parties to reach their own resolution of the dispute, facilitated by a skilled Conciliator/Arbitrator in an informal context. Whilst the model we adopt is unique, in that the same person conciliates and then if necessary arbitrates the dispute, it has proven to be a successful model. In the past twelve months almost 70 percent of matters have either been settled between the parties or withdrawn.

To ensure we maintain flexible, workable and efficient processes, the Commission embarked on a number of initiatives in 2008. Those initiatives included a comprehensive organisational review and an extensive survey of external users and service providers to evaluate the Commission's effectiveness in dispute resolution and case management practices.

We took the view that for the review process to be effective, we first needed to obtain as much reliable data as we could from all relevant sources. With that in mind, in the early part of 2008, we commissioned external consultants to undertake an extensive survey of injured workers, employers, scheme agents and for the first time, members of the legal profession, seeking feedback from their experiences with the Commission. Those surveys examined stakeholder opinion about the effectiveness of the Commission's Arbitrators and Approved Medical Specialists and the process utilized to resolve disputes, including the teleconferences, the conciliation/arbitration process and appeal mechanisms for both medical and legal determinations. The consultation with workers involved a series of focus groups with a number of workers who had recently been involved in

Commission proceedings. Through this process the Commission gained some very valuable insights into stakeholder perceptions of the dispute resolution process.

The survey material, plus the results of an internal survey of the Commission's staff, was then made available to external management consultants who conducted the organisational review. Following the extensive consultation process, a report was received by the Commission in early July 2008, which identified opportunities for both structural and operational realignment. The Commission is currently in the process of evaluating the range of options identified by the consultants.

I strongly believe in the value of individual professional development for the Commission's staff. An organisation is, after all, only as good as its people. I am pleased to report that during the year the Commission appointed an organisational development officer to undertake the preparation of an integrated professional development framework for our staff. By the end of this year all staff members who wish to participate in the program will have the opportunity to have in place an individual development plan (IDP), tailored to their particular circumstances.

A considerable amount of work has also been done to implement a professional development and appraisal system for the Commission's Arbitrators. In consultation with Arbitrator representatives, an appraisal process is now in place which is closely linked to professional development. The professional development cycle involves the identification and discussion of professional development plans, peer review, access to statistical information and quantitative reports, a component of self-assessment and finally formal evaluation. Although the cycle is in its first year of operation, I understand it has been well received by Arbitrators who regard the process as a useful and positive experience. We intend to introduce a similar system for the Approved Medical Specialists.

The Commission has had a successful year in terms of our engagement with external stakeholders. We have entered into a formal service and partnership agreement with the Workcover Authority for the provision of human resources, IT and other administrative support. We have participated throughout the year in various activities involving the Council of Australasian Tribunals and joint activities with the Motor Accidents Authority.

In keeping with best practice principles, during the year the Commission conducted a half-day strategic planning day and a full day corporate planning session. Arising from those activities the Commission now has a comprehensive five year strategic plan and detailed corporate and business plans in place, to guide our activities through the coming 12 months. We have also taken the opportunity through the year to undertake a comprehensive risk analysis and formulate a risk assessment matrix. Through this process we have been able to enhance our risk mitigation strategies. We have also developed a comprehensive disaster recovery plan.

During the year the Commission introduced a series of Key Performance Indicators (KPI's) to measure its performance against the legislative objectives. Performance against the KPI's for the Commission as a whole and for individual business units are reported monthly and published on the Commission Intranet; Annual KPI outcomes will be published more broadly.

Deputy President Gary Byron retired after completing a seven year term as one of the inaugural Deputy Presidents in November 2008. The Commission drew heavily on Gary's extensive experience in Courts administration, particularly in the formative years following its establishment in 2002. Gary made a significant contribution to the work of the Commission and he will certainly be missed.

2008 has been a busy but productive year for the Workers Compensation Commission. We have

achieved a great deal. We have set for ourselves clear measurable and achievable goals for our immediate and long term future.

Finally, I take this opportunity to thank the members and staff of the Commission for their contribution to the work of the Commission throughout the year. In particular I wish to express my appreciation to the Registrar Sian Leathem for her support and commitment.

I look forward to 2009 being a successful and productive year for the Commission.

**His Honour Judge Greg Keating
President**



Registrar's Report

In 2008 the Commission set itself an ambitious program, including the commissioning of a user survey, the conduct of an independent organisational review and the development of a comprehensive professional development framework for Arbitrators and Approved Medical Specialists. I am pleased to report that we were able to complete each of these important projects, although the work emerging from each is significant and will continue in 2009 and beyond.

Substantial efforts were also made to build upon the Commission's commitment to staff training and professional development, with the engagement of a full-time Organisational Development Officer in mid 2008. Significant achievements have been made since that time with the finalisation of an updated Induction Program and the roll-out of a staff Reward and Recognition Strategy. The Commission was also pleased to be able to support 21 of its staff in the completion of a Certificate III and IV in Government Services. The Commission looks forward to providing further development opportunities for staff in 2009.

I wish to acknowledge the important role played by the Commission's Arbitrators, Mediators and Approved Medical Specialists. The Commission has further strengthened its relationship with our service providers through the maintenance of Reference Group meetings and the conduct of professional development activities and surveys.

In 2008 the Commission developed and implemented a Professional Development Framework for both Arbitrators and Approved Medical Specialists. The Frameworks identify the key competencies required to perform these important roles and provide the foundation for self-assessment, peer review, training and development and performance appraisal. The effectiveness of the Frameworks will be evaluated in 2009.

Readers of the 2008 Annual Review will note that,

for the first time, the Commission has published and reported on a number of key performance indicators. These indicators are designed to track the Commission's progress in meeting its obligations to provide a timely and cost effective dispute resolution service. They will now be a regular feature of the Commission's reporting framework.

2009 promises to be an exciting year, as we move to progress recommendations emerging from the organisational review. I thank the President, Deputy Presidents, Deputy Registrars, staff and our service partners for their support and dedication 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 New South Wales. It was established under the *Workplace Injury Management and Workers Compensation Act 1998* and commenced operating on 1 January 2002.

The Commission is a 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 was established to take over the jurisdictions of both the NSW Workers Compensation Court and the Workers Compensation Resolution Service. 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 Joseph Tripodi (Minister for Finance, Minister for Infrastructure, Minister for Regulatory Reform, and Minister for Ports and Waterways) is the Minister under whose auspices the Commission falls.

OBJECTIVES OF THE COMMISSION

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

- ❑ To provide a fair and cost effective system for the resolution of disputes
- ❑ To reduce administrative costs
- ❑ To provide a timely service
- ❑ To create a registry and dispute resolution service

that meets expectations in relation to accessibility, approachability and professionalism

- ❑ To provide an independent dispute resolution service that is effective in settling disputes and leads to durable agreements
- ❑ To establish effective communication and liaison with interested parties

These objectives are challenging and important. Over the last seven years the Commission has striven to build a solid foundation of achievement aligned with these objectives. 2008 has been an important year for consolidating, reviewing and planning the next stage of the Commission's advancement. A new Strategic Plan has been developed, which will carry the Commission through to 2011 and will ensure that the Commission is guided by its statutory objectives in all its activities.

What Do 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 varies 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 detail 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.

The Organisation

MEMBERS

The Commission consists of the following Members:

- ❑ A President
- ❑ Two Deputy Presidents
- ❑ Five Acting Deputy Presidents



- ❑ A Registrar
- ❑ 50 Arbitrators

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

PRESIDENT AND DEPUTY PRESIDENTS

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

There are usually two full-time Deputy Presidents. Mr Bill Roche is currently holding office as one of the Deputy Presidents.

Mr Gary Byron held the office of Deputy President from the commencement of the Commission through to his retirement in November 2008. He, together with Justice Sheahan, the inaugural President and Deputy President, Dr Gabriel Fleming, and Registrar Helen Walker played an instrumental role in the establishment of the Commission in its early years.

Gary completed his seven-year appointment as Deputy President on 18 November 2008 and retired, not only from the Commission, but also from an outstanding 49-year career in public service in New South Wales, South Australia, Western Australia and the Commonwealth.

The Commission is currently awaiting the Ministerial appointment of a new full-time Deputy President to replace Deputy President Gary Byron.

Five Acting Deputy Presidents held appointments during 2008 to assist in the timely determination of arbitral appeals. The five Acting Deputy Presidents: Mr Anthony Candy, Mr Robin Handley, Ms Deborah Moore, Mr Kevin O'Grady and Mr Michael Snell, each held a 12 month appointment throughout 2008 and assisted the Commission to maintain its timely resolution of appeals. All five Acting Deputy Presidents

were reappointed on 10 December 2008 for a further twelve months.

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

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

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

REGISTRAR

Ms Sian Leathem is the Registrar of the Commission. 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 Mrs Annette Farrell and Mr Rod Parsons, and Executive Officer 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

There are currently fifty (50) Arbitrators holding appointments with the Commission located throughout New South Wales. 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. The 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

The President of the Commission appoints the Approved Medical Specialists. There are approximately 120 Approved Medical Specialists holding appointments with the Commission located throughout New South Wales.

The Medical Specialists are highly experienced medical practitioners from a variety of specialties.



To be appointed they must have completed the necessary training in the WorkCover guidelines to assess whole person impairment, and their application must have stood up to a rigorous assessment of their 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 the worker as a result of an injury, to the Approved Medical Specialist for assessment. The selected 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 *Workplace Injury Management and Workers Compensation Act 1998*, before court proceedings for such claims can be commenced.

To this end the Commission currently has 35 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 Mediators and Approved Medical Specialists 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 an Appeal Panel, which is constituted by an Arbitrator and two Approved Medical Specialists. The 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.

During 2008 the Commission changed the way that it manages the medical appeals. Previously all the Arbitrators and Approved Medical Specialists were eligible to participate in medical appeals. To improve the timeliness and quality of the determinations in Medical Appeals it was determined to appoint a smaller, more dedicated pool of Arbitrators and Approved Medical Specialists to undertake this work.

Interested Arbitrators and Approved Medical Specialists were asked to apply for appointment to the medical appeal panel lists. After review of the applications 16 Arbitrators were appointed to act as the convener of Medical Appeal Panels. In addition 42 of the Approved Medical Specialists were also appointed to participate 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 110 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 Unit

The Presidential Unit has five fulltime staff members in addition to the Presidential members.

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

Research Associates provide legal research and support to the Presidential Members.

The Administrative Associate works closely with the Presidential Members providing administrative support, such as preparing correspondence, reports, papers and presentations, and typing and formatting Presidential decisions.

As in previous years, the Presidential unit provided administrative support to the Conference of Australasian Tribunals (COAT) NSW annual conference in May 2008. Melanie Curtin and Marie Johns were also members of the COAT NSW, Education and Training subcommittee, which met throughout 2008 to develop the terms of reference and the tender documents for the recently commenced COAT NSW 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. In 2008, the Presidential Unit enhanced the publication of these decisions by notating, where relevant, decisions under appeal and/or determined on appeal by the Court of Appeal. In addition, 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 Presidential decisions and relevant Presidential decisions.

During 2008, the staff of the Presidential unit took over the management and administration of Applications to appeal against the decision of an Arbitrator. During a pilot of the new arrangement, which commenced in July 2008, the Presidential unit staff achieved an average two-week improvement in the timeliness of these appeals. This improvement was realised by reviewing and refining the administrative processes and involving the Presidential members early in the life of the application where appropriate.

The unit also took over the management of appeals lodged in the Court of Appeal against decisions of Presidential Members.

Registrar's Unit

The Registrar's Unit is made up of the Appeals Unit and the Professional Standards Unit, as well as the Executive Officer, the Registrar's Executive Assistant, and the Organisational Development Officer.

Appeals:

The Appeals Unit is responsible for the administration

of Medical Appeals.

Legally qualified staff in the Appeals Unit, as delegates of the Registrar, perform an important statutory function by exercising the Registrar's gatekeeper role under section 327(4) of the *Workplace Injury Management and Workers Compensation Act 1998*. This section states that a medical appeal is not to proceed unless the Registrar is satisfied that at least one of the specified grounds for appeal has been made out.

The Appeals Unit also manages judicial review proceedings in the Supreme Court in respect of the decisions of Medical Appeal Panels and the Registrar.

Professional Standards Unit:

The Professional Standards Unit is responsible for the coordination of professional development, support and management of Arbitrators, Approved Medical Specialists and Mediators. This includes the management of service provider recruitment and performance review processes as well as ongoing professional development activities, including orientation sessions, forums and conferences. The Unit provides a key liaison role between these service providers and the Commission, including a secretariat/ membership role in the Arbitrator, Approved Medical Specialist, and Mediator Reference Group.

The unit is also responsible for the provision of quality and timely stakeholder information, including the e-bulletin.



Operations

The Operations Unit is managed by the Deputy Registrar – Operations, Mrs Annette Farrell, and consists of three sub-units:

Registry:

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

Registry staff attend the two public counters in the Commission's premises at 1 Oxford Street, Darlinghurst. At the counter on level 19 the public can lodge documents in person or come to make enquiries. This is also where access to produced documents is managed.

Level 21 is where the Commission's Sydney Conciliation/Arbitration Conferences are held. The Registry staff can be found at the Concierge Desk providing directions to the public, assistance to the Arbitrators and generally managing the facilities on that floor.

More importantly Registry is responsible for registering matters and managing the information exchange period, including receipt of produced documents and access arrangements. The staff in Registry receive initial telephone enquiries and manage the Commission's incoming and outgoing mail.

Dispute Services:

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



Work undertaken by the unit includes allocation of work to Arbitrators, Approved Medical Specialists, and Mediators; arrangement of all stages in proceedings, including teleconference, conciliation/arbitration hearing, medical examinations; preparation of briefs for Arbitrators and Approved Medical Specialists; and issuing of Medical Assessment Certificates and Certificates of Determination to parties.

Expedited Assessment:

Expedited Assessment Officers perform a range of functions under delegations from the Registrar, including:

- ❑ Issuing interim payment directions
- ❑ Dealing with some interlocutory applications
- ❑ Managing applications to cure defective pre-filing statements
- ❑ Issuing certificates under section 362 for recovery of monies owed

They can also make recommendations in relation to work injury management disputes.

Legal

The Legal Unit is managed by the Deputy Registrar – Legal, Mr Rod Parsons.

The Legal Unit has a number of functions, including:

- ❑ Management of applications to revoke interim payment directions
- ❑ Management of applications for assessment of legal costs, and
- ❑ The provision of legal advice to members of the Commission, staff and service partners

The Deputy Registrar also handles inquiries from legal practitioners, employer and employee associations, WorkCover, other government departments, and members of the public.

The Research and Information Officer manages the Commission's library resources and is available to assist with work-related research. As a member of a range of formal library networks and a subscriber to specialised information services, the library has access to a range of electronic and hard copy resources.

Information Services

The Information Services Unit provides a variety of support services to the Commission, including business support, IT support, administration, facilities management and records, and information management.

REGIONAL SERVICE PROVISION

The Commission's approach to regional service provision is contained in the *Conciliation Conference and Arbitration Hearing Venue Policy* and the *Access and Equity Charter*. Both documents are available on the Commission's website.

The Commission is currently reviewing the regional locations in which it holds Conciliation Conferences/ Arbitration Hearings. Feedback received through the User Survey and from the Commission's User Group and Arbitrators indicates that there are a number of problems associated with the current approach to regional locations, including:

- ❑ Additional time and cost to parties where legal advisers are required to travel
- ❑ Inadequate facilities in many of the regional venues; and
- ❑ Inefficient use of Commission resources

There are currently 48 approved regional locations. The Commission has a number of Arbitrators who are located in or close to some of the regional locations. There is also a significant number of Sydney based arbitrators who are willing to travel to some or all regional locations to conduct Conciliation/Arbitration Conferences.

In the past 12 months, the Commission has held Conciliation/Arbitration Conferences in 33 of the 48 approved regional locations. In 9 of these locations, there were three or less Conferences held over that period. Applicant workers or their representatives are required to advise their preferred locations from the approved location list when lodging an application with the Commission. The Commission proceeds on the basis that the matter will be dealt with in the nominated location. However, at the initial Teleconference, there is a further opportunity for the

parties to discuss where the matter should be listed. Under the current arrangements, there is no coordination of regional listings. Once a matter has been allocated to an Arbitrator, it is a matter for them to settle on the date and location in consultation with the parties. This means that Conciliation/Arbitration Conferences held in regional locations are almost invariably isolated listings, requiring the Arbitrator and/or the legal representatives to travel to a regional location for a single matter.

The Commission maintains a list of venues for each of the regional locations. In some places we are able to access existing court or local council facilities. In other places, we are reliant on hiring commercial facilities, such as hotels. There is substantial variation in the quality and adequacy of the venues, particularly in the smaller regional locations. The Commission is currently considering ways in which regional service provision could be better coordinated and more efficiently delivered.

One option is to consolidate the existing list of 48 approved locations into a smaller number of regional centers, based on demonstrated need (previous usage levels) and geographic spread. This would allow the Commission to exercise a higher level of quality control over the approved regional venues.

The Commission is also considering the appointment of regional listing coordinators. The coordinator would monitor all Conciliation/Arbitration Conference listed in their nominated region and, where possible, assist in listing matters to the same Arbitrator on the same date. This would reduce the associated costs to the Commission and potentially the costs to the parties, who could consider briefing counsel already engaged to travel to that location.

The Commission anticipates putting in place new regional service arrangements during 2009.

INTERNAL COMMITTEES

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

The Practice and Procedure Committee held four meetings during 2008. The Committee operates as a deliberative and decision-making forum for a range of issues affecting practice and procedure in the Commission. Recent meetings have dealt with matters including the professional development of Arbitrators and Approved Medical Specialists, the revision of Commission forms and the development of a Commission Practice Manual.

Chair: President, Judge Greg Keating
Deputy President Gary Byron (now retired)
Deputy President Bill Roche
Registrar Sian Leathem
Deputy Registrar (Operations) Annette Farrell
Deputy Registrar (Legal) Rod Parsons

Review and Recommendation Committee

The Review and Recommendation Committee was formed in August 2008 as a direct result of the Organisational Review conducted by Bendelta. The role of the Committee is to consider each of the recommendations emerging from the review and how they might be best progressed. A range of advisory bodies including the Arbitrator Working Group, the staff Advisory Committee and four subject specific sub-committees has assisted the Committee. The Review and Recommendation Committee will continue to meet in 2009 to progress a range of recommendations.

Chair: President, Judge Greg Keating
Deputy President Gary Byron (now retired)
Deputy President Bill Roche
Registrar Sian Leathem
Deputy Registrar (Operations) Annette Farrell
Deputy Registrar (Legal) Rod Parsons

ARBITRATOR, AMS AND MEDIATOR REFERENCE GROUPS

The Commission has maintained Arbitrator, Approved Medical Specialist, and Mediator Reference Groups to

operate as advisory and consultative forums through which the Commission can communicate with and obtain feedback from Commission members and service partners in relation to a variety of issues.

Arbitrator Reference Group

Chair: Registrar Sian Leathem
Secretariat: Professional Standards Unit
Sue Duncombe, 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 Leathem
Secretariat: Professional Standards Unit
Dr Mohammed Assem, AMS
Dr Geoffrey Boyce, AMS
Dr P J Burke, AMS
Dr Mark Burns, AMS
Dr Drew Dixon, AMS
Professor Michael Fearnside, AMS
Dr Hunter Fry, AMS
Dr Michael Glicksman, AMS
Dr Phillipa Harvey-Sutton, AMS
Dr Lorraine Jones, AMS
Dr Ross Mellick, AMS
Dr Ross Mills, AMS
Dr Roger Pillemer, AMS
Dr Thomas Silva, AMS
Dr Brian Williams, AMS

Mediator Reference Group

Chair: Registrar Sian Leathem
Secretariat: Professional Standards Unit
Raymond Brazil, Mediator
Garth Brown, Mediator
Sue Duncombe, Mediator
Geri Ettinger, Mediator
Nina Harding, Mediator
Katherine Johnson, Mediator

Steve Lancken, Mediator
 John McGruther, Mediator
 Ross MacDonald, Mediator
 Derek Minus, Mediator
 Greg Rooney, Mediator
 Natasha Serventy, Mediator
 Mary Walker, Mediator
 Ross Whitelaw, Mediator

USER GROUP

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

The membership is as follows:

Chair: President Judge Greg Keating
 Deputy President Byron (now retired)
 Deputy President Roche
 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 Roshanna 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 2008 meetings included regional service provision, outcomes of the User Survey and updates to Commission forms.

How we do it

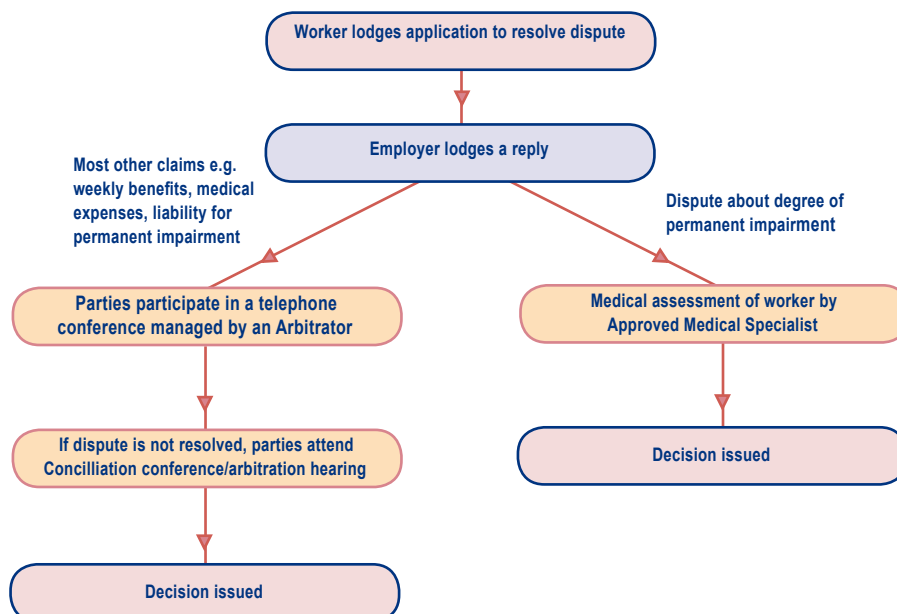
HOW THE PROCESS WORKS

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 any reply to the application to be lodged. The parties will be notified of the details of the medical assessment appointment.

Most other claims, such as weekly benefits, medical compensation, medical expenses, or where liability is disputed in relation to a claim for permanent impairment, will be referred to an Arbitrator.

A simple guide to how the process works is shown below:



If a dispute is referred to an Arbitrator, it will involve a Telephone Conference (Teleconference) and if it does not settle, may involve a face-to-face Conciliation Conference/Arbitration Hearing.

Arbitrators are trained to conduct Commission proceedings in a way that is fair to all parties. At every stage of the process, Arbitrators encourage and assist parties to resolve their dispute. However if 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. Disputes regarding the degree of permanent impairment may be referred directly to an Approved Medical Specialist.

The proceedings timetable contains the Teleconference date. The Commission schedules Teleconferences to take place 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 parties. They usually run for about half an hour but it depends on the issues being discussed.

A Teleconference involves the worker, their representative, the employer, the insurer and the insurer's legal representative, and is conducted



by the Arbitrator. The worker can participate in the Teleconference from their home or their representative's office.

A Teleconference is the first opportunity the Arbitrator has to bring the parties together to discuss the dispute. The Arbitrator will ask all parties about the dispute, identify the issues, and encourage the parties to reach an agreement.

During the Teleconference, the Arbitrator will confirm:

- The willingness of all parties to proceed
- The likelihood of settlement
- That all 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 (consent orders) that will be issued to the parties by the Commission.

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

If the parties do not reach an agreement and the dispute is not Determined on the Papers, the matter will be scheduled for a Conciliation Conference/ Arbitration Hearing. At this time the Arbitrator will also consider submissions from the parties as to the need to issue directions to produce documents.

CONCILIATION CONFERENCE

If the dispute was not resolved during 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.

These Conferences are typically scheduled to occur

within 21 days of the Teleconference, unless directions to produce documents have been permitted by the Arbitrator. If there are directions to produce documents the conference will be scheduled to occur after that process has been completed.

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

If the worker lives in Sydney, the Conference will be held in the metropolitan area. If the worker and their representative live in regional New South Wales, the Commission may arrange for the Conference to be held in an appropriate location.

At the Conciliation Conference, the Arbitrator explores the possibility of reaching an agreement about the dispute. This could cover things such as:

- ❑ A summary of the dispute
- ❑ Further discussion about the issues identified
- ❑ Working out possible outcomes for each party
- ❑ Negotiating an outcome that is acceptable to all parties

If the parties reach an agreement during the Conciliation Conference, the Arbitrator will record the agreement in a Certificate, which will be issued to the parties by the Commission.

If the parties are unable to reach an agreement about the dispute, the Arbitrator will end the Conference and give all participants a short break. After the break, the Arbitrator will start an Arbitration Hearing.

ARBITRATION HEARING

An Arbitration Hearing happens immediately after the Conciliation Conference if a matter cannot be settled. 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 Arbitral Hearing by contacting the Commission's Registry.

The Arbitrator will go over what has occurred and get all parties to agree that this is a full and correct summary of issues that are still in dispute. If necessary, evidence can be taken under oath or affirmation 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.

If the parties are unable to come to agreement, the Arbitrator will then make a legally binding decision about the dispute. The Arbitrator may tell the parties their decision at the end of the hearing or, more commonly, the Certificate of Determination and a Statement of Reasons for the decision will be sent to parties within 21 days of the hearing.

The Conciliation/Arbitration conferences are generally scheduled for three hours. They can run for longer however, depending on the complexity of the issues and progress of settlement discussions.

ARBITRAL APPEALS

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

Appeals from decisions of an Arbitrator may be made to Presidential members pursuant to section 352 of the *Workplace Injury Management and Workers Compensation Act 1998*.

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. Whilst the majority of arbitral appeals are determined 'on the papers', a number of appeals require a full hearing.

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

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

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 to recover 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 endeavors to bring the parties to agreement on the claim. If the parties fail to reach agreement, the Mediator will issue a certificate to that effect and the parties may then proceed to Court.

Case Study: Work Injury Damages - Mediation

In August 2005, Jamie M was working for a construction company at a site in Parramatta. Working at height laying roof tiles, Jamie stepped back onto the support formwork that collapsed, causing him to fall ten metres to the ground. The fall resulted in injury to Jamie's back, legs and right shoulder.

Jamie lodged a claim for work injury damages, alleging failure on the part of the employer to provide a safe system of work and safe place of work, as no appropriate harness equipment was provided. The employer disputed that the degree of permanent impairment resulting from the claim was greater than 15 per cent and that the injury resulted from any negligence or breach of statutory duty by the employer.

An Approved Medical Specialist, in proceedings brought before the Commission relating to a threshold dispute

for a work injury damages claim, assessed the degree of permanent impairment resulting from the claim as 19 per cent. This enabled the claim to proceed.

Following an exchange of pre-filing statements and other documents as required by the legislation, the claimant lodged an Application for Mediation with the Commission.

At a four-hour Mediation Conference held in May 2008, the Mediator appointed by the Commission assisted the parties to reach agreement to settle the claim.

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 ASSESSMENT

Parties to a medical dispute may appeal an assessment of permanent impairment by an Approved Medical Specialist. 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.

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 Registrar is satisfied that a ground of appeal is made out, the Registrar may refer the matter for further assessment or reconsideration, or refer the matter to an Appeal Panel.

Case Study: “Gatekeeper” role of the Registrar and “Demonstrable Error”

Bunnings Group Limited v Peter Howard HICKS & Ors [2008] NSWSC 874 (Simpson J, 5 September 2008)

The Worker made a claim for compensation for injury to his back when a wheeled step ladder upon which Mr Hicks was working malfunctioned, and he fell, holding a heavy box, and twisted his body. His right leg took the weight of the fall. He suffered injury both to his back and his knee in the fall. The injury was referred to an Approved Medical Specialist (AMS) for assessment. An Approved Medical Specialist issued a Medical Assessment Certificate assessing 20 per cent Whole Person Impairment, but attributed this entirely to pre-existing injury and subsequent surgery. The worker appealed against the assessment on the grounds that it contained a demonstrable error.

The Registrar allowed the appeal to proceed. An Appeal Panel revoked the Medical Assessment Certificate and issued a replacement Certificate. The employer sought a review of the Registrar and Appeal Panel’s decisions in the Supreme Court.

The Supreme Court dismissed the summons and held that the role of the Registrar is that of a “gatekeeper”. The Court held that it is not the role of the Registrar to

decide an appeal. That task remains in the hands of the Appeal Panel. The Registrar, in allowing an appeal to proceed, is not making a decision of a judicial character and therefore is not obliged to give reasons for her decision. In this matter, it was open to the Registrar, on the material before her, to find that an error capable of being demonstrated to the Appeal Panel had been made out.

In considering the meaning of the words “demonstrable error”, the Court held that “demonstrable” means “capable of being demonstrated”. “Demonstrable” does not mean, “has been demonstrated”. Therefore, the gatekeeper test requires that the Registrar be satisfied that the Appellant has made out a case that the error was capable of being demonstrated to the Appeal Panel.

THE MEDICAL APPEAL PANEL

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

In 2008, the Commission significantly reduced the number of Arbitrators and Approved Medical Specialists who sit on panels with the aim of improving consistency, quality and timeliness in Appeal Panel decision-making. A list of Appeal Panel members is at Appendix 3.

The role of the 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, providing it gives the parties an opportunity to be heard on those grounds.



The panel reviews material that was before the Approved Medical Specialist and any documents filed in the appeal proceedings, including additional information relied upon by the Appellant. The Appeal Panel may deal with the Appeal “on the papers” without further submissions from the parties, or where the Appeal Panel considers it appropriate, it may conduct a re-examination of the worker. It may also hold an assessment hearing in which it receives oral submissions from the parties.

Case Study: The Role of the Medical Appeal Panel

On 30 May 2008, the New South Wales Court of Appeal handed down a significant judgment relating to the nature of the review conducted by Appeal Panels.

Siddik v WorkCover Authority of NSW [2008] NSWCA 116 (Mason P, Giles JA, McColl JA, 30 May 2008)

An Approved Medical Specialist assessed the worker and issued a Medical Assessment Certificate. The Respondent appealed against the medical assessment. It relied upon a medical report as additional relevant information and contended that the assessment of the Approved Medical Specialist was in error, as the Approved Medical Specialist had not taken into account all the evidence filed by the parties and that the date of injury was misrecorded. The Registrar allowed the appeal to proceed to an Appeal Panel.

The Appeal Panel rejected the grounds of appeal relied upon by the Respondent. It refused to admit the medical report because it was not persuaded that the information was either not available or could not have been obtained prior to the assessment. It was also satisfied that the Approved Medical Specialist considered all medical evidence. However, in directing itself that its task was to conduct a review of the Approved Medical Specialist’s assessment, the Appeal Panel revoked the Medical Assessment Certificate on grounds that were not raised by either party in submissions.

The Court of Appeal held that it was inappropriate to resolve the issues by applying prescriptive labels

to the nature of the review conducted by Appeal Panels. While generally, an Appeal Panel is confined to conducting a review on the basis of the grounds of appeal raised by the parties, it can consider grounds of appeal and errors not raised by the parties in the appeal proceedings, if it gives the parties an opportunity to be heard.

EXPEDITED ASSESSMENT

The Expedited Assessment process provides for the resolution of disputes involving weekly compensation benefits for a period of not more than 12 weeks and/or medical expenses compensation up to \$7,500. It provides for a faster resolution than the standard dispute resolution process.

Matters in this stream are generally referred to a delegate of the Registrar to resolve. The delegate will review the matter and may schedule a Teleconference with the parties. Unlike the standard dispute resolution process, there is no provision for the issue of Directions for Production and Conciliation/Arbitration Hearings are not scheduled. If a dispute fails to resolve at the initial Teleconference, the matter will be decided on the papers.

An Interim Payment Direction may be issued for disputes involving weekly payments of compensation where:

- Provisional payments have not commenced within 7 days of initial notification of injury and there has been no reasonable excuse by the insurer for non payment; or
- There has been a failure to determine liability within 21 days of a claim being made.

Or for disputes involving medical expenses compensation where:

- There has been a failure to pay medical expenses within 21 days of a claim being made.

In some cases, the delegate may consider the matter is appropriate to be dealt with as an Interim Payment Direction application even though a dispute notice has been issued by the insurer. Interim Payment Directions are issued with no admission of liability.

For disputes involving closed past period weekly

compensation payments up to twelve weeks, the application may be dealt with as a “small claim”, resulting in the issue of a Certificate of Determination.

WORK INJURY MANAGEMENT DISPUTES

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

- ❑ There is no Injury Management Plan or it has not been followed
- ❑ There is no Return to Work Plan or it has not been followed
- ❑ No suitable duties have been provided for the injured worker
- ❑ The worker’s capacity to perform duties is disputed.

A dispute is generally referred to a delegate of the Registrar, who will arrange a Teleconference with the parties to resolve the dispute. In resolving the dispute, the matter may be referred to an Injury Management Consultant to conduct a workplace assessment, prior to the Registrar’s delegate making a recommendation to the parties.

Case Study:

Nicholas P was working for a freight company in February 2007 when he injured his wrist changing a flat tyre. Following surgery to the wrist, Nicholas returned to work on restricted duties in an administrative position. In February 2008, the employer indicated that suitable duties were no longer available and required Nicholas return full time to his pre-injury position.

At a Teleconference convened by a delegate of the Registrar, Nicholas, the employer, and the insurer’s case manager attempted to settle the matter. The parties agreed that Nicholas’s injury would prevent him returning to his pre-injury position. Ultimately, the delegate recommended that a rehabilitation provider be appointed to develop a return to work plan that included retraining options.

COST ASSESSMENTS

The legal costs payable in workers compensation matters changed significantly in late 2006 by amendment to the *Workers Compensation Regulation 2003*.

There are currently six costs assessors (see Appendix 2).

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

2008 Workload Discussion

Registrations

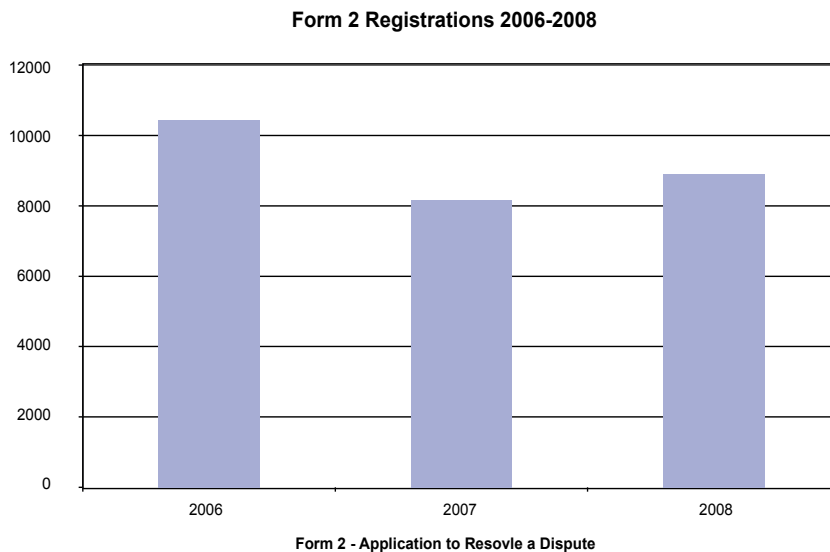
During 2008, the Commission received a total of 11,432 registrations comprising the following:

Application Type	Number
Application to Resolve a Dispute (Form 2)	8,898
Interim Payment Directions (Form 1) and Revocation of an IPD (Form 1A)	558
Workplace Injury Management Disputes	154
Registration for Assessment of Costs	245
Commutations (Form 5A) and Redemptions (Form 5B)	163
Mediations (Form 11)	598
Arbitral Appeals (Form 9)	161
Medical Appeals (Form 10)	655
TOTAL	11,432

Applications to Resolve a Dispute

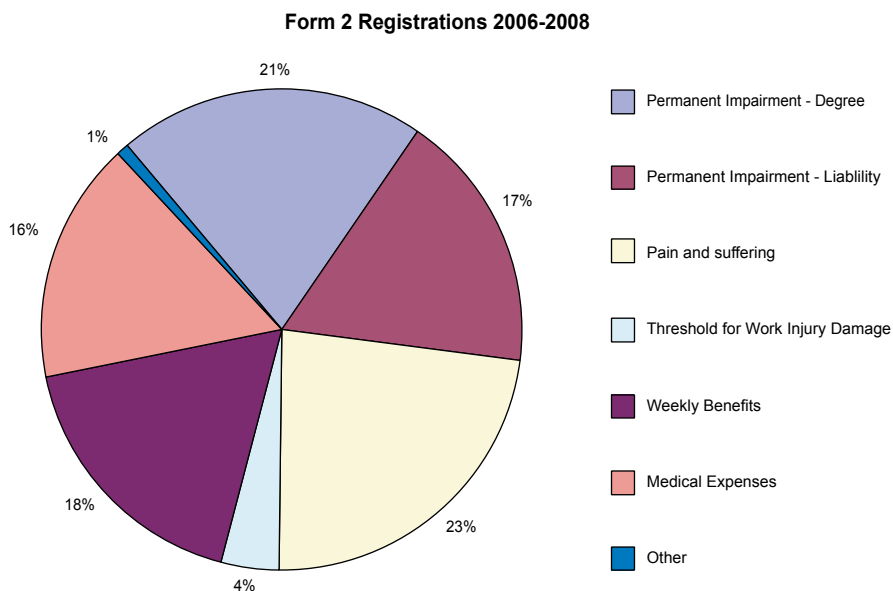
REGISTRATIONS

After a gradual decline in Form 2 registrations during 2006 and 2007, there was an increase of approximately 9 per cent in 2008. This increase appears to indicate that the impact of the November 2006 amendments has now stabilised and there is unlikely to be any further decline. Monthly trends during 2008 suggest that there is a modest upward trend in Form 2 registrations that we anticipate will continue in 2009.



ISSUES IN DISPUTE

Applications to Resolve a Dispute (ARD's) may involve one or more issues. During 2008, 38 per cent of Form 2 applications involved a claim for permanent impairment compensation (liability, quantum or both). 23 per cent of matters involved a claim of compensation for pain and suffering. 18 per cent of matters included a claim for weekly benefits and 16 per cent of applications included a claim for medical expenses.



FINALISATIONS

During 2008, the Commission finalised slightly less ARD's (Form 2) than it received (209 applications).

This reflects the impact of a 9 per cent increase in registrations without any associated increase in staff or resources.

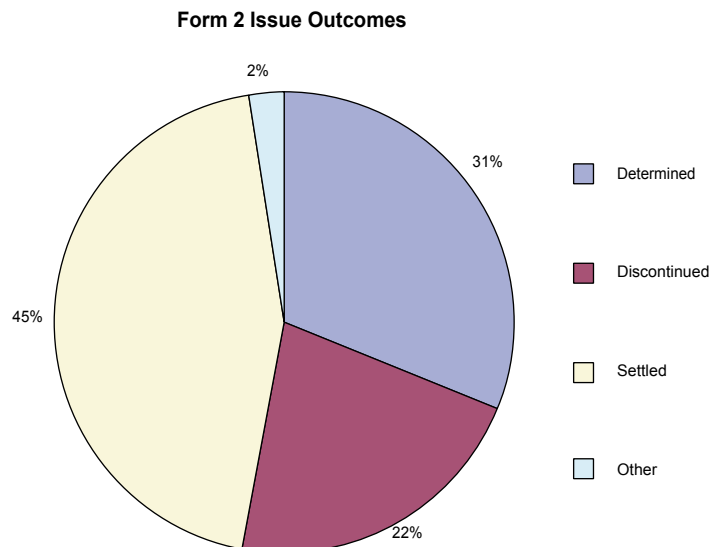
The higher finalisation rate in 2006 largely reflects the Commission's success in managing the large back-logs on hand at that time.



OUTCOMES

In 2008, all matters finalised by the Commission were recorded in the current data management system, Comcase. This has allowed the Commission to provide more accurate and comprehensive reporting of outcomes than was the case in previous Annual Reviews.

In summary, almost 70 per cent of ADR's were finalised without the need for a written determination, with 45 per cent being resolved through a settlement between the parties and a further 24 per cent being discontinued or otherwise resolved.



Approximately 31 per cent of ADR's (2,474 applications) were finalised by a formal determination. However, of those determinations, more than 80 per cent (1,993 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.

16 per cent (389 applications) were finalised by a written determination issued by an Arbitrator, and 4 per cent were finalised by an ex-tempore decision by an Arbitrator.

Other Applications

REGISTRATIONS

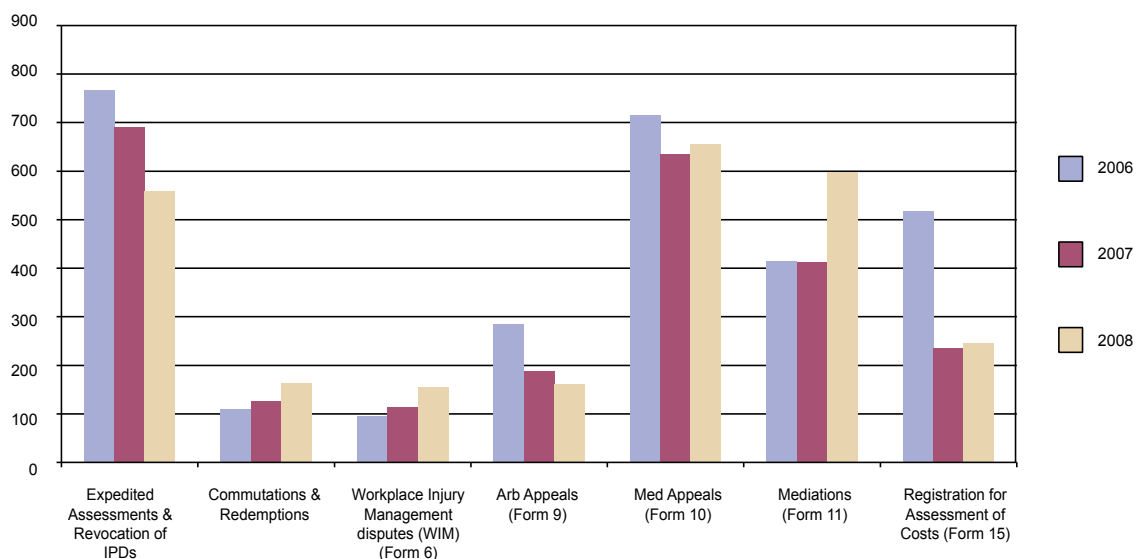
The number of Form 5A (Commutations) and 5B (Redemptions), Form 6 (Workplace Injury Management Disputes), Form 10 (Medical Appeals), Form 11 (mediations) and Form 15 (Cost Assessments) registrations have either increased slightly or remained steady over the past three years. There has been a steady decline in Form 1 (Interim Payment Direction) and 1A (Revocation of IPD) and in Form 9 (Arbital Appeals) registrations over the same period.

During 2008, there was a marked increase in the number of Applications to Mediate (Form 11), increasing from 413 in 2007 to 598 in 2008 (45 per cent increase). In early 2009 the Commission will refresh the Mediator Panel to ensure there are sufficient mediators available to handle matters as expeditiously as possible.

Since the amendments to the costs provisions, the Commission has experienced a sharp decline in the number of applications for assessment of costs. In 2005 and 2006 the number of lodgements were 666 and 519 respectively. Lodgements reduced by more than 50 per cent in 2007 with the total number of applications being 236.

In 2008 the number of applications for assessment of costs remained steady at 245.

Registrations by Form 2006-2008 (excluding Form 2)

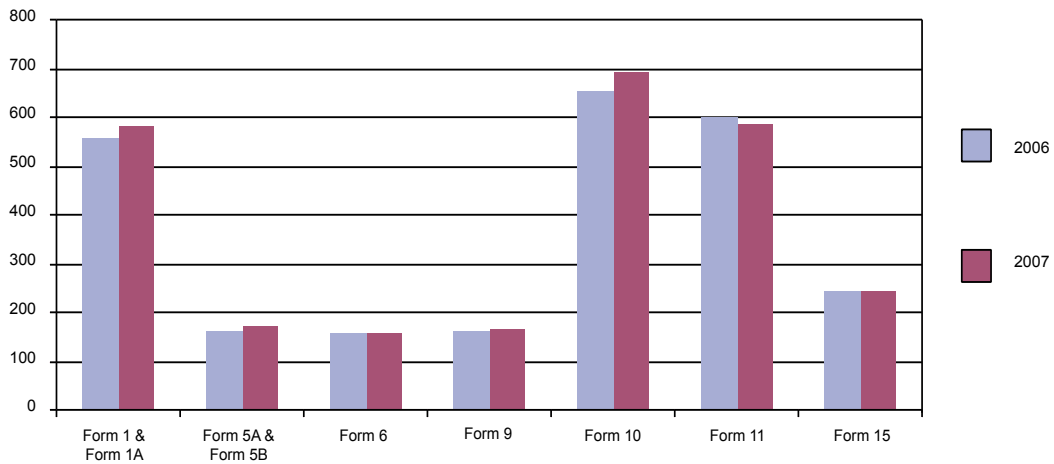


FINALISATION

During 2008, the Commission finalised more of the following types of applications than it registered during the year:

- ❑ Interim Payment Directions and Revocation of IPDs (Forms 1 and 1A)
- ❑ Commutations and Redemptions (Forms 5 and 5A)
- ❑ Arbitral Appeals (Form 9) and
- ❑ Medical Appeals (Form 10).

Registered vs Finalised 2008 (excluding Form 2)

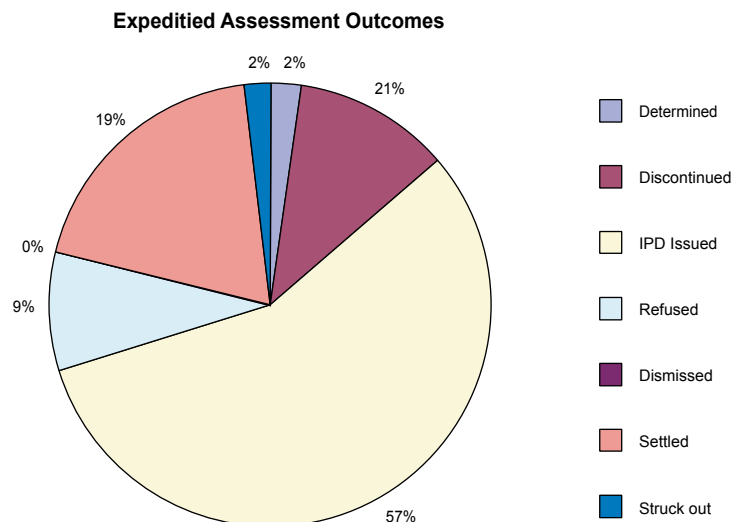


OUTCOMES

Expedited Assessments

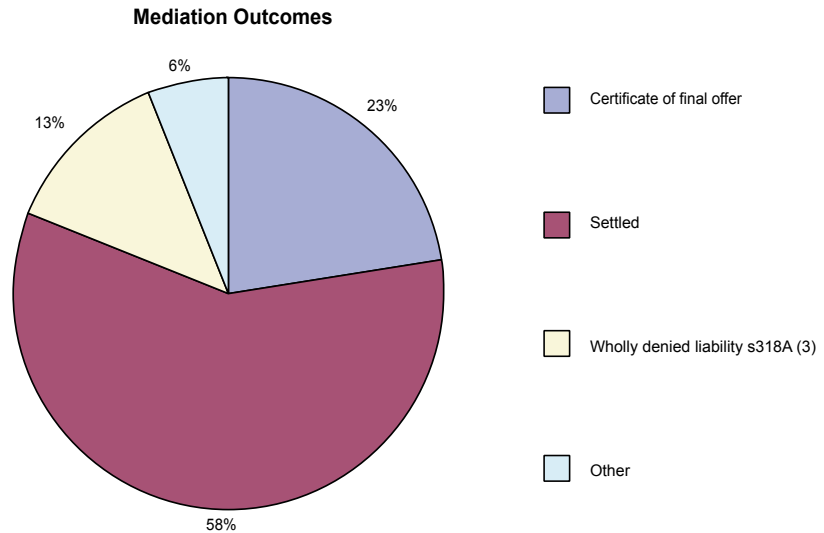
57 per cent of Applications for Expedited Assessment resulted in an interim payment direction (IPD) being issued. A further 19 per cent were settled, while 11 per cent were discontinued. In 9 per cent of applications, an IPD was refused.

Only 2 per cent of the Expedited Assessments were determined under section 304B of the Workplace Injury Management and Workers Compensation Act 1998 as small claims.



Mediations

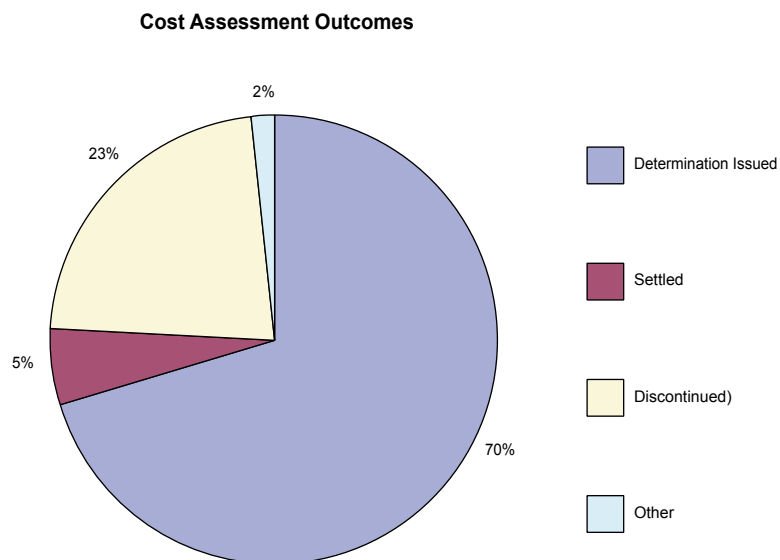
During 2008, 58 per cent all applications to mediate resulted in a settlement. However, when those that did not proceed to mediation are excluded from the data (ie: where the defendant wholly denies liability or where the matter is discontinued or struck out) the proportion of matters settled during the period increases to 72 per cent.



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

Cost Assessments

During 2008, 171 costs determinations were issued, representing 70 per cent of all the cost assessment applications registered. A further 5 per cent were settled and 23 per cent were discontinued.



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

Arbitral Appeals

Registrations and Finalisations

During 2008, 161 new applications to Presidential members were filed and 166 applications were finalised. By the end of the year the Commission had 48 appeals pending.

Again 2008, saw a decrease in the number of appeals filed against arbitral decisions from each of the previous three years. The Commission also finalised more appeals than it received in the twelve months.

The reduced number of appeals from Arbitrator decisions principally reflects the reduced number of disputed matters proceeding to hearing before arbitrators, noting that the majority of matters commenced in the Commission resolve by way of agreement.

Outcomes

Of the 166 matters finalised in 2008, 148 were finalised by way of a Presidential decision, 10 applications were rejected due to procedural non-compliance issues and 8 applications settled or were discontinued.

Timeliness

The Commission established a key performance indicator for arbitral appeal and Presidential determination, measuring the time from the date of filing to disposal of the application. The target set was 112 days and the Presidential unit achieved a yearly average timeliness of 106 days.

Medical Appeals

Registrations and Finalisations

During 2008, 655 new applications to appeal a Medical Assessment were filed and 693 were finalised.

The rate of the number of Medical Assessment Appeals lodged against the number of Medical Assessment Certificates issued in 2008 averaged 19.6 per cent per month, which represents a 6 per cent reduction in the medical appeal rate of appeal from 2007.

Outcomes

Of the 693 medical appeals finalised in 2008:

- ❑ 111 appeals did not proceed as the Registrar was not satisfied that a ground of appeal was made out
- ❑ 52 appeals were referred for further assessment or reconsideration
- ❑ 201 appeals resulted in Medical Assessment Certificates being confirmed by Appeal Panels
- ❑ 329 appeals resulted in Medical Assessment Certificates being revoked by Appeal Panels. This represents an 8 per cent revocation rate of all Medical Assessment Certificates issued by the Commission during 2008.

Timeliness

The Commission established a Key Performance Indicator for Medical Appeals of 100 days from registration to finalisation. During 2008, Medical Appeals took an average of 106 days to finalise, being slightly over the target.

Key Performance Indicators

During 2008, the Commission developed a series of key performance indicators (KPIs) designed to track the Commission's progress in delivering on a number of our statutory objectives, including timeliness and durability of decisions:

KEY PERFORMANCE INDICATORS	
Timeliness	Target (if applicable)
% of Dispute Applications resolved within:	
<input type="checkbox"/> 3 months	45% (excluding appeals) 40% (including appeals)
<input type="checkbox"/> 6 months	85% (excluding appeals) 80% (including appeals)
<input type="checkbox"/> 9 months	95% (excluding appeals) 94% (including appeals)
<input type="checkbox"/> 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 benchmarked 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.

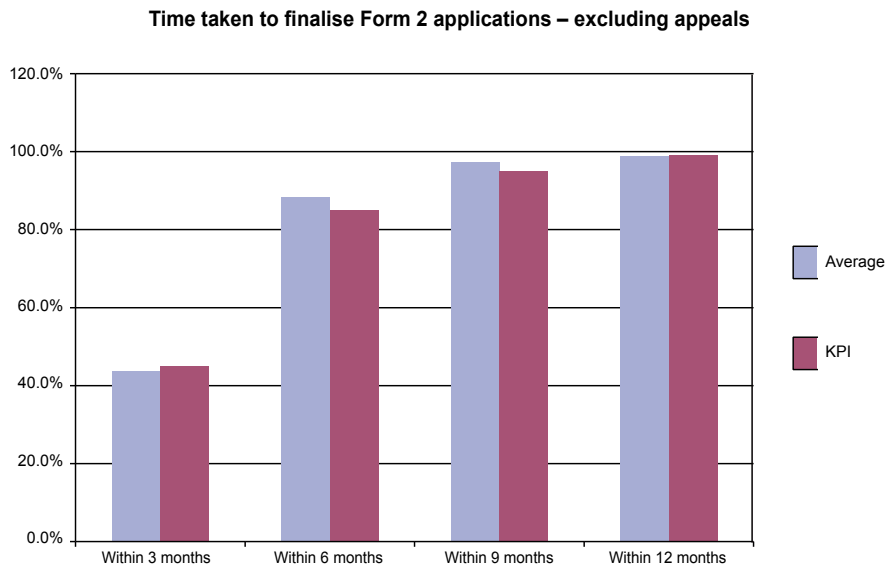
3 This KPI represents the number of appeals from Presidential decisions that are revoked on appeal, expressed as a percentage of the total number of Presidential decisions.

Timeliness

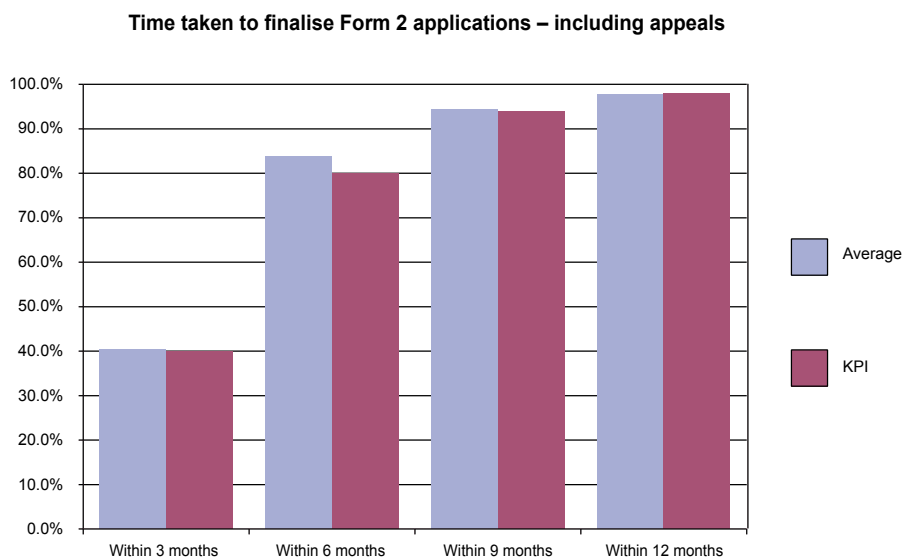
The Commission has developed a series of KPIs designed to monitor our effectiveness and efficiency in finalising dispute applications, both including and excluding appeal matters.

In most cases the Commission met or exceeded its KPIs during 2008, finalising approximately 45 per cent of all Form 2 applications in 3 months or less, with a further 40 per cent of matters being finalised within 6 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 and/or arbitral appeal.

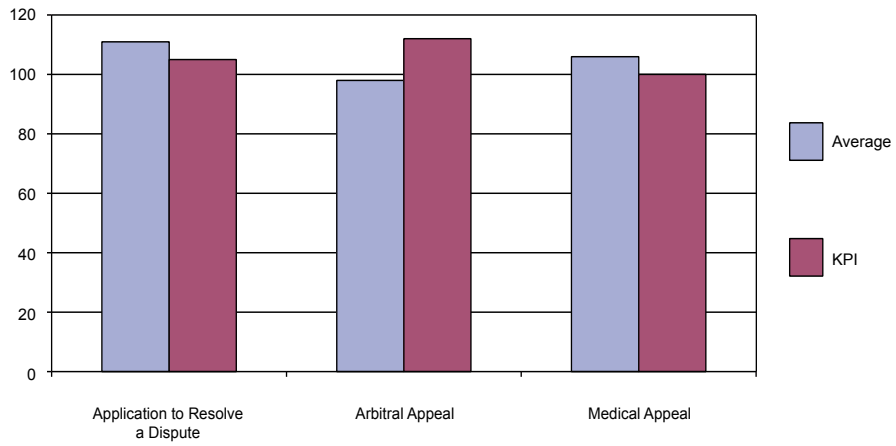


The Commission has also set KPIs for the average days required to finalise applications, being 105 days for an Application to Resolve Dispute, 112 days for an Arbitral Appeal and 100 days for a Medical Appeal.



The actual average days achieved during the reporting year were 111 days for an Application to Resolve Dispute, 98 days for an Arbitral Appeal and 106 days for a Medical Appeal. As this is the first Annual Review in which these figures have been reported, there is no comparative data available for previous years.

Average days taken to finalise matter



Corporate Plan 2008-2011



Achievements under the Corporate Plan

When developing the Corporate Plan the Commission identified four major strategic focus areas that are key to our delivering on our statutory objectives. These focus areas are:

1. Excellence in Client Services
2. Skilled and Committed People
3. Engaged Service Partners
4. Streamlined Business Systems

1 Excellence in Client Service

The Commission aims to provide an exemplary service to our clients by anticipating and responding to their needs through innovative, transparent and accountable services. A number of client service initiatives are outlined below.

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 equitable, fair, consistent and well-reasoned decisions. These include a 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.

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 Privacy Legislation the Commission has always had 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 Compliance project:

- ❑ Reviewed how the Commission handles personal information
- ❑ Reviewed the way all parties are notified of how the Commission stores and uses personal information
- ❑ Consulted with WorkCover on Privacy Compliance
- ❑ Developed the Commission's Privacy Management Plan
- ❑ Ensured the Plan is available on the Commission's Internet and Intranet websites.

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 2008 under Part 5 (s53) of the Privacy and Personal Information Protection Act 1998 (NSW).

COMPLAINTS HANDLING

The Commission's Complaint Handling Policy and Procedure is outlined in Part 5 of the Access and Equity Service Charter.

The Commission is committed to responding promptly

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

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

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

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

- ❑ The Registrar (or President) will investigate all written complaints and, where appropriate, may do one or more of the following: Consider what, if any, prompt action may resolve the complaint and, where appropriate, institute or recommend such action
- ❑ Consult with a staff or Commission Member who is the subject of the complaint
- ❑ Contact the complainant personally to attempt informal and speedy resolution of the complaint
- ❑ Refer the complaint to the President for consideration in relation to reviewing the

performance of an Arbitrator, Mediator or Approved Medical Specialist

- ❑ In the case of Commission staff, recommend that some action be taken in accordance with public sector procedures; and/or
- ❑ Initiate changes to practices or procedures to address the issues raised in the complaint.

Complaints received in 2008

During the reporting year, the Commission received a total of 19 complaints, comprising 11 involving Approved Medical Specialists, 3 involving Arbitrators, 1 involving a Mediator, 1 involving a member of staff and 3 concerning processes within the Commission.

All of the complaints were acknowledged in writing within 7 days of receipt and received a full written response within 28 days.

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.

CLIENT SATISFACTION SURVEY

In 2008, the Workers Compensation Commission engaged New Focus, a market research company, to conduct a client satisfaction survey.

The survey was conducted to enable the gathering and analysis of data regarding the level of client satisfaction, and more specifically, provide information to:

- ❑ Identify the Commission's strengths and opportunities for service delivery improvement;
- ❑ Understand user expectations and experiences regarding the level of service provided by the Commission;
- ❑ Measure the Commission's performance.

The survey was limited to external clients of the Commission including:

- ❑ Injured workers

- ❑ Employers
- ❑ Insurers/Scheme Agents
- ❑ Legal representatives

Methodology and Sample

The research methodology consisted of a qualitative phase followed by a quantitative phase. The qualitative phase included consultation with legal representatives and injured workers to assess their expectations and satisfaction with the Commission at key touch-points of interaction, and was used to inform the design of the quantitative survey instruments.

Tailored survey instruments were finalised for each of the four stakeholder segments.

All respondents were contacted via records provided by the Commission. As phone numbers and email addresses were not available for injured workers, a mail-out methodology was preferred for this segment.

Results

The Commission's service delivery is perceived to be at reasonable levels overall, with the major factors affecting this being staff, arbitrators, timeliness and provision of information.

Injured workers

Overall, injured workers were more satisfied with their experience and service received and gave more positive ratings than employers, insurers and legal representatives, across most touch-points of interaction with the Commission and for various stages of the dispute resolution process. The overall satisfaction scores for each dispute resolution process are listed below:

- ❑ Overall satisfaction with service at the teleconference stage (78 per cent very satisfied/satisfied)
- ❑ Overall satisfaction with the service given at the conciliation stage of the dispute (69 per cent very satisfied/satisfied)
- ❑ Overall satisfaction with the service given at the arbitration stage of the dispute (70 per cent very satisfied/satisfied)
- ❑ Overall satisfaction with the service given at the medical assessment stage of the dispute (49 per cent very satisfied/satisfied)

Employers

When analysing broad-level performance, employers were less satisfied than lawyers with 36 per cent very satisfied or satisfied overall. Similar to the insurer and lawyer segment, there was quite a large proportion of employers (38 per cent) that did not feel satisfied or dissatisfied with the service and gave a passive 'neither' response.

The employers felt the best aspects of dealing with the Commission, in order of those most frequently mentioned were:

- ❑ Dealing with cases, resolved promptly, reasonable timeframes (21 per cent)
- ❑ Clear/easy to understand timeframes/paperwork clearly outlined decisions (10 per cent)
- ❑ Willingness to achieve resolution, allowing settlements, closure (10 per cent)

Insurers

Insurers, similar to employers, were less satisfied than lawyers with 39 per cent being satisfied and a further 28 per cent dissatisfied or very dissatisfied. A third (33 per cent) of insurers were neither satisfied nor dissatisfied and rated in the neutral position of 'neither'. This is similar in proportion to the employer segment where around 3 in 10 gave neutral ratings when asked their overall satisfaction with the Commission.

The best aspects of dealing with the Commission, in order of those most frequently mentioned, were:

- ❑ Timely notifications of teleconferences, arbitrations and outcome
- ❑ Willingness to achieve resolution, allowing settlements, closure
- ❑ Clear/easy to understand timeframes/paperwork clearly outlined decisions

Legal representatives

Overall, just over half of the lawyers surveyed (53 per cent) were very satisfied or satisfied with the service provided by the Commission, while 20 per cent were dissatisfied or very dissatisfied. Higher analysis found that the longer lawyers work in this jurisdiction, the more dissatisfied they are with the

Commission across a range of items measured, such as forms being comprehensive and permitting of oral evidence, amongst others. On the other hand, legal representatives who had been practising for less than 5 years were more favourable towards the Commission on a number of items that included scheduling teleconferences, flexibility in changing times/dates, and the organisation of teleconferences, amongst others.

At a broad level, the best aspects of dealing with the Commission, in order of those most frequently mentioned, were:

- ❑ Prompt, efficient and timely overall (36 per cent)
- ❑ Staff polite, helpful and friendly (9 per cent)
- ❑ Good arbitrators/unbiased (8 per cent)

OTHER CLIENT SERVICES

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

- ❑ Regional sittings for arbitration hearings

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 Engaged Service Partners

PROFESSIONAL DEVELOPMENT ACTIVITIES

A program of mandatory conference days and voluntary short forums was conducted in 2008 for Arbitrators and Approved Medical Specialists (AMS). Arbitrators Professional Development activities included forums on topics such as: Costs complexity;

medical reports; and weight of evidence, as well as an annual conference for all Arbitrators in July 2008. The annual Arbitrator Conference focused on topics such as: Procedural Fairness and Evidence and developments in the Workers Compensation scheme, as well as providing an opportunity for Arbitrators from across New South Wales to discuss and explore topics relevant to their work for the Commission. The annual AMS Conference was held in August 2008 and was largely focused on the identification and prevention of bias in medical assessment. Additionally, AMS' held a number of forums to discuss case studies and complex issues encountered in their work for the Commission.

Additionally, a review of the Arbitrator and Approved Medical Specialist professional development and performance appraisal system was undertaken. Several options were explored and the outcome was the Commission introduced the Arbitrator and Approved Medical Specialist Professional Development frameworks in late 2008. The frameworks were largely based on the work of the Judicial Studies Board in the United Kingdom.

The revised professional development frameworks provide a robust and transparent program for the appraisal of Arbitrator and AMS competency, a framework for timely and comprehensive feedback, a program to identify performance issues, and an opportunity for Arbitrators and AMSs to address those issues. It also provides a formal approach to professional development of Arbitrators and AMSs generally and, in particular, for those who have identified areas for improvement.

There are two major components to the Professional Development Program:

- 1 The Professional Development Cycle
- 2 The Competency Framework

The Program provides Arbitrators and AMSs with:

- ❑ The opportunity to improve their performance through professional development needs self-assessment
- ❑ A professional development discussion and associated plan

- ❑ Participation in professional development opportunities
- ❑ Review of qualitative and quantitative reports
- ❑ A peer review approach to appraisal that includes preliminary self-assessment

The Arbitrator Professional Development Framework also includes a Mentoring Scheme.

The Professional Development Cycle

The Cycle consists of seven steps:

1. **Self-Assessment:** This provides the opportunity to record achievements and progress, as well as to identify opportunities for improvement and further development.
2. **Discussion and Plan:** An Arbitrator discusses their professional development needs with the Registrar (or her representative) based on their self-assessment. The outcome of this meeting is a Professional Development Plan. An AMS completes a self-assessed Professional Development Form identifying professional development needs.
3. **Professional Development Opportunities:** These activities include participation in activities external to the Commission and those conducted by the Commission – such as forums, and conferences. A Mentoring Scheme has been designed for Arbitrators and provides an opportunity for an experienced Arbitrator to act as a confidential adviser to one or more recently appointed or existing Arbitrators in order to help them better understand the workings of the Commission and their role within it.
4. **Peer Review:** This involves an Arbitrator receiving performance feedback from a trained Peer Reviewer based on recordings of telephone conferences, arbitrations and written documents. For AMSs, feedback is limited to Medical Appeal Panel Feedback and is a voluntary process.
5. **Qualitative and Quantitative Information:** A variety of statistical information is provided in addition to qualitative feedback from the Decisions Evaluation Committee and from Presidential members following Arbitral Appeals.
6. **Appraisal Self-Assessment:** The Arbitrator or AMS completes another Self-Assessment of their progress since the commencement of the Professional Development Cycle.

7. Appraisal: The performance of the Arbitrator or AMS is appraised against each of the identified competencies. A face-to-face discussion may take place.

The Competency Framework

The Competency Framework provides the basis for the work undertaken in the Professional Development Cycle. The Framework is divided into principal competencies, with each competency representing a core element of the role. The Principal competencies have performance indicators (examples of how it might be demonstrated) and performance measures (how they can be evaluated) attached to them.

The six Principal Competencies for an Arbitrator are:

- A. Knowledge and Values - to ensure a suitable level of knowledge of the Workers Compensation Commission's jurisdiction, law and procedure and an understanding of the appropriate principles and standards
- B. Communication – to ensure effective communication between Arbitrators, parties, Approved Medical Specialists, Commission Arbitrators, Registrar, and staff
- C. Conduct of Cases – to ensure the fair and timely disposal of Commission matters
- D. Evidence – to ensure that all relevant issues are addressed by identifying, managing, and considering evidence
- E. Decision-Making – to ensure effective deliberation, structure decision-making and timely disposal of the case
- F. Facilitation, case management skills and administrative skills – to ensure effective facilitation, case management and administrative skills are utilised where appropriate in managing applications

The five Principal Competencies for an Approved Medical Specialist are:

- A. Knowledge and Values
- B. Communication
- C. Medical Assessment for the Evaluation of Permanent Impairment

- D. Report of Medical Assessment
- E. Case Management and Administrative Skills

The Arbitrator and AMS Professional Development Programs will be evaluated at the conclusion of the first performance review cycle.

3 Skilled and Committed People

The Commission is committed to establishing a work culture of achievement, initiative and continuous improvement through leadership, learning, teamwork, and participation.

In 2008 a Staff Survey was conducted with a 64 per cent response rate. Generally, the results indicated that the Commission has a happy workforce, who are essentially supportive of the Commission's objectives. The main areas identified as needing work were development opportunities, consultation and change, and recognition.

A full-time Organisational Development Officer was appointed on a temporary basis in July 2008 and several initiatives aimed at maintaining and enhancing the skills and knowledge of the Commission staff have been implemented.

STAFF AWARDS

A Reward and Recognition Strategy was developed with the consultation of staff, and it was adopted in September 2008. As part of that Strategy, individuals identified a Staff Awards program as an important element and method of acknowledging exceptional work. The first awards were presented at the Staff Meeting on 10 December 2008. It is intended that the Staff Awards will be presented on a Quarterly basis as a way of acknowledging the high standard of service provided by staff.

INDUCTION KIT

There was a review and renewing of the WCC Induction process in 2008. A working group were drawn together and consulted on how the current Induction process was being implemented. There were

several flaws identified and addressed through this consultation process. As a result, an Induction Kit was designed and implemented in October 2008.

INDIVIDUAL DEVELOPMENT PLAN (IDP)

A Project Team designed the IDP process in 2006/07 and a pilot was conducted in August 2007. The results of the Staff Survey and the recruitment of an Organisational Development Officer prompted a review of the IDP process.

As a result of the review, and in consultation with staff, the IDP program was implemented in its original form. Information handbooks were written for Managers and Participants, the intranet site was updated, and information sessions were held in November 2008. The process is available to all staff except Arbitrators, Mediators, AMS, or casual/temporary staff less than 6 months. All staff have been encouraged to participate on a voluntary basis. The IDP is designed to assist staff to meet and discuss their career goals with their manager, and is not a Performance Management tool.

SHADOWING OPPORTUNITIES REGISTER

This is a voluntary register where staff can register their interest in either having someone shadow them, or request to shadow another staff member. This register has been designed specifically to assist in the process of build skills as well as sharing knowledge.

CAPABILITY FRAMEWORK

As part of the NSW Government's plans to deliver better results for the NSW community from Government services, a NSW Public Sector Capability Framework was developed by the Department of Premier and Cabinet. It provides a common and consistent basis to reflect the skills, knowledge and abilities expected from all NSW public sector staff to ensure high quality and responsive services to the community. The framework is designed to assist and underpin the new e-Recruitment system, Performance Management, Learning, Development and Training, Career Planning, and Workforce Planning.

The framework has been reviewed and modified to meet the needs of the Commission, and consultation

with staff will commence in January 2009.

INFORMATION SESSIONS

Several information sessions have been held in September and October – mainly aimed at improving research skills. A schedule of Information Sessions has been developed for 2009 providing information on Occupational Health and Safety, Salary Packaging, Legal Research, and Payroll.

CERTIFICATE III AND IV IN GOVERNMENT

There were 14 staff members who participated in the Certificate III in Government and 7 who undertook the Certificate IV. Funded as part of the Enterprise Bargaining agreement, most participants have now completed their work and a graduation ceremony will be held in March 2009.

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 and cover such areas as business skills, computer skills, and people and management skills.

LEADERSHIP DEVELOPMENT PROGRAMS

The Commission is participating in the Leadership Development Program that has been designed and is being delivered by WorkCover. There are currently 2 managers undertaking the program and it is expected that others will participate as the program develops further in 2009. It is also planned for some staff to participate in the Public Sector Management Course in 2009.

SUMMER CLERKSHIPS

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

The students are employed by the Commission over the University summer vacation period and rotate through the various decision-making and administrative areas of the Commission's Registry and Presidential Office.

CONFERENCES AND SEMINARS

- ❑ Members and staff attended various conferences during 2008, including: Court Quality Forum, Australian Institute of Judicial Administration, Sydney, 21-23 September 2008
- ❑ Going Public – A conference for Women in the Public Sector and Politics, Public Sector Events, Sydney, 20-21 November 2008
- ❑ Public Sector Workforce Strategy and Solutions 2008, L21, Sydney, 3-4 December 2008
- ❑ The New South Wales State Legal Conference, Sydney, 27 March 2008
- ❑ Australian Self Insurance Summit, Sydney, 1 April 2008
- ❑ State Legal Conference, Workers Compensation Session, Sydney, 21 August 2008

PAPERS

Members and staff presented the following papers at conferences during 2008:

- ❑ Workers Compensation - Court of Appeal Decisions, Deputy President Roche, CLE, Sydney, 15 February 2008
- ❑ Procedural Fairness, Deputy President Roche, CLE, Sydney, 15 February 2008
- ❑ Practice and Procedure in the WCC, Registrar Leatham, Albury and District Law Society CLE, Albury, 7 March 2008
- ❑ The Workers Compensation Commission, President Judge Keating, Australian Lawyers Alliance, Hunter Valley, 14 March 2008
- ❑ The Workers Compensation Commission, President Judge Keating, The New South Wales State Legal Conference, Sydney, 27 March 2008
- ❑ Recent Developments in the Workers

Compensation Commission, Registrar Leatham, State Legal Conference, Workers Compensation Session, Sydney, 27 March 2008

- ❑ Further Reflections on NSW Workers Compensation Commission, Deputy President Byron, Australian Self Insurance Summit, Sydney, 1 April 2008
- ❑ Admissibility and weight of Evident, Deputy Registrar Parsons, Arbitrators' Forum, 3 April 2008
- ❑ Restrictions on Medical Reports, Deputy Registrar Parsons, Arbitrators' Forum, 3 April 2008
- ❑ Workers Compensation - Court of Appeal Decisions, Deputy President Roche, Australian Lawyers Alliance, Sydney, 3 July 2008
- ❑ Aggregation of section 66 Awards – A Review of Relevant Case Law, Acting Deputy President Moore, Arbitrators' Conference, 25 July 2008
- ❑ Section 40 Assessments – Some General Principles, Acting Deputy President Snell, Arbitrators' Conference, 27 July 2008
- ❑ Update on the Workers Compensation Commission, Registrar Leatham, State Legal Conference, Workers Compensation Session, Sydney, 21 August 2008
- ❑ Costs and Complexity, Deputy Registrar Parsons, Arbitrators' Forum, 24 September 2008

4 Streamlined Business Excellence

FORMS

A review of the Commission's forms was commenced in 2007 with feedback from staff, external users as well as Arbitrators and service providers. 2008 saw the implementation of those suggestions and other required changes. As a consequence, 8 forms were changed and 5 new forms developed.

The forms that were changed are:

- ❑ Form 2 - Application to Resolve a Dispute

- ❑ Form 7 - Application for Assessment by Approved Medical Specialist
- ❑ Form 7A - Response to application for assessment by an AMS
- ❑ Form 9 - Appeal Against Decision of Arbitrator
- ❑ Form 9A - Notice of opposition to appeal against decision of Arbitrator
- ❑ Form 11C - Application for Mediation to Resolve Work Injury Damages Claim
- ❑ Form 13 - Application for Leave to Refer a Question of Law
- ❑ Form 13A - Notice of Opposition to Application for Leave to Refer a Question of Law
- ❑ Form 15 - Application for Assessment of Costs - Schedule 6 before 1 November 2006.

The new forms are:

- ❑ Form 2D - Application in Respect of Death of Worker
- ❑ Form 11E - Application to Strike Out of Pre-Filing Statement
- ❑ Form 11F - Opposition to Application to Strike Out of Pre-Filing Statement
- ❑ Form 15A - Application for Assessment of Costs - Schedule 6 on or after 1 November 2006
- ❑ Form 15B - Application for Assessment of Costs -Schedule 7

The guidelines that support the forms were also updated. All forms and guidelines were reviewed to make their format consistent. The forms and guidelines commenced operation on 1 October 2008 and are available on the Commission's website at wcc.nsw.gov.au

COMCASE

Comcase, the Commission's case management system, supports the flow of work between the Commission and its service providers and is also an important tool for internal case management. The system went live on 30 April 2007 as part of a major project. It draws together into one contiguous system the functions that were previously being accomplished through the use of several disparate applications and work systems and records an increased depth of information compared to the Commission's previous case-flow system. 2007 saw the bedding down of this new system.

2008 saw enhancements to the system so that it could even better support case management. These enhancements included:

- ❑ Fine-tuning of existing reports and the development of new reports. These new reports were developed so that the Commission could have a better understanding of work being undertaken and to better measure and improve performance
- ❑ Development of Comcase business processes for use by staff
- ❑ Fine-tuning of the workflows within Comcase to better support exactly what we do and make the user experience better for staff
- ❑ Fine tuning of the MyFiles module of Comcase. MyFiles is the module that allows secure Internet access by service providers to case allocations, submission of outcome documents and invoicing. Changes made include those to the invoicing module.

The on-line application module of Comcase – e-screens - is the last module to be implemented in this project. This module will give on-line access to the community. Testing has been completed and a pilot undertaken. The Comcase vendor is now implementing the last fine-tunings. It is envisaged that this new method for making applications to the Commission will go live in early 2009.

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 16 appeals from decisions of Presidential members pending in the Court of Appeal. In 2008, 8 appeals were filed in the Court of Appeal against decisions from Presidential members and 19 appeals from decisions of Presidential members were finalised as follows:

- 5 – resolved by consent orders or discontinued
- 1 – leave to appeal refused
- 10 – appeal dismissed
- 3 – appeal upheld and matter remitted to the Commission for rehearing

In 2008, the appeal rate from Presidential decisions to the Court of Appeal was 5.4 per cent.

The durability of Presidential determinations is measured by the number of Presidential decisions revoked on appeal. This is expressed as a percentage of the total number of Presidential decisions. The key performance indicator for 2008 was to achieve a revocation rate of less than 2 per cent.

In 2008, there were no Court of Appeal determinations from 2008 Presidential decisions. The three appeals upheld by the Court of Appeal in 2008 and remitted to the Commission for re-determination were all appeals from Presidential determinations made in 2007. In 2007, the Court of Appeal did not determine any appeals from 2007

Presidential decisions.

Therefore the revocation rate in 2008, expressed as a percentage of the total number of Presidential decisions made in 2007 (256 Presidential decisions), was 1.1 per cent.

Judicial Review of Registrar and Appeal Panel Decisions

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

2008 saw a significant reduction in the number of judicial review applications lodged in the Supreme Court against decisions of the Registrar and Medical Appeal Panels. There were 7 applications lodged. This represents a judicial review rate of less than 0.01 per cent of all decisions made.

Judicial Review - Outcomes

2008 saw a significant reduction in matters determined in the Supreme Court and Court of Appeal relating to decisions made by the Registrar and Medical Appeal Panels.

In 2008 there were 13 decisions handed down in the Supreme Court and Court of Appeal relating to decisions made by the Registrar and Appeal Panels.

Decision Maker	Number of Applications lodged
Medical Appeal Panel	3
Registrar	2
Medical Appeal Panel and Registrar	2
Total	7

Decision Maker	Dismissed	Upheld	Discontinued	Total
Medical Appeal Panel	2	1	0	3
Registrar	4	4	0	8
Medical Appeal Panel and Registrar	1	0	1	2
<i>Total</i>	7	5	1	13

In 2008, the Registrar and Medical Appeal Panels issued approximately 1200 reviewable decisions. Accordingly, approximately 0.41 per cent of all reviewable decisions were successfully reviewed in Superior Courts.

ARBITRAL APPEALS TO PRESIDENTIAL MEMBERS

(i) Procedural Fairness – Application of the rule in *Browne v Dunn*

Quadi v The Reject Shop (Aust) Pty Ltd [2008] NSWCCPD 3

Issue on appeal

- ❑ The issue in this appeal was whether the absence of cross-examination or questioning, in relation to inconsistencies in the worker's evidence, was a denial of procedural fairness.
- ❑ Deputy President Roche referred to *Aluminium Louvres and Ceilings Pty Limited v Zheng* [2006] NSWCA 24 where Bryson JA noted that there is no legal right to cross-examination in the Commission and the decision whether to allow cross-examination was discretionary.
- ❑ The Deputy President summarised the authorities relating to the 'hearing rule' principle of procedural fairness and considered that the appellant worker's argument on appeal attempted to raise a *Browne v Dunn* (1894) 6 R 67 point.

The Deputy President noted that:

"The Commission's rules requiring evidence to be filed with the Application or the Reply and the fact that cross-examination is not allowed as of right mean that the

potential consequences of non compliance with the 'rule' in Browne v Dunn are significantly diminished in the proceedings in the Commission. In any event, the 'rule' is not a rule of law but one of fairness that goes to the weight and cogency of the evidence concerned."

He also noted that provisions such as section 354 of the *Workplace Injury Management and Workers Compensation Act 1998* do not release the Commission from the obligation to apply the rules of law in arriving at its decisions and the need for the Commission to comply with the rules of procedural fairness.

In confirming the Arbitrator's decision, Deputy President Roche held:

- ❑ The Commission and its Arbitrators are bound to comply with the rules of natural justice and procedural fairness (*Inghams Enterprises Pty Ltd v Zarb* [2003] NSWCCPD 15);
- ❑ The issues in dispute in the case were fully and fairly raised in the respondent's Reply and in the lengthy submissions before the Arbitrator;
- ❑ It was open to the appellant worker's legal representative to seek leave to call oral evidence to explain any inconsistencies in the evidence but he did not do so. The worker had every opportunity to present her case and to deal with matters that were adverse to her interests, and
- ❑ The appellant worker was not denied procedural fairness by reason of the fact that she was not cross-examined.
- ❑

**(ii) Extension of time to appeal;
combining impairment assessments
for purpose of section 67(1) of the
1987 Act New South Wales**

Fire Brigades v Turton [2008] NSWCCPD 66

Facts:

Mr Turton had been employed by NSW Fire Brigades as a fireman from June 1973.

There were two allegations of injury set out in the Application to Resolve a Dispute. The first was that from 1 March 1999 to 24 February 2006, due to the nature and conditions of employment wearing ill-fitting boots, the respondent worker suffered plantar fasciitis. The second was that on 24 February 2006, at an exercise ground, the respondent worker stumbled whilst running in an exercise program at work, suffering lower back injury.

The Reply lodged by the appellant employer put 'injury' in issue, although the way it was expressed, indicated it was the foot injury allegedly resulting from the 'nature and conditions of employment', rather than the injury of 24 February 2006, that was disputed.

Following a telephone conference, consent orders were made for a referral to an Approved Medical Specialist (AMS) for the injury to the lumbar spine on 24 February 2006 and injury to the lumbar spine and right lower extremity as a result of the nature and conditions of employment from 1 March 1999 to 24 February 2006, with a deemed date of injury of 24 February 2006.

Medical Assessment Certificate (MAC):

The AMS recorded that the referral made to him by the delegate for the Registrar, was for assessment related to injuries on "24 February 2006", and "24 February 2006 (nature and conditions 1 March 1999 to 24 February 2006)". He said:

"As required, I have included these two dates in Table 2, and have simply suggested that for the first date of injury that there was no assessable impairment, as this has been included in the second date of injury, which includes the nature and conditions of employment. To do otherwise, in my opinion, would simply cause confusion."

Thus the only work related impairment, found by the AMS, related to the back injury, which he assessed at 6 per cent whole person impairment.

Medical Appeal:

The worker appealed against the MAC.

The Medical Appeal Panel confirmed the MAC in relation to the lumbar spine assessment but revoked it in respect of the assessment for the right lower extremity. The Appeal Panel assessed 4 per cent Whole Person Impairment (WPI) for the right lower extremity, which was combined with the 6 per cent WPI as found by the original AMS for the lumbar spine, providing a total of 10 per cent WPI.

Arbitration hearing:

At the conciliation/arbitration the primary issue was whether the impairments should be treated as a single impairment of 10 per cent, or as two separate impairments of 6 per cent and 4 per cent.

The Arbitrator considered that the consent orders and the referral to the AMS were documents forming "an agreement between the parties from which they can't now resilé", but she noted there was a distinction to be drawn between the frank injury to the back and the nature and conditions claim. However the arbitrator described herself as being bound by the combined percentage in the MAC and awarded compensation to the worker under sections 66 and section 67, the threshold for section 67(1) having been met.

Arbitral appeal:

The employer appealed the decision of the Arbitrator.

The main Issue on appeal was whether the threshold in section 67(1) of the 1987 Act had been crossed, permitting an award pursuant to section 67 for pain and suffering compensation.

Time to appeal:

The appeal was filed one day out of time, which the appellant employer acknowledged. The application was finalised, signed and an unsealed copy was served on the respondent worker on the 28th day (the last day for filing the appeal) but due to the regular filing clerk being absent from work, another clerk attended the Commission later that day but was too late as the office had closed when the clerk arrived.

Acting Deputy President Snell held that this was an exceptional circumstance and that the respondent worker would not be prejudiced in his defence of the appeal by it being filed one day late, so time to appeal was extended and leave to appeal granted.

In relation to the issue on appeal, Acting Deputy President Snell held:

- There was nothing in the consent orders and referral, that inherently led to the impairments being combined. The question of whether the incident of 24 February 2006, and/or
- the nature and conditions of employment from 1 March 1999 to 24 February 2006, caused injury to the respondent worker's lumbar spine was a question for determination by the Arbitrator not the AMS.

There are two circumstances where it is appropriate to combine impairment assessments, to ascertain whether a worker has exceeded the threshold in section 67(1):

1. *A worker receives more than one injury arising out of the same incident (section 65(2) of the 1987 Act and section 322(3) of the 1998 Act).*
2. *multiple impairments resulting from the same injury (section 322(2) of the 1998 Act).*

Applying Deputy President Roche's decision in *Department of Juvenile Justice v Edmed* [2008] NSWCCPD 6, for section 322(2) to apply impairments resulting from the "same injury" (same pathology) are to be assessed together regardless of whether they arise from the same incident(s).

On the evidence overall, it was clear there were two separate pathologies. There was a disc injury at the lumbosacral level, causing back symptoms and associated sciatica. There were also symptoms in the right foot resulting from plantar fasciitis and Achilles tendonitis. Therefore section 322(2) did not apply.

It was also clear that the separate pathologies had resulted from two incidents – the nature and conditions of employment from 1 March 1999 to 24 February 2006, and the incident of 24 February 2006. Thus section 322(3) did not apply.

As a result, the respondent worker did not meet the

threshold set under section 67(1) for entitlement to pain and suffering compensation.

Order:

The Arbitrator's decision was revoked and a new decision made in its place.

(iii) Circumstances in which a matter will be referred to an AMS for further assessment under section 329(1)(b) of the 1998 Act

Milosavljevic v Medina Property Services Pty Ltd [2008] NSWCCPD 56

Background:

Ms Milosavljevic filed a medical appeal against a Medical Assessment Certificate (MAC) by an Approved Medical Specialist (AMS), Dr McClure, on the grounds that the MAC contained a demonstrable error and was made on the basis of incorrect criteria. Dr McClure had assessed the worker as having a 6 per cent whole person impairment (WPI) from which he deducted 50 per cent for a pre-existing condition.

The Medical Appeal Panel (the Appeal Panel) revoked Dr McClure's MAC and issued a new MAC assessing Ms Milosavljevic as having 6 per cent WPI, but with no deduction for any pre-existing condition. The Appeal Panel declined Ms Milosavljevic's application to rely on fresh evidence in the form of her statutory declaration.

Ms Milosavljevic's solicitor wrote to the Registrar submitting that there had been an "obvious material error" in Dr McClure's decision and, because his decision would be "materially different if the correct facts had been taken into account and considered", it was appropriate for the matter to be referred back to the AMS (Dr McClure) "for reconsideration such that the AMS can rescind, alter or amend his decision in the certificate previously issued by him" under section 378 of the 1998 Act.

In a separate letter, the solicitor submitted that the Appeal Panel had also erred in assessing 6 per cent WPI. In accordance with section 378, he requested the Appeal Panel correct the mistake.

The Appeal Panel reconsidered its decision, and confirmed its previous decision in relation to

the application to rely on fresh evidence and its certifications.

After the reconsideration by the Appeal Panel, Ms Milosavljevic's solicitor wrote to the Commission stating that the new decision was "only partially helpful" as it did not comply with his application. He requested that the original AMS review the matter.

The Registrar's delegate advised that there was no further avenue for the AMS to reconsider his assessment because his MAC had been revoked and replaced by the Appeal Panel's assessment.

Still dissatisfied, the solicitor wrote again stating that section 378 required the AMS to "consider any matter and amend any decision previously made... irrespective of any subsequent decision of the Appeal Panel."

The Registrar responded, advising that because the Appeal Panel had revoked the first MAC there was no "decision" for the AMS to reconsider. The Registrar issued a Certificate of Determination in accordance with the Appeal Panel's findings of 6 per cent WPI 28 days after of the Appeal Panel's decision.

Ms Milosavljevic's solicitor then requested that the matter be referred to an Arbitrator so that an application under section 329 could be made (still reserving his client's rights under section 378) for "the matter to be referred for assessment following an initial assessment by AMS Assessor Dr Andrew McClure". He also submitted that the Certificate of Determination was wrong as the Appeal Panel had determined 12 per cent WPI not 6 per cent WPI.

The matter was allocated to an Arbitrator who refused Ms Milosavljevic's application for further assessment under section 329(1)(b). Ms Milosavljevic appealed the Arbitrator's determination to a Presidential member under section 352 of the 1998 Act.

Issue on appeal:

The issue in dispute on appeal was whether the Arbitrator erred in declining to refer Ms Milosavljevic's matter to an AMS (not necessarily the same AMS) under section 329(1)(b) of the 1998 Act on the ground that, as a result of the Certificate of Determination, no "medical dispute" existed.

The Appellant relied upon the decision in *Target Australia Pty Ltd v Mansour* [2006] NSWWCPCD 286 ('*Mansour*') where it was held that section 329 is not restricted to the circumstances set out in section 327(6) (which provides that the Registrar may refer a medical assessment for further assessment or reconsideration "as an alternative to an appeal against the assessment"), but is in broad unlimited terms.

Deputy President Roche held:

His reference in *Mansour* (at [68]), to section 329 being in "broad unlimited" terms was a reference to the fact the section provided no guidance as to how or when it was to be used. However, there was nothing to indicate that the legislature intended that section 329 could be used in an unrestrained or unlimited way regardless of the Commission's previous orders or determinations. The exact scope of section 329 must be determined on a case-by-case basis.

Section 329 gives no power to "open up and allow for examination of administrative functions" [59(f)] or to overturn a valid determination. The section does not provide a "protective appeal mechanism" [59(d)] in circumstances where the matter in dispute has been finally determined by the Commission and there has been no appeal from that determination.

There is a clear distinction between the issuing of a MAC by an AMS or Appeal Panel, and the determination of a dispute by the Commission. The issuing of a MAC does not equate with the determination of the dispute.

A decision of the Appeal Panel is not a decision of the Commission under section 350 and may be subject to judicial review in the Supreme Court (*Campbelltown City Council v Vegan* [2004] NSWSC 1129).

A decision of the Appeal Panel is not liable to challenge in an appeal to a Presidential member.

Appeals to Presidential members are governed by section 352 and are restricted to appeals "against a decision in respect of the dispute by the Commission constituted by an Arbitrator."

There is no right of appeal to a Presidential member against a Registrar's decision except where the Registrar is acting as an Arbitrator [53].

The Deputy President did not accept that the Appeal Panel had misdirected itself as to the task it was required to perform. But if it had, there was no right of appeal to a Presidential member in relation to such an error.

“the granting of an application for a reconsideration under section 378 is discretionary and contingent upon appropriate legal and/or factual grounds being established (see “Registrar’s Guideline” 22 October 2007). The Registrar is not obliged to refer every application for reconsideration to an AMS and was under no obligation to do so in the present matter, as the Appeal Panel MAC had revoked the AMS’s MAC” [60(a)].

The Arbitrator’s decision to refuse the application under section 329 was confirmed.

(IV) Death claim; meaning of “stands in the place of a parent” in section 4 of the 1998 Act

James Allen Rose-Barnett & ors by their representative Sharyn Gaye Rose v T A Edison Pty Ltd [2008] NSWCCPD 10

Facts:

The deceased worker, Mr Hunt, left several people dependent on him for support, with there being six claimants for compensation under sections 25 and 26 of the 1987 Act. The claimants included the deceased’s de facto wife, Ms Rose, the biological children of the deceased and Ms Rose, and Ms Rose’s three sons who were not the biological children of the deceased.

The Arbitrator found that all of the claimants were partly dependent for support on the deceased, but only awarded compensation to the biological children of the deceased and Ms Rose.

In respect of Ms Rose’s three boys, the Arbitrator found that Mr Hunt did not stand “in the place of a parent” under section 4 of the 1998 Act and they were therefore not entitled to recover compensation.

Arbitral Appeal:

The issue on appeal was whether the Arbitrator erred in not finding that the boys were persons to whom the deceased stood in the place of a parent.

Deputy President Roche held that:

The term “dependant” is defined in section 4 of the 1998 Act. The definition involves two concepts and, to be entitled to compensation, an Applicant for benefits under sections 25 and 26 of the 1987 Act must satisfy both. First, an Applicant must be “a member of the worker’s family” and, second, he or she must be a “dependant of the worker” who was “wholly or in part dependent for support on the worker” at the time of death (‘dependency’). The definition includes a person who is wholly or in part dependent for support on the worker “to whom the worker stands in the place of a parent”.

The question is one of fact and degree that requires careful consideration of all the circumstances of the relationship.

The Arbitrator’s general approach was correct. He considered the responsibilities and powers of a biological parent and then considered to what extent the deceased fulfilled those responsibilities with respect to the three boys.

However, that approach had to be considered in the light of all the evidence, the authorities, the objectives of the legislation and the fact that the Workers Compensation Acts (the 1987 Act and the 1998 Act) are beneficial legislation.

Under “System Objectives”, Section 3(c) of the 1998 Act provides that the purpose of the Act is to, among other things:

“provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses.”

Entitlements under beneficial legislation should not depend on “distinctions, which are too nice” (per Mahony JA in Articulate Restorations & Developments

Pty Ltd v Crawford (1994) 10 NSWCCR 751 at 765). At the same time, the principle that beneficial legislation should be given a liberal construction does not entitle a court to give it a construction that is unreasonable or unnatural (per McColl JA in Amaca Pty Ltd v Cremer & ors [2006] NSWCA 164, citing IW v City of Perth [1997] HCA 30; (1997) 191 CLR 1 (at 11 – 12) per Brennan CJ and McHugh J).

Having regard to the above authorities and the beneficial nature of the Workers Compensation Acts, a worker is in the place of a parent where he or she accepts, in a real and substantial way, the responsibilities of a parent to provide for the care, maintenance and upbringing of the child concerned. The provision of shelter, food and clothing will be an important and often a critical factor, but it is equally important to consider the circumstances in which the worker provides the shelter, food and clothing and the nature of the relationship the worker has with the child. The nature of a parental relationship “is complex and includes more than financial support” (*Chartier v Chartier* 1999 CanLII 707 (S.C.C.); (1999) 168 D.L.R. (4th) 54 at [43]).

A generous relative may provide financial support for a child, but not be in the place of a parent.

To come within the terms of section 4 of the 1998 Act the worker must also assume responsibility for other aspects of the child’s upbringing, as a parent would.

The deceased had assumed those responsibilities in the present matter and therefore stood in the place of a parent in respect of the boys.

QUESTION OF LAW

Nanda v Noteflow Pty Ltd [2008] NSWCCPD 64

The issue in dispute between the parties was whether an Approved Medical Specialist (AMS), in assessing the degree of permanent impairment under section 322 of the *Workplace Injury Management and Workers Compensation Act 1998* (‘the 1998 Act’), could take into account gastro-intestinal reflux disease (GRD) in determining whether the injuries sustained met the 15 per cent whole person impairment (WPI) threshold.

With the consent of the parties, the Arbitrator referred the following question of law to the President:

For the purposes of satisfying the threshold requirements under section 151H of the Workers Compensation Act 1987 in respect of injuries occurring before 27 November 2001, is the application of Part 7 of Chapter 7 of the 1998 Act, limited to those injuries compensable under the Table of Disabilities pursuant to section 66 of the 1987 Act?

‘Novel or complex’

Under section 351(3) of the 1998 Act, the President is not to grant leave for the referral of the question of law unless he is satisfied that the question involved is novel or complex.

The President was satisfied that the question posed was both complex and novel because:

- ❑ It required an interpretation of the interaction and scope of the legislative provisions, including the savings and transitional provisions in relation to the statutory compensation scheme as assessed under section 66 of the 1987 Act, and the legislative provisions in relation to the claiming of work injury damages.
- ❑ It involved a determination as to the jurisdiction of the Commission and it had relevance not only to the parties in the current proceedings but also to other work injury damages threshold disputes.

Leave to refer the question of law was granted.

Held:

It was common ground that the Worker had received compensation under section 66 for his back injury. It was also common ground that the Table of Disabilities, as it applied to injuries received prior to 1 January 2002, did not include, as an injury for which compensation was payable, the condition known as GRD from which Mr Nanda alleged he now suffered. However, GRD is a condition recognised by Chapter 6.2 of AMA5 and is compensable under the current lump sum compensation regime.

In determining whether that threshold of 15 per cent WPI as required by section 151H was satisfied, the degree of permanent impairment must be assessed as provided by Part 7 (Medical Assessment) of Chapter 7 of the 1998 Act (see section 151H(4)).

Part 7, Chapter 7 provides that the assessment of

the degree of permanent impairment for the purpose of the *Workers Compensation Acts* is to be made in accordance with the WorkCover Guidelines (section 322 of the 1998 Act). The worker's entitlement under the Table of Disabilities was irrelevant as that was not the issue in dispute.

In respect of the dispute as to the extent of Mr Nanda's WPI, the question was whether he had, as a result of his injury, sustained a 15 per cent WPI, as assessed under the new scheme for the assessment of lump sum compensation (Part 7 of Chapter 7 of the 1998 Act)? The new scheme provided for Mr Nanda's GRD to be taken into account in determining his WPI.

This view was consistent with the decision of Tobias JA in *JC Equipment Hire Pty Ltd v The Registrar of the Workers Compensation Commission of NSW* [2008] NSWCA 43, where his Honour said at [60]:

"Section 149 of the 1987 Act emphasises the dichotomy between damages on the one hand and statutory compensation on the other. The fact that statutory compensation may be retained by a worker injured by his or her employer's negligence is unsurprising given that work injury damages are now confined to present and future economic loss. The scheme of the legislation is, simply, that non-economic loss is determined in accordance with the provisions of ss 66 and 67 of the 1987 Act, whereas economic loss (where fault on the part of the employer causing the relevant injury is established) is recoverable as damages. The confining of such damages to economic loss does not, in my view, blur the dichotomy between a claim for lump sum compensation (as defined in s 4 of the *WIM Act*) on the one hand and work injury damages (as defined by s 250 of that Act) on the other."

The President answered the question of law as follows:

For the purpose of satisfying the threshold requirements under section 151H of the Workers Compensation Act 1987, in respect of injuries occurring before 27 November 2001, the application of Part 7 of Chapter 7 of the Workplace Injury Management and Workers Compensation Act 1998 is not limited to those injuries compensable under the Table of Disabilities pursuant to section 66 of the Workers Compensation Act 1987 Act.

PRE-FILING STRIKE OUT APPLICATIONS

Fairmont Aged Care Centre v McFarlane [2008] NSWCCPD 30

Ms McFarlane sustained serious injuries to her lower back, in an incident alleged to have occurred on 19 November 2002, during the course of her employment with the Defendant, Fairmont Aged Care Centre.

Ms McFarlane served a pre-filing statement on 18 November 2005.

On 20 December 2007, the defendant filed an application in the Commission seeking an order striking out the pre-filing statement on the basis that the claimant had not filed an Application for Mediation to Resolve Work Injury Damages Claim following the service of the defendant's pre-filing defence on 14 December 2005.

The defendant submitted that it was prejudiced by the claimant's failure to move forward with her claim by filing an Application for Mediation and a Statement of Claim. The Defendant however did not articulate in its submissions how or why such prejudice arose.

President Keating held:

Section 151DA(2) provides:

"(2) A pre-filing statement remains current from the time it is served until it is struck out under this section on the application of the person ("the defendant") on whom it was served or it is withdrawn by the person who served it, whichever happens first."

The President noted that Acting President Gary Byron had observed in *John Lacey Earth Moving Pty Limited v Campbell-Willis* [2007] NSWCCPD 197:

"The legislative intention of these provisions is to provide time, both to facilitate the resolution of the claim prior to commencing court proceedings, through the early exchange of information and evidence, and to enable the participation of the parties in mediation.

As noted by the President in *Pasminco Cockle Creek Smelter Pty Ltd v Gardner* [2006] NSWCCPD

108 at [15] and as relied on by the Defendant in this application:

‘It is clearly not the intention of the legislature that the time limit within which a claimant may bring work injury damages proceedings should be extended indefinitely by the operation of these provisions. Claimants must actively pursue the required steps throughout this pre-litigation process. The pre-filing statement should remain current for the purpose of completing those required steps.’

Whilst section 151DA (2) provides that the pre-filing statement remains current until it is struck out by the President on application of the Defendant, or is withdrawn by the Claimant, “whichever happens first”, the Act is silent as to what grounds will support a strike out application.”

Whilst conscious of the defendant’s submission that over five years had elapsed since the claimant’s injury and over two years had elapsed since the pre-filing statement was served, the President did not accept that the defendant was prejudiced by the delay for the following reasons:

- ❑ The delay on the part of the claimant had not allowed the investigative trail to go cold.
- ❑ This was not a matter where the defendant was unable to pursue inquiries which it may have done had the matter been pursued with more vigour.
- ❑ The claimant’s injuries arose out of a frank incident, which was promptly reported to the defendant.
- ❑ The defendant’s pre-filing defence included a plethora of investigations and medical reports obtained at regular intervals throughout the period between the claimant’s accident and the current time.

Two matters relevant to the exercise of discretion under section 151DA(2) had been articulated by Acting President Byron in *Lacey*:

- ❑ *A pre-filing statement is not intended to extend time indefinitely, and*
- ❑ *Limitation periods exist to protect parties from potential prejudice caused by the passage of time*

between the date of injury and the commencement of court proceedings.

The President agreed that both of these were relevant matters in the exercise of the discretion, however, he distinguished the facts before him from the facts confronting Acting President Byron in *Lacey*.

In *Lacey*:

- ❑ no explanation for the delay had been provided to the Commission for progressing the matter since the service of the pre-filing statement, and
- ❑ though the claimant had been given every opportunity to be heard on the application, he failed to make any submissions opposing the defendant’s strike out application.

The President held:

This matter involved a very seriously injured worker who had undergone extensive spinal surgery and had suffered from a poor outcome.

An explanation for the delay had been offered and, although it was not entirely satisfactory, there being a failure to adequately explain large portions of the delay, it was clear that the claimant was now actively pursuing her entitlement to claim damages in respect of the injuries she sustained.

The extent of her whole person impairment was still a matter of some controversy. A report was received from Dr Fearnside as recently as 29 January 2008 reassessing the extent of the claimant’s entitlements pursuant to section 66.

Order:

The defendant’s application for the claimant’s pre-filing statement to be struck out was refused.

Appendices

Appendix 1

MEMBERS OF THE COMMISSION

President

His Honour Judge Greg Keating

Deputy Presidents

Mr Gary Byron (retired 18 November 2008)

Mr Bill Roche

Acting Deputy Presidents

Mr Anthony Candy

Mr Robin Handley

Ms Deborah Moore

Mr Kevin O'Grady

Mr Michael Snell

Registrar

Ms Sian Leathem

Arbitrators (as at 31 December 2008)

Mr Geoffrey Adelstein

Mr Ross Bell

Ms Anne Britton

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 Michael Fishburn

Mr Robert Foggo

Mr Stavros Georgiadis

Ms Eraine Grotte

Ms Robin Gurr

Mr Philip Harvey

Mr John Hertzberg

Mr John Ireland

Dr John Keogh

Mr Stephen Lancken

Ms Carol McCaskie

Mr John McDermott

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

Ms Marian Trenerry

Ms Elizabeth Tydd

Mr Leigh Virtue

Mr Nick Vrabac

Mr Ross Whitelaw

Mr John Wynyard

Appendix 2

SERVICE PARTNERS

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
Ms Robin Gurr
Ms Nina Harding
Mr Hans Heilpern
Mr Stephen Herrick
Mr John Hertzberg
Mr John Ireland
Ms Katherine Johnson
Mr John Keogh
Mr Stephen Lancken
Mr John McDermott
Mr Ross MacDonald
Mr John McGruther
Mr Derek Minus
Mr George Newhouse
Mr Daniel O'Keefe
Mr Rory O'Moore
Mr Greg Rooney
Ms Jennifer Scott
Ms Natasha Serventy
Mr Philip Theobald
Ms Mary Walker
Mr John Weingarh
Mr Ross Whitelaw

Approved Medical Specialists

Dr Robert Adler
Dr Klaas Akkerman
Dr Peter Anderson
Dr John Ashwell

Dr Mohammed Assem
Dr John Beer
Dr Trevor Best
Dr Atindra Bhattacharyya
Dr Tony Blue
Dr James Bodel
Dr Anthony Bookallil
Dr John Stanley Bosanquet
Dr Geoffrey Michael Boyce
Dr Kenneth Brearley
Dr Robert Breit
Dr Frank Breslin
Dr Peter Bryan
Dr David Bryant
Dr Peter Burke
Dr Mark Burns
Dr Michael W Burns
Dr William Bye
Dr Geoffrey Coffey
Dr Richard Crane
Dr David Crocker
Assoc Prof William James Cumming
Dr Michael Davies
Dr Michael Delaney
Dr Drew Dixon
Dr John Dixon-Hughes
Professor John Duggan
Dr Peter Endrey-Walder
Dr Donald Kingsley Faithfull
Assoc Prof Michael Fearnside
Dr Antonio E L Fernandes
Dr Sylvester Fernandes
Dr Robin B Fitzsimons
Dr Susanne Freeman
Dr Hunter Fry
Dr John F W Garvey
Dr Robert Gertler
Dr Peter Giblin
Dr Michael Gliksman
Dr John Harrison
Dr Henley Harrison
Dr Philippa Harvey-Sutton
Professor John B. Hickie
Professor Robin Higgs
Dr Yiu-Key Ho
Dr Nigel Hope
Dr Kenneth Howison
Dr Kenneth Hume

Dr Murray Hyde-Page
Dr Peter L Isbister
Dr Anthony Johnson
Dr Lorraine Jones
Dr Sornalingam Kamalaharan
Dr Robert Kaplan
Dr Gregory Kaufman
Dr Sikander Khan
Assoc Prof Leon Kleinman
Dr Edward Korbelt
Dr Lana Kossoff
Dr Damodaran Prem Kumar
Dr Sophia Lahz
Dr William Lennon
Dr Keith Lethlean
Dr Edmund Lobel
Dr Michael Long
Dr Ivan Lorentz
Dr William Lyons
Dr David Macauley
Dr Nigel Marsh
Dr Tommasino Mastroianni
Dr David Maxwell
Dr Andrew McClure
Dr Gregory McGroder
Dr John D McKee
Dr Ross Mellick
Dr Roland Middleton
Dr Ross Mills
Dr Paul Niall Dr Brian Noll
Assoc Prof Robert Oakeshott
Dr Chris Oates
Dr John O'Neill
Dr Kim Ostinga
Dr Roger Parkington
Dr Julian Parmegiani
Dr Brian Parsonage
Dr Roger Pillemer
Dr Graham Pittar
Dr Stuart Porges
Dr T B Raj
Dr Tom Rosenthal
Dr Roger Rowe
Assoc Prof Michael Ryan
Dr Avtar Sachdev
Dr Edward Schutz
Dr Joseph Scoppa
Dr James Scougall
Dr Alan Searle

Dr Thomas Silva
Dr John H Silver
Dr Gregory Steele
Dr John P H Stephen
Dr J Brian Stephenson
Dr Harry Stern
Dr John Robert Strum
Dr Geoffrey Stubbs
Dr Stanley Stylis
Dr Nicholas A Talley
Dr Stuart Taylor
Dr Ben Teoh
Dr Graham Vickery
Dr John Voss
Dr William Walker
Dr Tai-Tak Wan
Dr George Weisz
Dr Kalev Wilding
Dr Brian Williams

Costs Assessors

Robert Foggo, Arbitrator
Stephen Lancken, Arbitrator
John McDermott, Arbitrator
John Mc Gruther, Arbitrator
Chris Messenger, Arbitrator
Marian Trenerry, Arbitrator

Appendix 3

MEDICAL APPEAL PANEL APPOINTMENTS

MAP Arbitrators

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
Ms Marian Trenerry
Ms Elizabeth Tydd
Mr John Wynyard

MAP AMS

Dr John Beer
Dr James Bodel
Dr Peter Burke
Dr Mark Burns
Dr Joseph Scoppa
Dr Richard Crane
Dr Ken Hume
Dr David Crocker
Dr Michael Fearnside
Dr Philippa Harvey-Sutton
Dr Sophia Lahz
Dr Bill Lyons
Dr Greg McGroder
Dr Ross Mellick
Dr Paul Niall
Dr Brian Noll
Dr Robert Oakeshott
Dr Roger Pillemer
Dr Lana Kossoff
Dr Brian Parsonage
Dr Brian Williamson

MAP Supplementary AMS

Dr Geoffrey Boyce
Dr Robert Breit
Dr John Dixon-Hughes
Dr Sylvester Fernandes
Dr John Garvey
Dr Michael Gliksman
Dr Yiu-Key Ho
Dr Peter Isbister
Dr Keith Lethlean
Dr Nigel Marsh
Dr Tom Mastroianni
Dr James McLeod
Dr Ross Mills
Dr Stuart Porges
Dr T.B. Raj
Dr Tom Rosenthal
Dr Avtar Sachdev
Dr John (Brian) Stephenson
Dr Julian Parmegiani
Dr Graham Vickery
Dr Mohammed Assem

