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Workers Compensation
Commission

ANNUAL REVIEW 2017/18

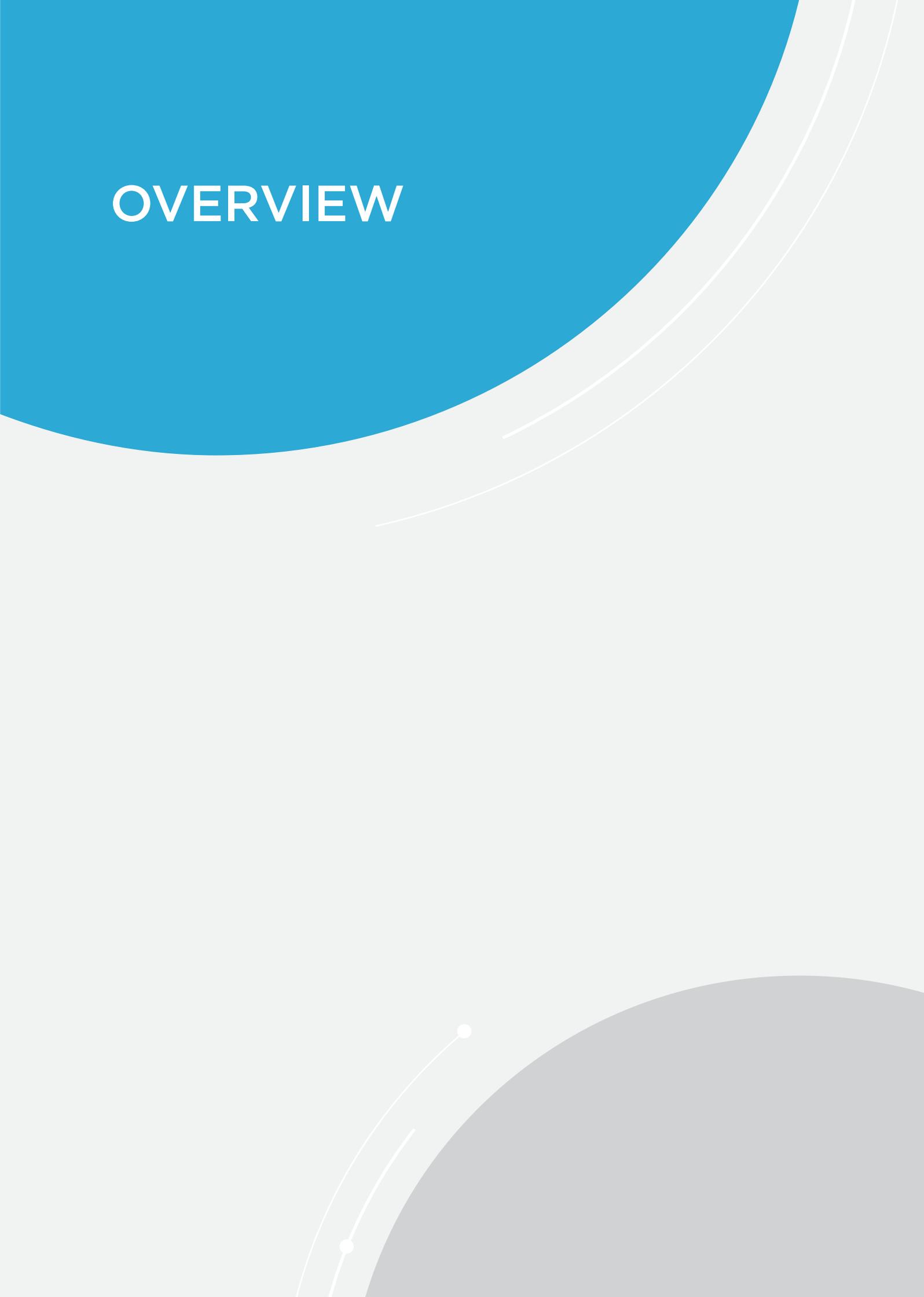
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Online Version

The online version of this Annual Review can be accessed at www.wcc.nsw.gov.au

OVERVIEW





PRESIDENT'S REPORT

It is my great pleasure to present the 2017/18 Annual Review.

This review provides a comprehensive analysis of the work of the Commission for the 12 months to 30 June 2018. It also provides information on the Commission's achievements, measured against accepted benchmarks, and initiatives implemented during the year.

One of the measures of success of courts and tribunals is the timeliness of the resolution of disputes. Accordingly, the Commission is constantly striving to improve efficiency in the resolution of disputes. I am pleased to report that, by using a range of technological advances and other case management techniques, the average times for disputes progressing to telephone conference, medical assessment and mediation have all significantly improved. Indeed, the average time to resolve liability disputes (without an appeal) is just over three months.

The improvement in the timely resolution of disputes is largely due to the transition of all Arbitrators and Mediators, and some Approved Medical Specialists, to electronic files instead of paper files. This has eliminated the requirement to physically transfer files between the Commission and its members and service partners, which is a much

more efficient use of our resources.

Improvements to timeliness are also due to the Commission's capacity to adapt quickly to emerging trends. For example, following the 2012 legislative amendments, the entitlement to ongoing weekly compensation for many workers will cease after five years, unless certain preconditions are met. One of those preconditions is the requirement that the degree of permanent impairment that results from an injury is more than 20%. The operation of the amendment took effect from December 2017.

From November 2017 to June 2018, the Commission received 485 disputes regarding the degree of permanent impairment with the potential to affect ongoing entitlements to weekly compensation. By introducing a new flexible procedure, we have been able to expedite the resolution of these types

of disputes by several weeks compared to the standard timeframes for dispute resolution. It is gratifying to note that this new procedure went a long way to ensuring workers were not prejudiced by the situation.

The Commission's blended conciliation and arbitration model continues to be an indispensable ingredient in the timely, fair and transparent resolution of disputes. Our focus remains on

Our focus remains on assisting parties to reach their own resolution of the dispute through conciliation ... Of 4,642 registered disputes, only 415 proceeded to a final determination by an Arbitrator, representing less than 10% of all disputes lodged

assisting parties to reach their own resolution of the dispute through conciliation rather than imposing an arbitrated outcome on them where that can be avoided. During the year, the vast majority of matters were resolved at various stages of the conciliation process. Of 4,642 registered disputes, only 415 proceeded to a final determination by an Arbitrator, representing less than 10% of all disputes lodged.

The quality and durability of those decisions is paramount. Most determinations by Arbitrators are accepted by the parties as a fair and independent assessment of the merits of the dispute. Of the disputes that proceeded to final determination by an Arbitrator during the year, only 15% were appealed to a Presidential member and only 6% were revoked on appeal.

I mentioned earlier the assessment of performance against accepted benchmarks. During the year the Commission submitted to an assessment utilising the Australia and New Zealand Tribunal Excellence Framework. I am pleased to report that the Commission's performance was again assessed to be in the highest of the six assessment bands. This assessment demonstrated improved performance in a number of areas, which is further detailed in this review.

In February 2018, the Commission settled a Strategic Plan for the next three years. The strategic focus will be on three major areas: dispute resolution excellence, innovative operations, and engagement of our staff, members and service partners. The Strategic Plan will better equip the Commission to deal with disputes quickly and efficiently.

In May 2018, following an extensive review, the NSW Government announced plans to reform the workers compensation dispute resolution system. The Government's proposed changes are a welcome reform that will simplify the dispute resolution process, making it much easier for workers to navigate the system. In addition to our current jurisdiction, it is proposed that the Commission will have jurisdiction to determine disputes concerning work capacity decisions by insurers. This proposed new process will replace merit reviews currently being undertaken by the State Insurance Regulatory Authority and

procedural reviews currently undertaken by the Workers Compensation Independent Review Office. When the proposed changes come into force, it is anticipated that the Commission will triage work capacity disputes through an expedited assessment pathway.

In terms of engaging and supporting its staff and members, I draw readers' attention to the Commission's CoNext initiative. CoNext has been a positive initiative which has enabled staff to have direct engagement in developing, prioritising and participating in projects and activities that enhance the Commission's workplace and performance.

In another important initiative, the Commission has continued its transition to a fully digital case management platform, consistent with the NSW Government's priority of providing better digital services. The new platform will improve accessibility to the Commission's services and enable electronic lodgement of documents and remote access to dispute proceedings by parties and their legal representatives.

Finally, while the new digital platform will assist the Commission to achieve greater success in 2018/19 and beyond, I would like to stress that it is our people that remain our greatest asset. Throughout the year there have been many examples of outstanding service in delivering the Commission's vision of excellence and innovation in dispute resolution. I extend my thanks, as always, to our outstanding team.



Judge Greg Keating

ACHIEVEMENTS DURING THE YEAR



6,798

dispute
applications
registered



3,778

telephone
conferences



1,790

'con/arbs'
(conciliation
conferences/
arbitration
hearings)



2,323

medical
assessments

Published Decisions

55

Presidential



343

Arbitrator



88

Medical Appeal Panel



5,691

workers
compensation
disputes
finalised



92%

of finalised
matters resolved
without a
determination



1,364

work injury
damages
disputes
finalised



71%

settlement of
work injury
damages cases
that proceeded
to mediation

IMPROVING THE COMMISSION'S PERFORMANCE

President

Tribunal Excellence

The Framework for Tribunal Excellence is a tool that assists tribunals to deliver quality services by providing a resource for assessing performance against eight areas of excellence and a model methodology for continuous evaluation and improvement.

The Framework was developed by an international consortium consisting of the Australasian Institute of Judicial Administration (Australia & NZ), the Federal Judicial Center (USA), the National Center for State Courts (USA) and the Subordinate Courts of Singapore.

In 2014 the Workers Compensation Commission was assessed against the International Framework for Tribunal Excellence and in 2017 was re-assessed against a modified version of the Framework (the Australia and New Zealand Tribunal Excellence Framework) to determine what improvements had been made.

The Framework asks 95 questions across the eight areas of tribunal excellence to obtain a total score out of 1,000 and then rates the tribunal within one of six bands. The Commission demonstrated improvement in all eight areas of tribunal excellence, being placed in the top band (band 6) and achieving a score of 897 out of 1,000, compared to 811 in 2014.



IMPROVING THE CLIENT EXPERIENCE

The Commission's members and staff have worked hard over the past year to improve the client experience through:

- Reducing the time to reach a resolution;
- Greater accessibility, including digital delivery;
- Getting decisions right the first time.

Reducing the Time to Reach a Resolution

For many injured workers in NSW, the end of 2017 meant the end of their entitlement to ongoing weekly compensation, due to circumstances relating to section 39 of the *Workers Compensation Act 1987* (which sets a time limit on entitlement to weekly compensation payments). Of the 485 section 39 disputes registered during the year, 53% were registered in November and December alone.

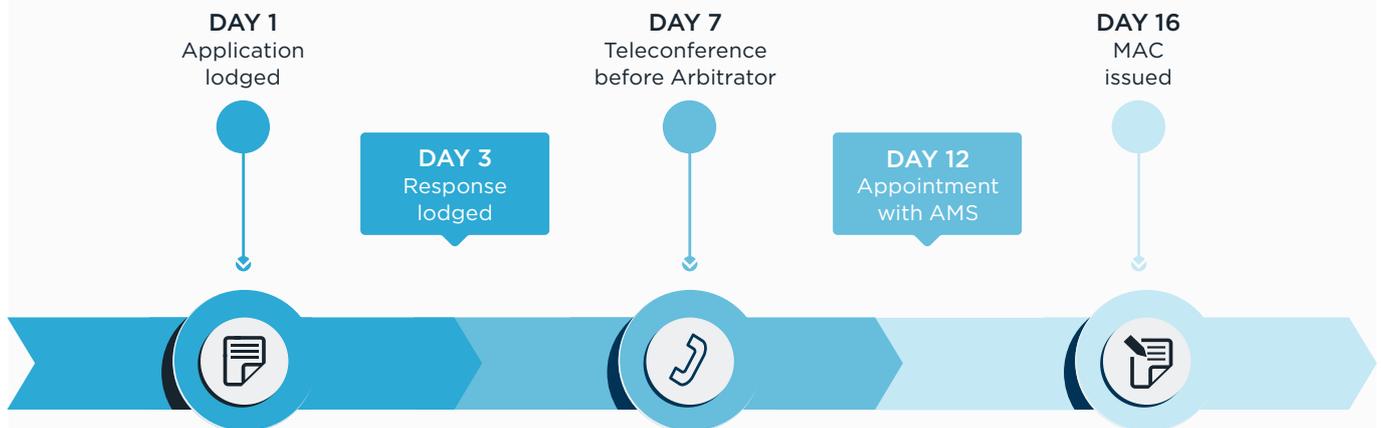
In preparation for a sharp increase in section 39 disputes, the Commission consulted widely with stakeholders, including insurers, the legal profession and the regulator, on introducing an expedited process.

Priority processing of applications, reduced lodgement times for insurers and reduced times for completing Medical Assessment Certificates (MACs) were just three of several measures adopted.

For section 39 matters referred directly to an AMS (Approved Medical Specialist), the average time from registration to issuing the MAC was 20 days less than the standard timeframes for other disputes types referred directly to an AMS.



Expedited timeframe (actual example, December 2017)



Greater Accessibility, including Digital Service Delivery

Improving accessibility has been a focus during the past year, including increasing digital service delivery.

In 2017/18, approximately one-third of mediations, conciliations and arbitration hearings were conducted outside of the Sydney CBD, and a number of proceedings were conducted electronically. The Commission also continues to provide interpreter services for workers in dispute proceedings. In the past year, interpreters were provided in 49 different languages.

During the year, the Commission continued its transition to a fully digital case management platform, consistent with the NSW Government's priority of providing better digital services. The expansion of the digital platform has already enabled the time to telephone conference to be reduced by one week (to 28 days), with almost one-third of disputes being resolved at that point. Furthermore, all Mediators and Arbitrators are now working in a paperless environment, having transitioned from paper-based to electronic files.

The full digital package, to be piloted with legal practitioners in the first half of 2018/19, will improve accessibility to the Commission's services and enable electronic lodgement of documents and remote access to dispute proceedings by parties and their legal representatives. The digital platform will further expand the Commission's capacity to provide access to regional and remotely located workers.

The review of the Commission against the Framework for Tribunal Excellence assessed the Commission on a range of accessibility measures, including the following:

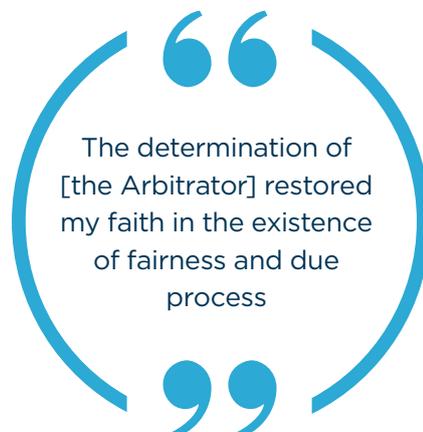
- Online lodgement facility for applications or the ability to lodge applications and upload documents electronically: 4.8 out of 5;
- Functional and easy-to-access website: 4.5 out of 5;
- Provision to hold hearings away from the main location (e.g. to reduce party travel time and transaction costs): 5 out of 5;
- Easy access for people with special needs: 4.6 out of 5;
- Access to telephone and videoconferencing facilities to save parties travel time and costs: 5 out of 5;
- Overall accessibility: 9.5 out of 10.

With an ongoing focus on the digital platform and other accessibility initiatives, the Commission will continue to provide greater accessibility for its clients. In particular, the announcement by the NSW Government that the Commission will soon be the 'one stop shop' for workers compensation dispute resolution is an exciting challenge for the year ahead.

Getting Decisions Right the First Time

The 'durability' of a decision refers to how likely it is to be upheld (i.e. not overturned) on appeal. The Commission achieved a very high level of durability in its decisions during the year. Of the matters proceeding to final determination before an Arbitrator, only 15% were appealed to a Presidential member and only 6% were revoked on appeal to a Presidential member.

This achievement is due in no small part to the expertise of the Commission's members, and to their willingness to give clients a fair hearing before making a decision. In the vast majority of cases, they are able to 'get it right the first time'. The following comments from clients highlight the professionalism shown by the Commission's Arbitrators:



I was at my wits' end as to how to get a fair go from my employer. If I had not had the option to appeal to the WCC, I am sure my side of the story would never have been heard or acknowledged.

The determination of [the Arbitrator] restored my faith in the existence of fairness and due process, something I had come to doubt in [an atmosphere] where employee complaints and concerns are ignored and/or dismissed as inconsequential.

Client comment, October 2017

I would like to express my support for the way in which [the Arbitrator] handled my case ...

I was required to attend 2 hearings; on both occasions [the Arbitrator] conducted the proceedings in an unbiased and professional manner. He listened intently to both sides [and] asked numerous questions to clarify the many different arguments that were put forward by both sides ...

With this decision he has made, I now look forward to returning to my former health and wellbeing and resuming my pre-injury active life style, as well as returning to work on full duties with my work crew.

Client comment, November 2017



ABOUT THE COMMISSION

Our Role

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

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

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

Our Objectives

The Commission's objectives are:

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

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

Our Functions

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

When required to decide a dispute, the Commission aims to provide fast, consistent and durable outcomes. A summary of significant disputes in 2017/18 is set out in Appendix 4, Developments in the Law.

In-person conciliations and arbitration hearings, referred to as con/arbs, are held in Sydney and other locations throughout NSW. Con/arbs will usually be held at locations convenient to injured workers.

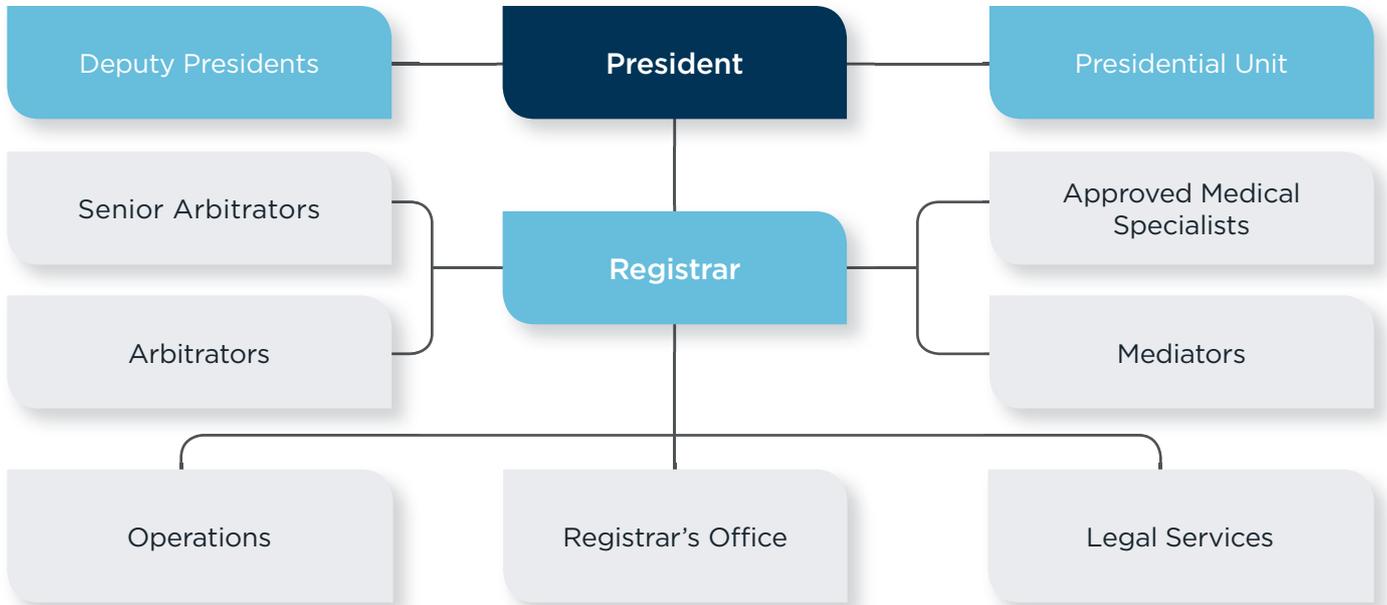
The Commission has proven to be effective in resolving disputes in a timely manner. It encourages the early exchange of information and open communication between the parties. Most parties are legally represented, and an interpreter is provided if required to assist a worker.

Relevant legislation

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

OUR PEOPLE

Organisation Structure



Our Members

As at 30 June 2018, the Commission was comprised of:

- Judge Greg Keating, President;
- Michael Snell, Deputy President;
- Elizabeth Wood, Deputy President;
- Larry King SC and Geoffrey Parker SC, Acting Deputy Presidents;
- Rodney Parsons, Registrar;
- Catherine McDonald and Glenn Capel, Senior Arbitrators; and
- 7 full-time and 16 sessional Arbitrators (see Appendix 1).

President and Deputy Presidents

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

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

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

Registrar

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

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

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

Senior Arbitrators and Arbitrators

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

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

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

Our Staff

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

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

Operations Branch

The Director Operations strategically leads staff in the provision of Registry Services, Dispute Services, Operations Improvement and Administrative Support. The branch provides registry services, case management services, Arbitrator, Mediator and Approved Medical Specialist support, and process improvement initiatives.

Registry Services staff are the first point of contact for workers, insurers, legal representatives and the public. The unit manages the call centre, mailroom, registration of dispute applications and information exchange processes, and concierge functions for the Commission’s hearing rooms in its Darlinghurst premises. The unit is also responsible for maintaining the Commission’s research library and managing file archives and sound recording processes.

Dispute Services staff are responsible for case management of workers compensation disputes, medical appeals and work injury damages disputes. The unit refers medical disputes to Approved Medical Specialists for assessment and makes interim decisions to efficiently progress matters in the Commission. Dispute Services staff also draft Certificates of Determination for the two Directors for permanent impairment compensation awards.

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

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



Legal Services Unit

The Director Legal Services strategically leads a team of legal staff that provide professional services to the Commission and stakeholders.

Legal services include the statutory decision-making functions of the Registrar, providing legal advice to members and staff, responding to legal enquiries from the public and the legal profession, updating the Commission's **Arbitrator Practice Manual** and **Approved Medical Specialist Practice Manual**, and issuing the external publications **On Review** and **Decisions of Medical Appeal Panels**.

Statutory decision-making functions include:

- Expedited assessments;
- Assessing the merit of medical appeal applications;
- Costs assessments;
- Curing defective pre-filing statements; and
- Disputes regarding access to information and premises, and conduct money/production fees.





Registrar's Office

The Registrar's Office, comprising the Office of the Registrar and Business Support Unit, is responsible for planning, strategy, organisational development and corporate services.

Office of the Registrar staff provide general support to the Registrar, including coordinating responses to Ministerial correspondence and government agency and stakeholder enquiries, and coordinating presentations to internal and external stakeholders and other interested groups. The office is also responsible for managing the budget cycle, providing timely and accurate organisational data, and managing risk and audit functions.

Business Support Unit staff provide corporate support services, including delivery of information services, data analysis of performance, people capability development, project management and facilities management.

Presidential Unit

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

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

OUR PARTNERS

Approved Medical Specialists

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

Medical assessments are conducted throughout NSW, or by video in appropriate circumstances.

Approved Medical Specialists also sit on Medical Appeal Panels.

As at 30 June 2018, there were 132 Approved Medical Specialists who held appointments with the Commission (see Appendix 2).

Mediators

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

Mediators will attempt to bring the parties to agreement through mediation conferences, which are conducted in Sydney and in regional NSW locations.

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

As at 30 June 2018, there were 26 Mediators who held appointments with the Commission (see Appendix 3).



OUR DISPUTE PATHWAYS

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

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

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

- Expedited assessments;
- Legal disputes;
- Medical disputes;
- Work injury damages disputes.



**Expedited
Assessments**



**Legal
Disputes**



**Medical
Disputes**



**Work Injury
Damages Disputes**

EXPEDITED ASSESSMENTS

This dispute resolution process is designed to resolve disputes quickly and efficiently. Disputes for weekly compensation benefits up to 12 weeks and/or medical expenses compensation up to \$9,178 are fast-tracked to a teleconference before a delegate of the Registrar. Disputes regarding injury management are also expedited in this way. The teleconference is held 14 days from the date of lodgement of the dispute and most are resolved at this stage.

The parties are almost always legally represented in expedited assessments, and insurers are encouraged to attend. Workplace injury management disputes allow the parties to openly discuss appropriate steps to return an injured worker to meaningful employment.

A delegate may refer a workplace injury management dispute to an injury management consultant for independent assessment.

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

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



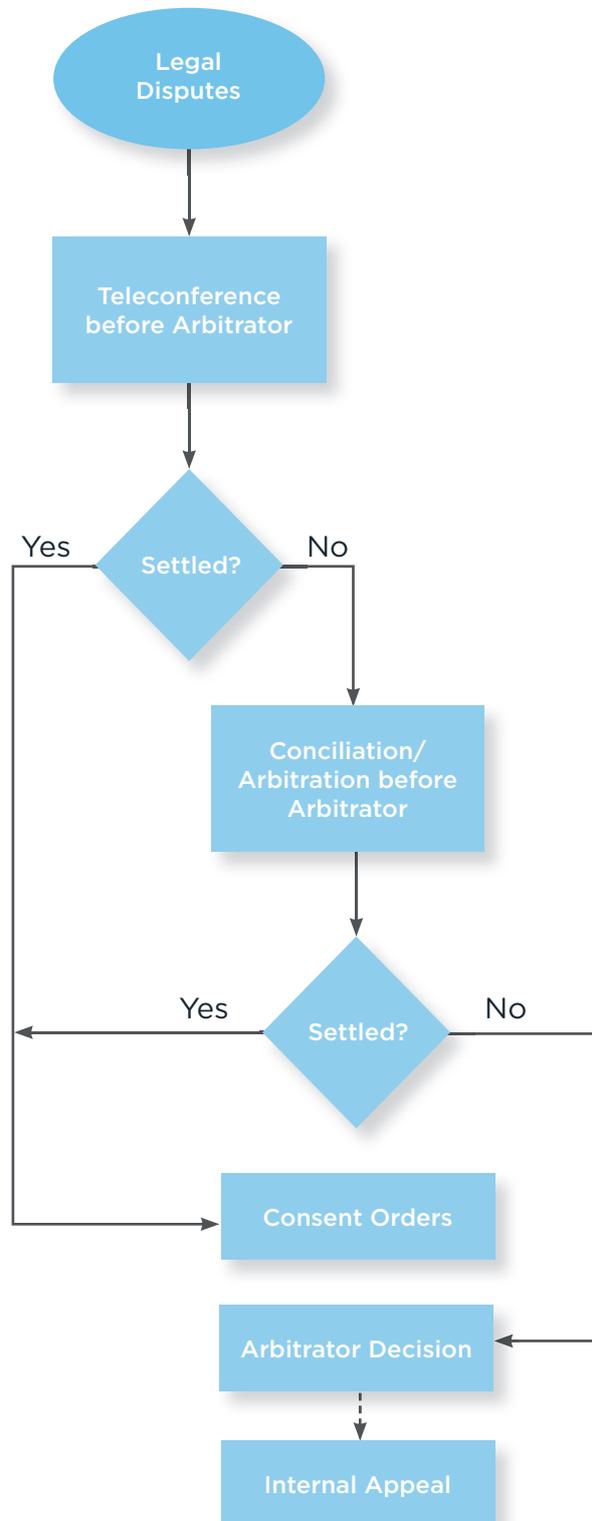
LEGAL DISPUTES

Disputes for weekly compensation exceeding 12 weeks, medical and related expenses compensation exceeding \$9,178, and all other compensation types are listed for teleconference, before an Arbitrator, 28 days from the date the dispute is lodged. If the matter does not resolve at teleconference, the Arbitrator will list the matter for a combined in-person conciliation conference and arbitration hearing, within three weeks if the matter is ready to go ahead, or up to eight weeks if third-party documents (e.g. medical records) are required to be produced to the Commission.

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

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

Either party may appeal to a Presidential member against an Arbitrator's decision.



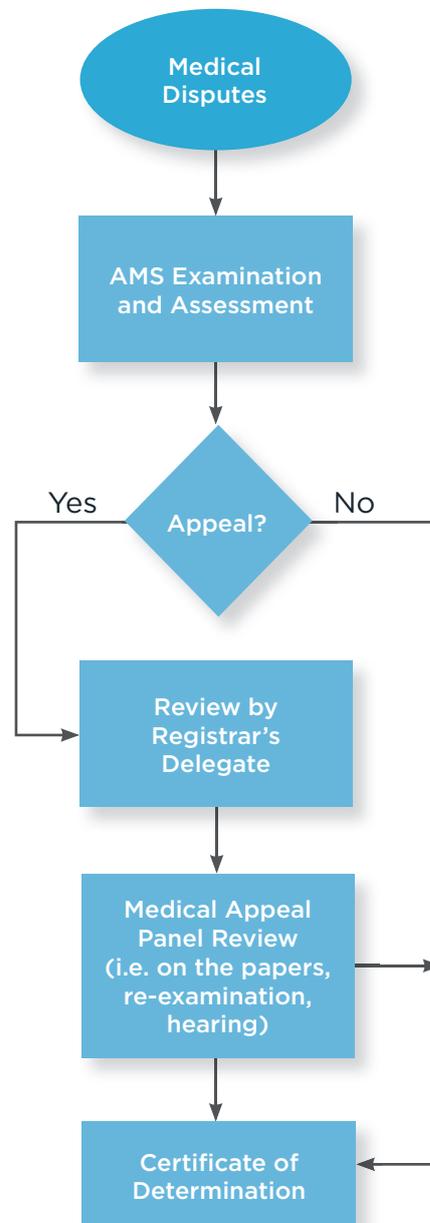
MEDICAL DISPUTES

Medical disputes, mostly concerning the degree of permanent impairment resulting from an injury, are referred to Approved Medical Specialists for assessment.

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

A party may appeal against an assessment of permanent impairment through an internal appeal to a Medical Appeal Panel (constituted by an Arbitrator and two Approved Medical Specialists). An appeal may proceed only if the Registrar's delegate is satisfied, on the face of the application and any submissions, that at least one of the grounds for appeal has been made out. An appeal must be lodged within 28 days of the assessment certificate.

Certificates of Determination are issued 28 days after assessment certificates are issued, to allow sufficient time for appeal applications to be lodged.



WORK INJURY DAMAGES DISPUTES

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

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

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

The Commission is also responsible for resolving disputes relating to:

- the threshold for entitlement to work injury damages;
- defective pre-filing statements;
- directions for access to information and premises; and
- pre-filing strike-out applications.



APPEALS

Arbitral Appeals

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

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

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

Presidential members may determine appeals 'on the papers', if the written submissions constitute sufficient information, or after a telephone conference or formal hearing.

An Arbitrator's decision may be confirmed or revoked. If revoked, a new decision may be made

in its place or, alternatively, the dispute may be allocated to a new Arbitrator for re-hearing.

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

Medical Appeals

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

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

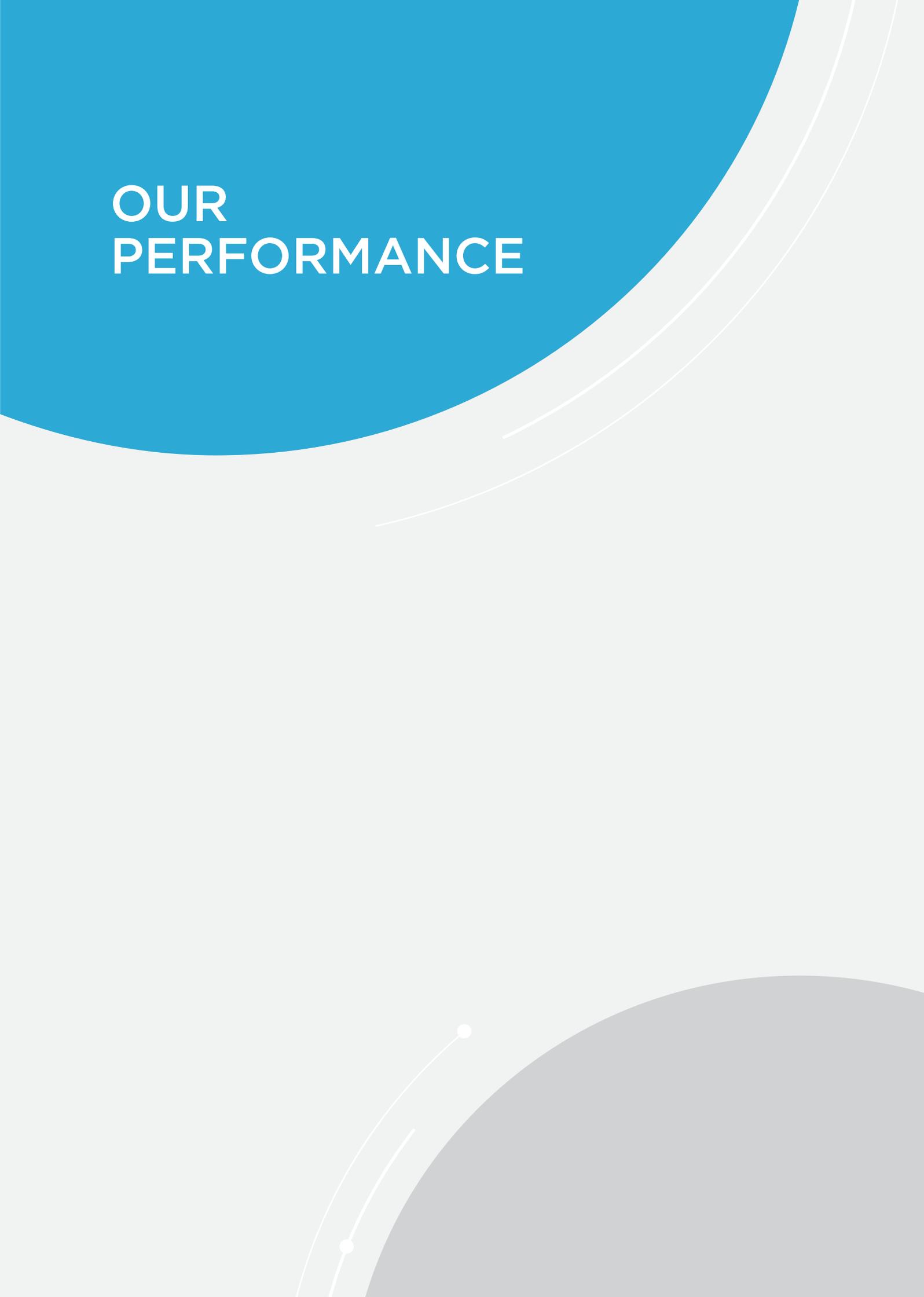
The Registrar, or delegate, must be satisfied that a ground of appeal is made out before referring the matter to a Medical Appeal Panel, comprised of an Arbitrator and two Approved Medical Specialists. The Registrar may also refer the matter to an Approved Medical Specialist for further assessment or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

The Medical Appeal Panel determines whether further submissions are required, whether the worker needs to be re-examined by a panel member, and/or whether an assessment hearing is required to allow the parties to make oral submissions to the Appeal Panel. Alternatively, appeals may be dealt with 'on the papers' without further submissions from the parties.

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

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

OUR PERFORMANCE



KEY PERFORMANCE INDICATORS

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

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

The resolution rates for disputes resolved within six, nine and 12 months have been maintained.

There has also been improvement in the percentage of disputes resolved within three, six, nine and 12 months for disputes resolved where one of the parties has appealed against the decision of an Arbitrator.

Decisions made by Arbitrators and assessments by Approved Medical Specialists continue to be durable, with low revocation rates. There has been a significant improvement in the durability of assessments by Approved Medical Specialists.

Timeliness	Target	2016/17	2017/18
% of Dispute Applications resolved (no appeal):			
— 3 months	45%	58%	61%
— 6 months	85%	94%	94%
— 9 months	95%	99%	99%
— 12 months	99%	100%	100%
% of Dispute Applications resolved (with appeal):			
— 3 months	40%	51%	55%
— 6 months	80%	84%	87%
— 9 months	94%	93%	95%
— 12 months	98%	96%	98%
Average days to resolution for Dispute Applications with no appeal	105	93	91
	Target	2016/17 Average	2017/18 Average
Average days to resolution of Arbitral Appeals	112	122	95
Average days to resolution of Medical Appeals	100	96	89
% of Expedited Assessments resolved within 28 days	90%	72%	79%
	Target	% Revoked	% Revoked
% of determined Dispute Applications revoked on appeal ^[1]	<15%	4%	6%
% of Medical Assessment Certificates revoked on appeal ^[2]	<15%	9%	6%

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

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

WORKLOAD AND PERFORMANCE

Total Registrations

The table below shows the number of applications registered by the Commission for the past two financial years. Overall, total registrations reduced in 2017/18 by approximately 3.5%.

Application type	2016/17	2017/18
Application to Resolve a Dispute (Form 2)	5,014	4,805
Application for Expedited Assessment (Form 1)	86	76
Workplace Injury Management Dispute (Form 6)	41	14
Application for Assessment of Costs (Form 15)	12	5
Registration of Commutation (Form 5A)	54	40
Application for Mediation (Form 11C)	1,313	1,345
Application to Cure a Defective Pre-filing Statement (Form 11B)	0	3
Application to Strike Out a Pre-Filing Statement (Form 11E)	6	3
Disputed Direction for Access to Information and Premises (Form 11)	4	2
Arbitral Appeal (Form 9)	58	61
Medical Appeal (Form 10)	458	444
TOTAL	7,046	6,798

Applications to Resolve a Dispute (Form 2)

Most of the compensation dispute applications lodged in the Commission are Applications to Resolve a Dispute (Form 2).

The graph below compares Form 2 dispute registrations over the past two financial years, showing a decrease of 4% in 2017/18.

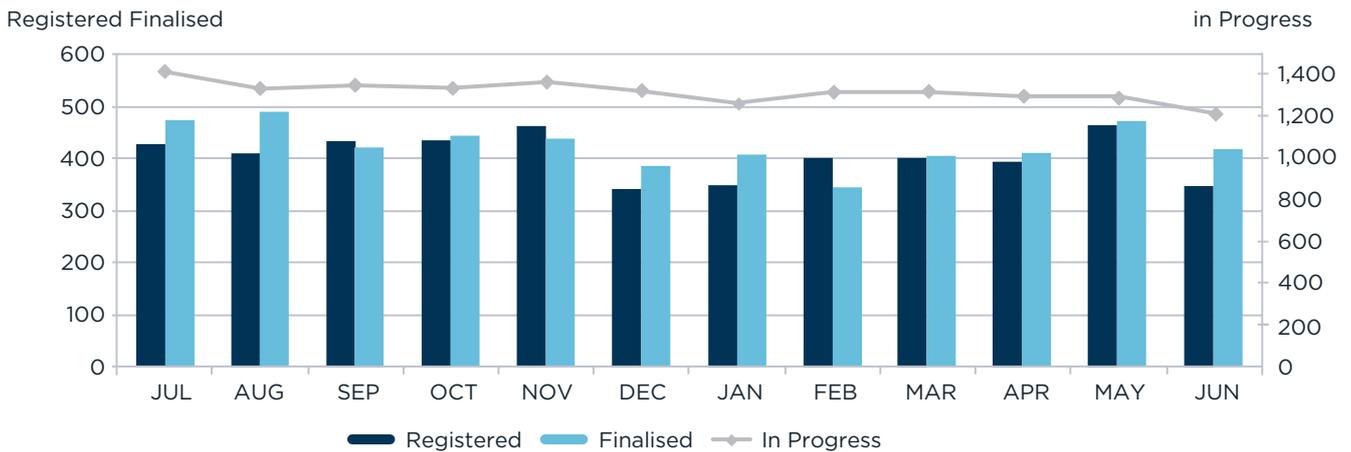
In 2017/18, an average of 400 Form 2 dispute applications were lodged each month, compared to 418 per month in the previous financial year.

FORM 2 - COMPARISON OF REGISTRATIONS

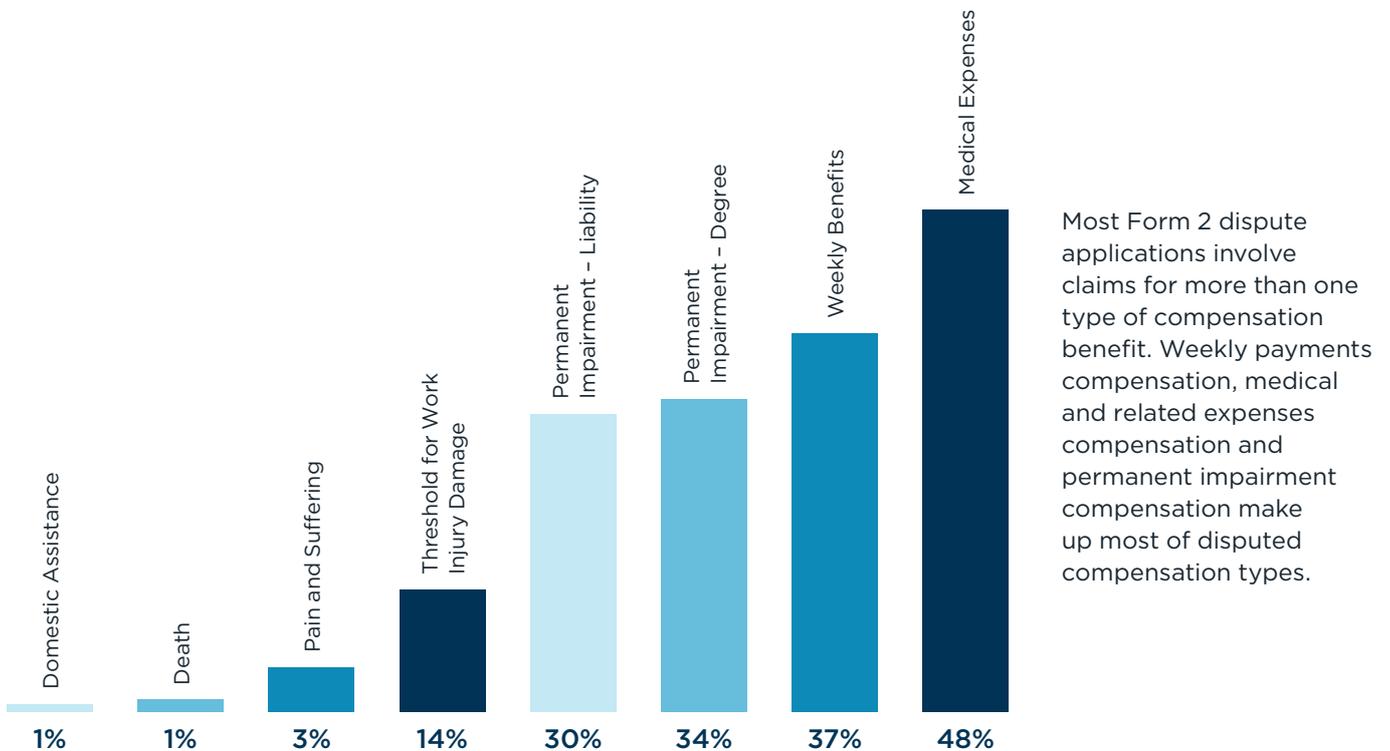


A monthly comparison of Form 2 disputes lodged and finalised in 2017/18 is shown below. The graph also indicates the number of active Form 2 dispute applications at any given time. The number of active disputes was maintained below 1,450 matters for the whole of the year. As at 30 June 2018, there were 1,213 active Form 2 dispute applications on hand. The active case load has reduced by about 17% compared with the previous reporting period.

FORM 2 - REGISTERED, FINALISED AND IN PROGRESS

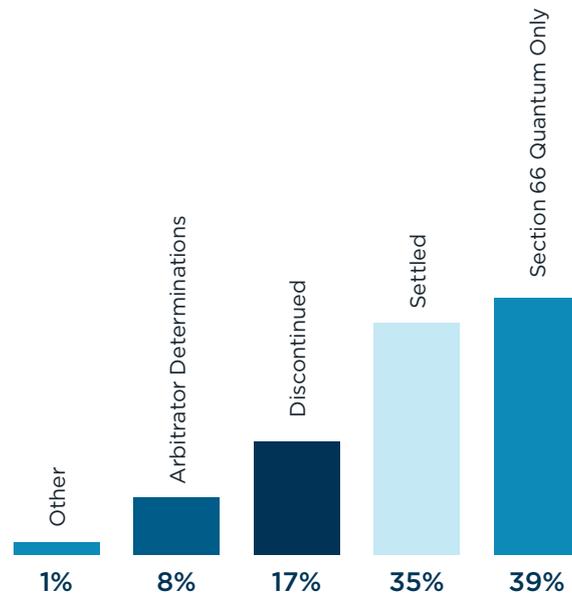


FORM 2 - COMPENSATION IN DISPUTE 2017/18



In 2017/18, disputes limited to the degree of permanent impairment (section 66 quantum only) made up 39% of all resolutions for Form 2 dispute applications. Settlements throughout the year remained strong, with Arbitrators required to determine only 8% of disputes in the reporting period. The profile of outcomes has remained essentially the same over the past two financial years.

FORM 2 - OUTCOMES

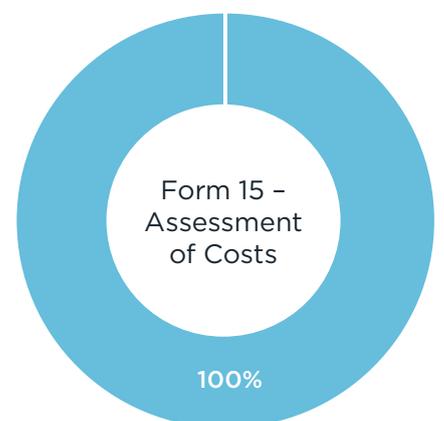
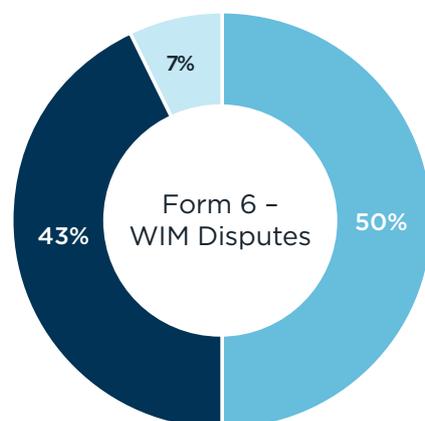
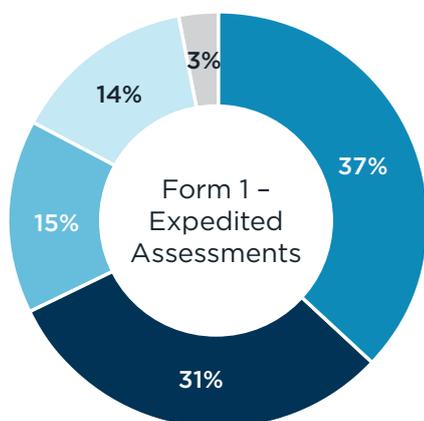


Other Compensation Dispute Applications

Other Compensation Dispute Applications (excluding appeals) included:

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

The figures below show outcomes for expedited assessments, workplace injury management and assessment of costs.



- IPD Issued
- Settled
- Other
- Discontinued
- Refused
- Recommendation Issued
- Discontinued
- Recommendation Refused
- Other
- Determination Issued
- Discontinued
- Other

Locations

During 2017/18, the Commission held 1,790 con/arbs at 19 locations:

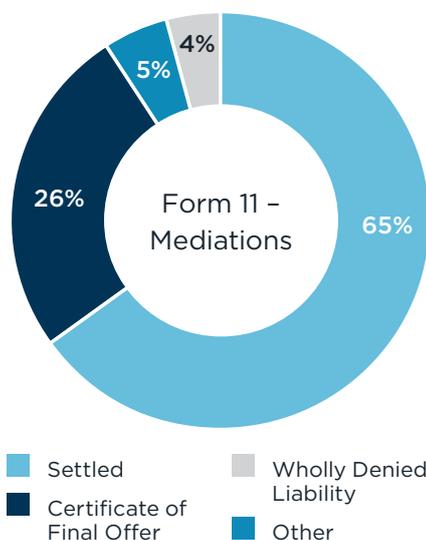
Albury	Ballina	Bathurst	Broken Hill
Coffs Harbour	Dubbo	Gosford	Griffith
Newcastle	Orange	Penrith	Port Macquarie
Queanbeyan	Sydney	Tamworth	Taree
Tweed Heads	Wagga Wagga	Wollongong	

Work Injury Damages Dispute Applications

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

In 2017/18, the Commission registered 1,345 Applications for Mediation to Resolve a Work Injury Damages Claim (Form 11C). In the same period, it finalised 1,364 mediation disputes.

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



Of the 1,238 matters in which a mediation conference was held, 883 (71%) of them settled.

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

Arbitral Appeals

In 2017/18, the Commission received 61 Applications to Appeal Against a Decision of an Arbitrator (Form 9). During the same period, Presidential members determined 50 appeals, and two applications were discontinued.

Overall, 4% of appealable decisions by Arbitrators were revoked on appeal.

Medical Appeals

There were 2,659 Medical Assessment Certificates issued in 2017/18, representing a 17% increase compared with 2016/17. Application to Appeal Against Decision of Approved Medical Specialist (Form 10) lodgements decreased by 3%, from 458 appeals lodged in 2016/17 to 444 in 2017/18.

There were 446 medical appeals finalised in 2017/18. Approximately 6% of Medical Assessment Certificates issued were overturned on appeal.

Judicial Review of Registrar and Medical Appeal Panel Decisions

Fourteen judicial review applications were lodged in the Supreme Court of NSW in 2017/18. Of those matters, 12 were against the decisions of Medical Appeal Panels and two against decisions of delegates of the Registrar. Overall, the judicial review rate was less than 1% of all decisions made by Medical Appeal Panels and Registrar's delegates.

In 2017/18, the Supreme Court determined nine judicial review applications, dismissing three applications and quashing six Medical Appeal Panel decisions.

Appeals to the Court of Appeal from Presidential Decisions

In 2017/18, the Court of Appeal determined three appeals against Presidential decisions. Of those matters, two were dismissed and one was upheld and remitted to the Commission for re-determination.

As at 30 June 2018, four Presidential decisions were pending appeal before the Court of Appeal.

EDUCATION AND COLLABORATION

User Group

The User Group, comprised of Commission representatives and representatives from the State Insurance Regulatory Authority, the NSW Bar Association and The Law Society of NSW, meets quarterly to raise issues relevant to practice and procedure in the Commission. As at 30 June 2018, the User Group membership was:

- Judge Greg Keating, President (Chair);
- Michael Snell, Deputy President;
- Elizabeth Wood, Deputy President;
- Rodney Parsons, Registrar;
- Annette Farrell, Director Operations;
- Michael Wright, Director Legal Services;
- Catherine McDonald, Senior Arbitrator;
- Glenn Capel, Senior Arbitrator;
- Petrina Casey, State Insurance Regulatory Authority;
- Ross Stanton, NSW Bar Association;
- Shane Butcher, The Law Society of NSW;
- Kristi McCusker, The Law Society of NSW;
- Stephen Harris, The Law Society of NSW;
- Andrew Mulcahy, The Law Society of NSW.

Council of Australasian Tribunals

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

The President and Registrar are committee members of the NSW Chapter of COAT, while the Registrar is also a member of the Australasian Tribunal Administrators' Group.

Workers Compensation Inter-Jurisdictional Meeting

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

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

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

The most recent annual Inter-Jurisdictional Workers Compensation Dispute Resolution Organisations Meeting was held in June 2018. It was held in conjunction with the COAT National and NSW Chapter joint conference in Canberra, ACT. This meeting was attended by representatives from dispute resolution organisations in the following jurisdictions: Commonwealth, New South Wales, South Australia, Tasmania, Victoria, and Western Australia. Each jurisdiction provided an update on developments in the law, practice and procedure. Valuable insights were gained from each jurisdiction, particularly in respect of recent reform and dispute resolution practices.



CONFERENCES AND SEMINARS

In-house Conferences and Forums

Annual professional development conferences are held for Arbitrators, Mediators and Approved Medical Specialists. Conference sessions include both internal and external speakers.

The theme for this year's Arbitrator and Approved Medical Specialist conferences was improving the worker experience.

Dr Margaret Byrne, an expert on cultural intelligence and cultural competence, presented at both conferences. Dr Byrne spoke about the skills decision-makers need to deliver fair outcomes in matters where cultural differences may play a role in what goes on, and what may go wrong, when someone not born in Australia comes before a tribunal.

To communicate effectively with workers from culturally and linguistically diverse groups, the Commission provides interpreters where requested by parties. Associate Professor Ludmilla Stern, from the University of NSW and formerly on the Board of Directors of the National Accreditation Authority for Translators and Interpreters (NAATI), brought a wealth of experience in addressing Arbitrators and Approved Medical

Specialists on the interpreter process, the role of interpretation users in effective communication and tips for working effectively with interpreters.

Joanna Kalowski is a mediator and judicial educator, and has worked with courts and tribunals in Australia, Asia and Europe. Joanna gave the opening address at the Mediator conference, focusing on challenges in managing the process of mediation. The closing address was delivered by Professor Nicholas Glozier, a consultant psychiatrist who specialises in epidemiology, clinical trials and health service research and is a Professor of Psychological Medicine at the University of Sydney. Professor Glozier's presentation provided useful insights gathered from research on vulnerable people in the compensation system.

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

External Presentations by Invitation

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



PUBLICATIONS

Bulletins

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

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

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

On Appeal

On Appeal summarises decisions of Presidential members delivered during the previous month and provides an overview of relevant High Court and Court of Appeal decisions.

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

On Review

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

On Review is available on the Commission's website (www.wcc.nsw.gov.au).

Weekly Summaries

The Commission publishes a short weekly summary of relevant Arbitral and Medical Appeal Panel decisions.

Arbitrator Practice Manual

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

The manual, first published in 2009 and subsequently revised, was updated in 2017/18.

Approved Medical Specialist Practice Manual

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

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



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GOVERNANCE AND ACCOUNTABILITY



OVERVIEW

The Commission maintains a robust corporate governance framework that covers:

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

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

Governance Committees and Forums

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

Executive Committee

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

Senior Leaders Group

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

Access and Equity

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

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

Codes of Conduct

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

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

Complaint Handling

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

During the year, the Commission received a total of eight complaints. Two concerned medical assessments conducted by Approved Medical Specialists, two concerned Mediators, two concerned proceedings held by Arbitrators and two concerned administrative issues.

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

Risk Management

The nature of the Commission's business operations exposes it to a wide range of risks. As such, in line with good governance, the Commission has developed and implemented a risk management framework, compliant with AS/NZS ISO 31000:2009, Risk Management - Principles and Guidelines.

The risk management framework incorporates:

- Management documentation;
- Communication and training;
- Risk assessment and review;
- Monitoring and reporting.

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

PEOPLE AND CULTURE

Employment Provisions

The Attorney General, in consultation with the Minister for Finance, Services and Property, appoints Members of the Commission, while the President appoints Approved Medical Specialists and Mediators.

Staff are employed under the *Government Sector Employment Act 2013*, supported by its regulation and rules.

Member and Service Partner Retention and Appointments

Appointments and re-appointments for 2017/18 were as follows:

- Appointment of Deputy President, Elizabeth Wood
- Appointment of the following Arbitrators:
 - Marshal Douglas
 - Rachel Homan
 - John Isaksen
 - Nick Read
 - Michael Wright
- Re-appointment of the following Mediators:
 - Ross Bell
 - Jak Callaway
 - Philip Carr
 - Janice Connelly
 - Gerard Egan
 - Geri Ettinger
 - David Flynn
 - Robert Foggo
 - Nina Garding
 - John Ireland
 - Katherine Johnson
 - John Keogh
 - Stephen Lancken

- Margaret McCue
- John McGruther
- Garry McIlwaine
- Chris Messenger
- Dennis Nolan
- Philippa O’Dea
- Jennifer Scott
- John Tancred
- John Weingarth
- Appointment of the following Mediators:
 - Laurence Boule
 - Bianca Keys
 - Anthony Scarcella
 - John Whelan
- Temporary appointment of the following Approved Medical Specialists:
 - Nigel Ackroyd
 - Paramatma Dhasmana.

Learning and Development

In addition to the conferences and seminars set out on page 28, Commission staff and members completed a range of internal and external learning and development activities during the year, including:

- COAT National and NSW Chapter Annual Conference;
- COAT Registrar and Executive Officer Conference;
- Resolution Institute accredited mediator course.

Work Health and Safety and Wellbeing

The Work Health and Safety Committee has oversight of the Commission’s work health and safety program. The Commission has a number of strategies for minimising risk and ensuring the health and safety of its people, including:

- Regular site inspections;
- Consultation with staff;
- Injury and hazard management;
- Risk assessment and mitigation;
- Workstation set-up checklists;
- Engagement of ergonomic specialists.

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

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

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

The newly reconstituted Social Committee hosted a variety of social events during the year, including a Melbourne Cup function, Christmas party, Easter egg hunt, hot cross bun morning tea and Australia’s Biggest Morning Tea. All social events included fundraising for various charities. Various business units also organised informal morning teas and lunches.

Workplace Diversity

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

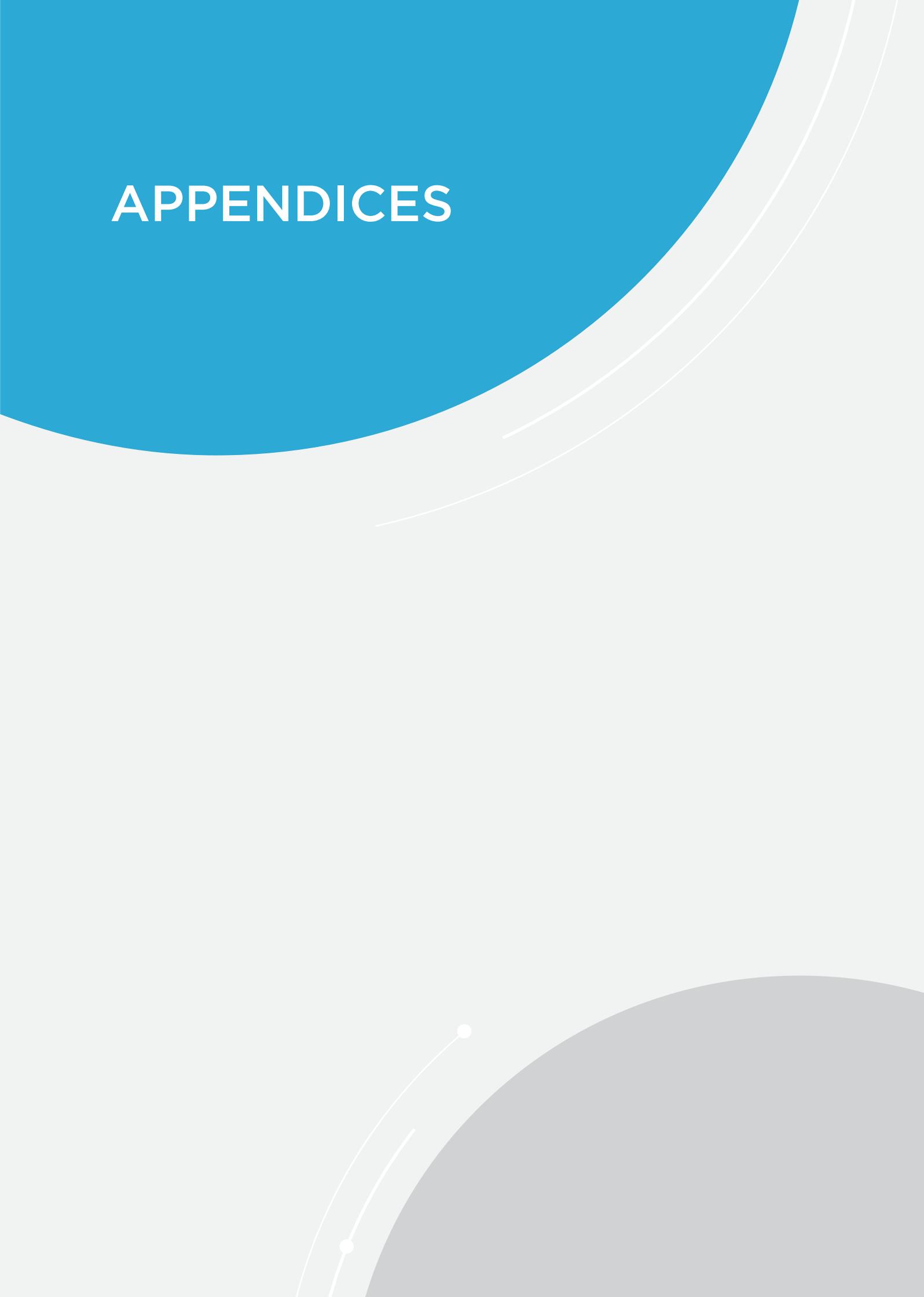
Consultation Mechanisms

The Commission is committed to workplace relations that value consultation, communication, cooperation and input from staff on matters that affect the workplace.

There are formal and informal opportunities for employee consultation, including:

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

APPENDICES



Appendix 1 – Arbitrators

(As at 30 June 2018)

Senior Arbitrators

Glenn Capel
Catherine McDonald

Arbitrators

Full Time

Josephine Bamber
Brett Batchelor
John Harris
Rachel Homan
John Isaksen
Paul Sweeney
Tim Wardell

Sessional

Linda Ashford A/J
Elizabeth Beilby
Ross Bell
Garth Brown
William Dalley
Marshal Douglas
Grahame Edwards
Gerard Egan
Deborah Moore
Jane Peacock
Richard Perrignon
Nicholas Read
Carolyn Rimmer
Anthony Scarcella
John Wynyard
Philip Young

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

The Director Operations, Annette Farrell, and Director Legal Services, Michael Wright, are also appointed as Arbitrators.

Appendix 2 – Approved Medical Specialists

(As at 30 June 2018)

Dr Robert Adler
Dr Peter Anderson
Dr Tim Anderson
Dr Douglas Andrews
Dr John Ashwell
Dr Mohammed Assem
Dr John Baker
Dr John Beer
Dr Christopher Bench
Dr Neil Berry
Dr Trevor Best
Dr Graham Blom
Dr James Bodel
Assoc Prof Geoffrey Boyce
Dr Kenneth Brearley
Dr Robert Breit
Assoc Prof David Bryant
Dr Mark Burns
Dr Gregory Burrow
Dr William Bye
Dr Beatrice Byok
Prof John Carter
Dr Edward Cassidy
Dr Lionel Chang
Dr Christopher W Clarke
Dr Richard Crane
Dr David Crocker
Dr Paul Curtin
Dr Michael Davies
Dr Thomas Davis
Dr Michael Delaney
Dr Drew Dixon
Dr John Dixon-Hughes
Dr Hugh English
Prof Paul Fagan
Dr Donald Kingsley Faithfull
Assoc Prof Michael Fearnside
Dr Antonio E L Fernandes
Dr Sylvester Fernandes
Dr Robin B Fitzsimons
Dr John F W Garvey
Dr Robert Gertler
Dr Peter Giblin

Dr Margaret Gibson
Dr John Giles
Dr John Glass
Dr Michael Gliksman
Prof Nicholas Glozier
Dr David Gorman
Dr Richard Haber
Dr Ian Hamann
Dr Scott Harbison
Dr Henley Harrison
Dr John Harrison
Dr Philippa Harvey-Sutton
Dr Mark Herman
Dr Roland Hicks
Dr Yiu-Key Ho
Dr Alan Home
Dr Michael Hong
Assoc Prof Nigel Hope
Dr Kenneth Howison
Dr Murray Hyde-Page
Dr Robert Ivers
Dr Caron Jander
Dr Mark Jones
Dr Sornalingam Kamalaharan
Dr Nalayini Kanagaratnam
Dr Hari Kapila
Dr Gregory Kaufman
Dr Edward Korbel
Dr Lana Kossoff
Dr Damodaran Prem Kumar
Dr Sophia Lahz
Dr David Lewington
Dr Monica Ling
Dr Michael Long
Dr Frank Machart
Dr Nigel Marsh
Dr Wayne Mason
Dr Tommasino Mastroianni
Dr Andrew McClure
Dr Michael McGlynn
Dr David McGrath
Dr Gregory McGroder
Dr John D McKee
Dr Ian Meakin
Dr Allan Meares
Dr Ross Mellick
Prof George Mendelson

Dr Patrick John Morris
Dr Bradley Ng
Dr Paul Niall
Dr Brian Noll
Dr Chris Oates
Dr David Daniel O’Keefe
Dr John O’Neill
Dr Julian Parmegiani
Dr Brian Parsonage
Dr Robert Payten
Dr Roger Pillemer
Dr Thandavan B Raj
Dr Anne-Marie Rees
Dr Loretta Reiter
Dr Samson Roberts
Assoc Prof Michael Robertson
Dr Michael Rochford
Dr David Rosen
Dr Tom Rosenthal
Assoc Prof Michael Ryan
Assoc Prof Anthony Samuels
Dr Edward Schutz
Dr Joseph Scoppa
Dr Wasim Shaikh
Dr Tarra Shaw
Dr John Silver
Dr Andrew Singer
Prof David Sonnabend
Dr Michael Steiner
Dr John P H Stephen
Dr J Brian Stephenson
Dr Harry Stern
Dr Ash Takyar
Dr Nicholas A Talley
Dr Philip Truskett
Dr Tai-Tak Wan
Dr Ian Wechsler
Dr George Weisz
Dr Gregory White
Dr Kaley Wilding
Dr Brian Williams
Assoc Prof Siu Wong

Appendix 3 – Mediators

(As at 30 June 2018)

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

Appendix 4 – Developments in the Law

Pacific National Pty Ltd v Baldacchino [2018] NSWWCCPD 12

Mr Baldacchino (the applicant) claimed the costs of a total knee replacement pursuant to section 60(5) of the 1987 Act. The applicant had reached the retirement age, payments of weekly compensation had ceased, and he had not been assessed as greater than 10% whole person impairment. Accordingly, he was prevented from obtaining medical expenses pursuant to section 59A of the 1987 Act.

Section 59A(6) exempts certain treatments from the operation of section 59A, including “artificial aids, members, eyes or teeth and other artificial aids or spectacles (including hearing aids and hearing aid batteries)”.

Arbitrator Harris determined in the Applicant’s favour that the proposed treatment was reasonably necessary as a result of injury.

The Arbitrator also determined that the proposed total knee replacement fell within the meaning of ‘artificial aids’ within section 59A(6) of the 1987 Act. The Arbitrator’s reasons were based on the following premises:

1. In *Thomas v Ferguson Transformers Pty Ltd* [1979] 1 NSWLR 216 (*Thomas*), Hutley JA (Hope JA agreeing) held that the meaning of ‘artificial aids’ as in the former section 10 of the *Workers’ Compensation Act 1926* meant “anything that was specifically constructed to enable the effects of the disability to be overcome” and that the “essential quality of an artificial aid is an aid specially

tailored to the needs of a person, which flowed from the injury. The artificial aid is specific to an injured person.”

2. This part of section 10 of the 1926 Act was repeated in substantially the same form into section 59 of the 1987 Act, which in turn was incorporated into section 59A(6) when it was introduced in the 2015 amendments.
3. Applying settled authority (see for example the unanimous bench of the High Court in *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 107 (*Re Alcan*), there is a presumption that the legislature had approved the meaning ascribed to a provision by a previous interpretation of a Superior Court where that same legislation is repeated in a subsequent Act.
4. The words in section 59A(6) should be given the same meaning as they had in section 59 of the 1987 Act, applying the principles in *Registrar of Titles (W.A.) v Franzon* [1975] HCA 41 at [11].

The employer lodged an appeal, which was dismissed by Deputy President Snell. On appeal, the Regulator intervened supporting the Arbitrator’s decisions and reasons.

The Deputy President adopted the Arbitrator’s reasons and added some further observations, including the following:

1. The decision in *Thomas* has been applied by the Court of Appeal (on a different issue) and on multiple occasions in the former Compensation Court and in the Commission.

2. The plain words of the statutory definition of ‘artificial aids’ had changed little since the decision in *Thomas*, and not in a way which would suggest the meaning of the words had altered (at [47]).
3. The presumption in *Re Alcan* was recently considered and applied by the High Court in *Fortress Credit Corporation (Australia) II Pty Limited v Fletcher* [2015] HCA 10 and by the Court of Appeal in *Public Service Association and Professional Officers’ Association Amalgamated Union of New South Wales v Industrial Relations Secretary on behalf of the Department of Justice* [2015] NSWCA 386.
4. Another reason the words should have the same meaning in section 59A as they do in section 59 is that they were “consistent with those provisions operating coherently together giving to effect to harmonious goals”, a reference to *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28.
5. The Deputy President also considered the the wording of the text. If the meaning is “literally clear and unambiguous” then effect is given to the clear words (at [101]) and Hutley JA in *Thomas* gave the words “their full literal meanings, consistent with the clear words of the provision” (at [103]).
6. There was nothing in the text or purpose of the section which would cause the words to be read narrowly so as only to apply to an external part of the body.

Both the Arbitrator and the Deputy President found it unnecessary to determine whether a proposed

knee replacement also fell within the meaning of 'artificial member' in section 59A(6).

An application to appeal the decision has been filed in the Court of Appeal.

***Australian Bushman's Campdraft and Rodeo Association Ltd v Gajkowski* [2017] NSWCCPD 54 and *The Camden Show Society Inc v Gajkowski* [2017] NSWCCPD 55**

The issue in these appeals concerned whether the claimant was taken to be a deemed worker and entitled to workers compensation, pursuant to clause 15(1)(c) of Schedule 1 to the 1998 Act. Clause 15(1)(c) provides that a person engaged for fee or reward to take part as an entertainer in any public performance in a place of public entertainment to which the public is admitted on payment of a fee or charge is, for the purposes of the 1998 Act, taken to be a worker employed by the person conducting or holding the contest or public or other performance.

The claimant regularly participated in rodeo events as a bull rider. He was taking part in a rodeo at the Camden Showground in the open bull riding category when he suffered a head injury resulting in severe and permanent brain damage, when his head struck a bull. The claimant held that he had been working towards earning a living as a professional bull rider and was pursuing the 'Australian Rookie Title' in the open bull category, when he suffered the injury. He claimed workers compensation against both Camden Show Society Inc (CSS) and Australian Bushman's Campdraft and Rodeo Association Ltd (ABCRA) as joint holders/conductors of the rodeo event.

The rodeo was an annual event run by CSS. ABCRA is a not-for-profit sporting organisation whose prime function is to administer and promote and encourage participation in the sport of rodeo and campdrafting. ABCRA provides administrative support to affiliated committees, of which CSS was one. ABCRA provides a list of events to CSS, which selects which ones to run. ABCRA advertised the event in its magazine. The rodeo competitors, judges and staff were selected from a list of ABCRA members provided by ABCRA. ABCRA also provided rules and regulations for the event. The claimant completed an online registration form and paid an entry fee through ABCRA's website. However, the rodeo event was staged by CSS, which provided set-up and venue, arranged for rodeo stock, and paid for advertising, protection, judges, staff and prize money.

The Arbitrator found that the claimant was a deemed worker pursuant to clause 15(1)(c). The Arbitrator awarded the claimant compensation, apportioning equal liability between CSS (as the holder of the event) and ABCRA (as the promoter of the event).

CSS and ABCRA appealed the Arbitrator's decision on several grounds. On appeal, it was accepted that for clause 15(1)(c) to apply there must be an agreement between the claimant and putative employer for valuable consideration. The President found that the Arbitrator erred in failing to deal with the question of whether the parties had entered into a legally enforceable agreement. Any prize money payable was contingent on winning a place in the rodeo. It was variable and at the discretion

of CSS. Further, the claimant was free to withdraw from the rodeo at any point in time. The agreement to participate in the rodeo was not an agreement for valuable consideration that would amount to an engagement for 'fee or reward' under clause 15.

In the alternative, the President also found that the Arbitrator erred in focusing on the concept of whether the claimant was an entertainer rather than whether the event amounted to a 'performance' for the purpose of clause 15(1)(c). The President held that the Arbitrator's finding that the claimant was an entertainer under clause 15(1)(c) was an error of law. The claimant paid to participate in the rodeo, and the event was in the nature of a contest rather than a performance.

The President also found that the Arbitrator erred in apportioning liability equally between CSS and ABCRA. ABCRA's involvement in the rodeo was administrative and facilitative but it did not hold or conduct the rodeo. CSS played the active role in holding and conducting the rodeo. It followed that, if the claimant were to succeed, CSS would be 100% liable for any compensation payable.

The President revoked the Arbitrator's determination. He found that the claimant was not a deemed worker under clause 15(1) and therefore was not entitled to any compensation. The President entered awards for the respondents in both cases.

Hunter Quarries Pty Limited v Alexandra Mexon as Administrator for the Estate of Ryan Messenger [2017] NSWSC 1587

Supreme Court, 22 November 2017, Schmidt J

Mr Messenger was employed as a machine operator by Hunter Quarries. In 2014 a 40-tonne extractor that he was operating tipped, crushing the cabin in which he was working. When colleagues attended they found no pulse, and he was pronounced dead on the scene by ambulance officers.

The deceased's wife made a claim for lump sum compensation of 100% whole person impairment. Proceedings were commenced in the Commission and referred to an Approved Medical Specialist for assessment. The dispute concerned whether the worker had reached maximum medical improvement. The AMS assessed 100% WPI, but on reconsideration changed the assessment to nil. The matter came before an Appeal Panel, which revoked the Medical Assessment Certificate and assessed 100% WPI.

Hunter Quarries then commenced judicial review proceedings in the Supreme Court.

Proceedings in the Supreme Court largely concerned the meaning of the term 'permanent impairment' as used in sections 65 and 66 of the 1987 Act and section 322(1) of the 1998 Act. The State Insurance Regulatory Authority was joined to the proceedings as amicus on the basis that the construction had consequences for the scheme. Hunter Quarries contended that the term did not encompass impairment so serious that death would inevitably follow within a short timeframe. It also contended that to construct otherwise would mean that a deceased worker could recover 'double compensation' for the one injury.

Her Honour rejected the construction of 'permanent impairment' proffered by Hunter Quarries. She held that it would introduce ambiguity into the statute.

Her Honour rejected the construction that 'permanent impairment' excludes impairments where death followed 'shortly after injury' as it would introduce limiting words into the statute. Such words could have easily been introduced into the statute but were not.

Her Honour also considered *Bourke v State Rail Authority (NSW)* (1999) 18 NSWCCR 429 and *Hillier v Gosford City Council* (Compensation Court (NSW), Armitage J, 22 June 1998, unrep), as well as the conflicting authority of *Ansett Australia v Dale* [2001] NSWCA 314, cases referred to by the Appeal Panel and which considered the construction of the word 'permanent'. Her Honour preferred the approach in *Dale*.

It was held that the Appeal Panel did not act beyond jurisdiction, having found relevant error. There was no 'double compensation' as contended by Hunter Quarries, and the certification of Mr Messenger's impairment of 100% was correct.

Hunter Quarries lodged an appeal to the Court of Appeal, and the matter is currently reserved before a five-member bench.

ANNUAL REVIEW

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Workers Compensation Commission
Level 20, 1 Oxford Street, Darlinghurst 2010
PO Box 594 Darlinghurst NSW 1300 Australia
T: 1300 368 040 F: 1300 368 018
www.wcc.nsw.gov.au