Submission No 13

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

Organisation: Workers Compensation Commission

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Standing Committee on Law and Justice

Inquiry into Opportunities to Consolidate Tribunals in NSW

Submission by the Workers Compensation Commission

November 2011

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Executive Summary

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

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

The Commission's dispute resolution process encourages the parties to be directly involved in an accessible and accountable process, to ensure that injured workers obtain a fair and quick resolution to disputes about workers compensation entitlements.

The Commission considers there are a range of factors supporting its retention as an independent, specialist Tribunal:

- Workers compensation is a complex and difficult area of law that requires specialist knowledge and experience gained through years of practice in the jurisdiction.
- Recent reforms to the Commission have placed considerable emphasis upon balancing timely service delivery with durable and quality decisions. To this end, in July 2010, the Attorney General appointed a cohort of Arbitrators with extensive knowledge and experience in workers compensation law. This has resulted in a significant drop in both arbitral appeal and revocation rates. There has also been a marked increase in the satisfaction levels of legal representatives practising in the Commission. A shift to a generalist or super tribunal may affect the significant improvements the Commission has recently made in the quality and durability of its decisions.
- The Commission places considerable emphasis on managing applications in an expeditious manner. Absorbing workers compensation disputes into a generalist tribunal has the potential to compromise our current focus on the early exchange of information and active case management.
- Other States that have adopted a super tribunal model have excluded workers compensation from their scope and focused instead on consolidating civil and administrative jurisdictions.
- The efficiencies and benefits to be derived from a shared services model have already been realised in the Commission, through our continued relationship with the Compensation Authorities Staffing Division (CASD).
- Of the four options canvassed in the discussion paper, none appears to contemplate integration of the workers compensation jurisdiction.

- The Commission is funded through contributions from the WorkCover Authority, rather than via a Treasury allocation. Consolidation into a super tribunal would require a significant change to the existing funding arrangements.

Factors Against Consolidation

There are a range of factors that militate against the integration of workers compensation disputes into a generalist or super tribunal. A brief discussion of each of those appears below.

Specialist Jurisdiction

Recent reforms to the Commission have placed considerable emphasis upon ensuring that Arbitrators who resolve and determine disputes have the technical expertise and experience in the jurisdiction to deliver durable and quality decisions. This has resulted in a significant drop in both appeal and revocation rates, and has led to a marked increase in the satisfaction levels of legal representatives who practise in the Commission. Any shift to a generalist or super tribunal has the potential to undermine the significant progress the Commission has made in improving the durability of decisions in a highly specialised and complex jurisdiction.

Impact on Timeliness

The Commission places considerable emphasis on managing applications in an expeditious manner. As a result, over 40 per cent of applications without appeals are finalised in three months, 90 per cent within six months and 100 per cent in 12 months.

This contrasts with workers compensation applications in the Commonwealth Administrative Appeals Tribunal (AAT). For example, in 2010/11, only 68 per cent of workers compensation applications in the AAT were finalised in 12 months and only 86 per cent in 18 months.

Absorbing workers compensation disputes into a generalist tribunal has the potential to compromise our current focus on the early exchange of information and active case management.

Other Super Tribunals

Other States that have moved to a super tribunal model – namely, Victoria, Western Australia and Queensland – have deliberately excluded workers compensation from their scope. In each of those States, the consolidation has focused on the civil and administrative jurisdictions only.

Relationship with CASD

Due to the Commission's close association with the Compensation Authorities Staffing Division (CASD) and our continued reliance on CASD for corporate services, the efficiencies and benefits to be derived from a shared services model have already been realised. Under a Shared Services Agreement, the Commission receives a suite of finance, human resources, information technology and other corporate support services.

Funding Arrangements

The Commission is funded through contributions from the WorkCover Authority, rather than a Treasury allocation. Consolidation into a super tribunal would require a significant change to the existing funding arrangements.

The Commission's annual expenditure in 2010/2011 was approximately $29.5 million. As a result of various savings achieved through the recent reforms, this was a substantial reduction from expenditure in 2009/2010 of $33.1 million.

Discussion Paper

Finally, it is noted that none of the four options contained in the discussion paper appears to contemplate integration of the workers compensation jurisdiction, or any of the other compensation jurisdictions in NSW (such as motor accidents, dust diseases, victims compensation etc).

Recent Reforms

In 2008, the Commission retained independent management consultants, Bendelta, to review the Commission's internal structure and operational framework. The review was commissioned partly in response to a high number of successful appeals from the decisions of Arbitrators in contested cases. In 2005, there were 331 appeals registered against a decision of an Arbitrator. By 2008, one in every three decisions of Arbitrators was appealed to a Presidential member and at least half of those appeals succeeded.

The review found a number of contributory factors leading to these outcomes, including:

- the contractual arrangements with Arbitrators, being sessional instead of full-time members
- the mix of expertise of Arbitrators
- the training and support mechanisms available to Arbitrators.

In 2007, the Commission had contracts with 54 sessional Arbitrators. Many of them only worked sporadically for the Commission and continued to engage in other professional undertakings at the same time. This made it particularly difficult, both for the individual Arbitrators and for the Commission, to invest sufficient resources into professional development to keep Arbitrators current with the latest developments in the law and procedure.

The review also concluded that the expertise of many sessional Arbitrators was heavily weighted towards experience in dispute resolution skills, and that some did not have the necessary knowledge and experience required to deliver durable decisions.

To address these problems, one of the methods adopted was to transition to full-time Arbitrators experienced in workers compensation law. They were supplemented by a smaller group of sessional Arbitrators who assist with medical appeals, excess workload in the metropolitan areas, and regional service provision.

The majority of Arbitrators are now former practising solicitors or barristers, who bring with them a wealth of technical expertise in the jurisdiction and knowledge of dispute resolution.

The Commission has also enhanced the training and resources available to Arbitrators. These include:

- The development of a comprehensive Practice Manual;
- Publication of case digests '*On Appeal*' and '*On Review*';
- A comprehensive peer review and appraisal system for Arbitrators; and

- The appointment of Senior Arbitrators, who can provide professional guidance to Arbitrators and assist the Commission with issues affecting Arbitrators.

The reforms have already had a significant impact in terms of the durability of arbitral decisions. In the first 12 months after the full-time Arbitrators were appointed, the appeal rate was reduced by 52 per cent (a total of 92 appeals) and the number of successful appeals has been significantly reduced. In the first six months after the new Arbitrators were appointed, the revocation rate fell by approximately 70 per cent.

Internal Structure

While these structural reforms were taking place, the Commission also engaged in a comprehensive internal organisational restructure. The restructure was undertaken to achieve greater operational efficiency and to facilitate a higher level of collaboration between the business units. All position descriptions were reviewed and redrafted in line with the NSW Public Sector Capability Framework. As a result of the restructure, the Commission achieved a net reduction of five full-time equivalent positions compared to 2009.

The revised structure created three distinct units:

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

Independent Evaluation

In June 2011, the Commission retained PricewaterhouseCoopers (PwC) to undertake an evaluation of the effectiveness of the recent reforms affecting the Commission. In particular, PwC examined the changes to arbitral services and the effectiveness of the internal structural changes. The final report was received by the Commission in September 2011. A copy of the report is enclosed for the information of the Standing Committee (Annexure A).

The PwC report concludes that the recent reforms have been broadly effective in improving the quality and durability of decisions. The report contains a range of positive findings about the success of the changes, including:

- The internal restructure was effective overall;
- The Commission has the right capability to deliver good client service;
- Arbitral decisions have become more durable and the resolution of matters more effective;

- Consistency of outcomes is relatively high;
- External stakeholders are more satisfied with the Commission's services; and
- Average time to resolve matters has improved, with a small sacrifice in timeliness between the three- and six-month bands.

The evaluation process was informed by a stakeholder survey, which included employers, insurers, workers and lawyers. The survey was undertaken by an independent agency, New Focus. The final report revealed improved satisfaction ratings across almost all areas of service, compared to results obtained in the previous 2008 survey.

Funding

The Commission does not receive a budget allocation from the Treasury, but is instead funded by contributions payable by the WorkCover Authority in accordance with Section 35(2)(e1) of the *Workplace Injury Management and Workers Compensation Act* 1998. The Commission is a not for profit entity (as profit is not its principal objective) and does not generate revenue.

A copy of the Commission's 2010/2011 Annual Accounts is at Annexure B. The accounts demonstrate that significant savings were achieved compared to 2009/2010 (from $31.1 million to $29.5 million). These savings resulted from a number of factors, including reduced contractor costs associated with the transition to in-house Arbitrators; reduced staffing costs resulting from a reduction in permanent positions; and other associated savings in areas such as travel and postage.

Shared Corporate Services

Section 374(4) of the *Workplace Injury Management and Workers Compensation Act* 1998 specifies that the WorkCover Authority shall provide facilities and staff for the Commission's operations. Since 2004, the Commission's corporate services have been provided by the WorkCover Authority. This includes a suite of services incorporating human resources, finance, information technology and site services. Until 2011, the arrangements were reflected in a Service Partnership agreement between the Commission and the WorkCover Authority.

In June 2009, the then Premier announced the creation of 13 principal agencies, including the creation of the Compensation Authorities Staffing Division (CASD). One of the primary objectives was to consolidate service delivery across corporate services in human resources, finance and information technology. As a result of that process, CASD now comprises the following agencies:

- Workers' Compensation Dust Diseases Board;

- Lifetime Care and Support Authority;
- Motor Accidents Authority;
- WorkCover Authority; and
- The NSW Sporting Injuries Committee.

While the Workers Compensation Commission is not formally part of CASD, in all material respects we form part of the cluster and receive corporate services under a new CASD Shared Services Service Agreement. There is a high level of cooperation and collaboration between the Commission and other agencies within the cluster.

Under the Shared Services Agreement, the Commission is provided with finance, payroll, information technology, human resources and other corporate service support, eliminating the need for the Commission to maintain these services in-house.

About the Commission

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

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

The Commission's dispute resolution process encourages the parties to be 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 Greg Pearce (Minister for Finance) is the Minister with responsibility for the Compensation Authorities Staffing Division (CASD), including the Workers Compensation Commission.

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

Section 373 brings into effect Schedule 5 of the Act, which contains provisions relating to members of the Commission, including Arbitrators. Pursuant to clause 4(1) of Schedule 5, the remuneration of a sessional Arbitrator (including travelling and subsistence allowances) in respect of work done as a member of the Commission is as the Minister determines. The remuneration of full-time members of the Commission is determined pursuant to *the Statutory and Other Officers Remuneration Act* 1975.

The legislation governing the Commission includes:

- *Workplace Injury Management and Workers Compensation Act* 1998;
- *Workers Compensation Act* 1987;
- *Workers Compensation Regulation* 2010, and
- *Workers Compensation Commission Rules* 2010.

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; and

- To establish effective communication and liaison with interested parties.

These objectives are both challenging and significant. Over the last 10 years, the Commission has endeavoured to build a solid foundation of achievement aligned with these objectives.

Rationale for Establishment of the Commission

The Workers Compensation Commission commenced operation on 1 January 2002. Prior to that time, there had been a statutory workers compensation scheme for a significant period (see the *Workers' Compensation Act* 1926), with disputes ultimately determined by the former Compensation Court. However, burgeoning costs and delays in the former system had caused public disquiet in the way compensation was being delivered. A new Act in 1987 dramatically changed the awarding of the common law damages for negligent actions in the workplace. In 1992, a new objective measure for the assessment of compensation for permanent impairment was introduced. Further changes occurred in 1998 to enhance injury management and claims management procedures. However, the court-based adversarial curial model continued, with the existing system leading to New South Wales having the highest rate of disputed claims in Australia. In the calendar year 2001, some 25,590 cases were filed in the Compensation Court. Only 10 per cent of those disputed major claims were settled through conciliation. Of those disputes lodged with the Court, fewer than 10 per cent proceeded to a judgment, with over 90 per cent of disputes being settled between the parties on the 'steps of the Court'.

The Commission's Model

In contrast to the old system, the Commission's model actively encourages the resolution of disputes at the earliest possible opportunity. If parties are unable to reach a settlement with the assistance of an Arbitrator, the same Arbitrator will proceed to determine the matter. Legal representation is permitted, but legal practitioners need to take a broad view of their role through actively participating in the achievement of an early resolution of the dispute. The majority of disputes are settled or discontinued before a determination is required.

The *Workers Compensation Commission Rules* 2011 (the Rules) set out the practices and procedures of the Commission, including the manner of lodgment of applications and responses and information exchange between the parties. In addition, the Commission has developed a number of forms, Practice Directions, and Registrar's Guidelines to assist parties through its processes. These are all available at the Commission's website www.wcc.nsw.gov.au.

One of the distinguishing features of Commission proceedings is the requirement for early information exchange between the parties. The information exchange provisions require each party

to the dispute to proceed on the basis of a full and frank exchange of information upon which they intend to rely as early as possible in the proceedings. Failure to comply with the information exchange provisions will prevent documents or information being admitted into evidence, except with leave. The timeframes for lodgment and service, and the penalties for non-compliance, mean that both applicant and respondent must be ready to proceed with their respective cases at the time an application for dispute resolution and any reply are lodged.

Functions

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: for example, arbitration, medical assessment, mediation, and expedited assessment. The path selected depends on the issues in dispute and the steps involved vary according to the complexity of the matter.

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

- Weekly compensation payments;
- Medical expenses compensation;
- Compensation to dependants of deceased workers;
- Injury management;
- Lump sum compensation for permanent impairment/pain and suffering;
- Work injury damages; and/or
- Costs.

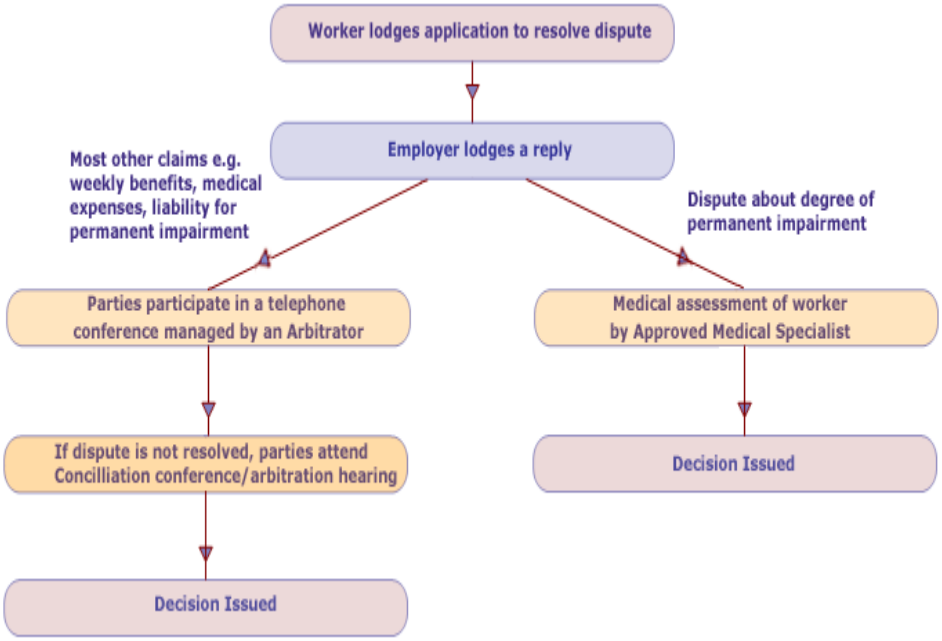
The Commission has an internal appellate jurisdiction that is a distinguishing feature of its operations. The Presidential Members of the Commission conduct appeals from the decisions of the Arbitrators. Similarly, Medical Appeal Panels determine appeals against assessments by Approved Medical Specialists.

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

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

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

The following simple guide shows how the process works:



If a dispute is referred to an Arbitrator, a telephone conference (teleconference) will initially be held. If the dispute does not resolve, or the parties do not settle at the teleconference, the Arbitrator may set the matter down for a face-to-face conference meeting called the conciliation conference/arbitration hearing.

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

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

Teleconference

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

The timetable contains the teleconference date. The Commission schedules teleconferences approximately 35 days after the date of registration.

The Commission books the teleconference using the details provided by the parties in the Application and the Reply. Written confirmation of the date and time for the teleconference is sent to all the parties.

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

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

During the teleconference, the Arbitrator will confirm:

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

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

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

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

Conciliation Conference

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

The Commission aims to hold conciliation conferences approximately 21 days from the date of the teleconference, unless the Arbitrator permits the issuing of directions to produce documents. If directions to produce documents are issued, the conciliation conference will be scheduled to occur after the directions have been dealt with and completed.

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

If the worker lives in Sydney, the meeting will be held in the metropolitan area. If the worker and/or his or her legal representative live in regional New South Wales, the Commission will arrange the conciliation conference according to its venue policy.

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

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

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

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

If the parties are unable to reach an agreement about the dispute, the Arbitrator will terminate the conciliation conference and call for a short intermission. After the break, the Arbitrator will commence the arbitration hearing.

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

Arbitration Hearing

If the dispute fails to settle at the face-to-face conciliation conference, then it moves into a more formal phase – the arbitration hearing.

This occurs on the same day, following the conciliation conference. The proceedings are informal, but the hearing is recorded and is open to the public. Parties may obtain a copy of the sound recording of the arbitration hearing by contacting the Registry.

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

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

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

If the parties are unable to come to an agreement, the Arbitrator will make a legally-binding decision about the dispute. The Arbitrator may advise the parties of the decision at the end of the hearing. More commonly, however, the Arbitrator will reserve his or her decision, and a Certificate of Determination and Statement of Reasons will be issued, usually within 21 days of the hearing.

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

Arbitral Appeals

The President is responsible of the operation of the internal arbitral appeal process in the Commission. Appeals from decisions of the Commission constituted by an Arbitrator are made to Presidential members pursuant to section 352 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the 1998 Act).

Following legislative amendments that commenced operation on 1 February 2011, an appeal against a decision of an Arbitrator has once again been limited to a determination as to whether the decision appealed against was affected by error. This amendment reverses the effect of the decision of the Court of Appeal in *Sapina v Coles Myer Ltd* [2009] NSWCA 71, where the Court found that an arbitral appeal is to proceed by way of a full review of the Arbitrator's decision.

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

If the Presidential member is satisfied that he or she has been provided with sufficient information, the appeal can be determined on the documentary material without holding a conference or formal hearing. While the majority of arbitral appeals are determined 'on the papers', a number of appeals require a full hearing.

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

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

Pre-filing Strike Out Applications

Workers who allege injury as a result of their employer's negligence may bring court proceedings to recover work injury damages. Before a claimant can commence proceedings for the recovery of work injury damages, he/she must serve a pre-filing statement. Under section 151D, proceedings cannot be commenced more than three years after the date of injury, except with the leave of the court in which the proceedings are to be taken. Time does not run in certain circumstances, including while a pre-filing statement remains current.

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

Questions of Law

The President hears and determines questions of law. From time to time, a novel or complex question of law may arise in arbitral proceedings. An Arbitrator, by his or her own motion, or on application by a party under section 351 of the 1998 Act, may refer a question of law to the President for determination. Leave to refer a question of law is granted only if the question is 'novel or complex'. In determining whether or not to grant leave to refer a question of law, the President will take into account, among other things, whether the question involves an interpretation of legislative provisions not previously considered at a Presidential or appellate level.

Despite the reference of a question of law to the President, the Arbitrator will, wherever possible, continue to progress the proceedings. The exception to this course will be where the question of law concerns the Arbitrator's jurisdiction to make a determination (section 351(4) of the 1998 Act).

Common Law – Mediation

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

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

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

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

Medical Assessments

The Registrar refers 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 in assessments certified by 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; and
- Whether the degree of impairment is fully ascertainable.

Appeals against Medical Assessment

Registrar's Gatekeeper Function

Parties to a medical dispute may appeal against an assessment of permanent impairment by an Approved Medical Specialist pursuant to section 327 of the 1998 Act. Following registration of the medical appeal application and the exchange of submissions between the parties, the Registrar has a legislative requirement to exercise a "gatekeeper" function regarding whether a ground of appeal as specified in section 327(3) of the 1998 Act has been made out in the appeal application. Solicitors in the Legal and Medical Services Branch, under the delegation of the Registrar, make the "gatekeeper" determinations.

An appellant may rely on all or any one of four grounds of appeal. The majority of medical appeals rely on the ground that there is a "demonstrable error" contained in the Medical Assessment Certificate.

If the medical appeal application is made on the ground that either the assessment was made using incorrect criteria (section 327(3)(c)) or that the Medical Assessment Certificate contains a demonstrable error (section 327(3)(d)), or both, the application must be made within 28 days after the issuing of the Medical Assessment Certificate.

If the Registrar's delegate is satisfied that a ground of appeal is made out, the appeal application is referred to an Appeal Panel chosen by the delegate. The delegate may refer the matter for further assessment or reconsideration as an alternative to an appeal.

The Medical Appeal Panel

The role of the Medical Appeal Panel is to conduct a review of the grounds of appeal raised by the appellant. However, it may also review other grounds of appeal, if it gives the parties an opportunity to be heard on those grounds. Medical Appeal Panels are comprised of an Arbitrator and two Approved Medical Specialists.

The Medical Appeal Panel reviews material available to the Approved Medical Specialist (AMS) and documents filed in the medical appeal proceedings, including any additional information relied upon by the appellant. Where appropriate, the Medical Appeal Panel may deal with the medical appeal 'on the papers' without further submissions from the parties; or, the Medical Appeal Panel may decide to conduct a re-examination of the worker. It may also hold an assessment hearing where the parties may make oral submissions.

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

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

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

Costs Assessments

The general costs order in the Commission is that costs are to be as agreed or assessed. Failing agreement, application may be made to the Registrar to assess costs. Applications may be made for party/party costs, solicitor/client costs or agent/client costs.

Assessments are undertaken by delegates of the Registrar. Delegates have jurisdiction to assess costs in relation to workers compensation claims and disputes, and work injury damages claims. Prior to 2010, the majority of costs assessments were delegated to sessional Arbitrators. In 2010, the Commission embarked on a transition to assessment of costs by Solicitors in the Legal and Medical Services Branch, effectively making the assessment of costs a core business function of the Branch.

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

Expedited Assessments

The expedited assessment process provides for faster resolution of disputes than the general dispute resolution process. Matters are generally set down for a teleconference with the parties. Teleconferences are usually conducted approximately two weeks after lodgment of the dispute application. Conciliation conferences/arbitration hearings are not scheduled and there are no provisions to issue directions for production. Filing of a Reply is optional and submissions are usually finalised during the teleconference. The filing of written submissions is accommodated for the more complex disputes. Additional material is usually filed and served prior to the teleconference.

Expedited assessments may be divided into three categories:

1. Interim Payment Directions;
2. Small Claims; and
3. Workplace Injury Management Disputes.

Expedited Assessment Officers in the Commisison’s Legal and Medical Services Branch conciliate and determine these disputes under delegation of the Registrar.

Interim Payment Directions

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

An IPD is intended to ensure early intervention where an insurer fails to commence payment of compensation or fails to determine a claim within the required time, although an IPD may also be made when an insurer disputes liability and a dispute notice has been issued.

If a dispute fails to resolve at the teleconference, the delegate of the Registrar will determine the dispute by reference to the documents lodged and submissions made in the proceedings. If the dispute is determined in favour of the worker, the Expedited Assessment Officer will direct payment by the insurer, by way of an IPD. An Expedited Assessment Officer is to presume that an IPD is warranted in circumstances prescribed by the legislation. Decisions of Expedited Assessment Officers are not published.

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

Small Claims

In some cases, Expedited Assessment Officers may determine past weekly compensation benefits claims for a closed period of up to 12 weeks under the “small claims” provisions in sections 304A and 304B of the 1998 Act. Under the “small claims” provisions, the delegate of the Registrar exercises arbitral functions and a dispute is determined by the issuing of a Certificate of Determination. The determination is subject to the appeal provisions in section 352 of the 1998 Act.

Workplace Injury Management Disputes

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

- There is no injury management plan or the plan has not been followed;
- There is no return to work plan or the plan has not been followed;
- Suitable duties have not been provided to the injured worker, and/or
- The worker’s capacity to perform duties is in dispute.

Composition and Structure

Members

The Commission currently consists of the following Members:

- The President – Judge Greg Keating
- Two Deputy Presidents – Bill Roche and Kevin O'Grady
- Two Acting Deputy Presidents – Tony Candy and Lorna McFee
- The Registrar – Sian Leathem
- Three full-time Senior Arbitrators – Eraine Grotte, Deborah Moore and Michael Snell
- 15 full-time equivalent Arbitrators
- 18 sessional Arbitrators

The Attorney General appoints the Members of the Commission.

President and Deputy Presidents

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

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

The Registrar is responsible for the administrative management of the Commission and is the functional head of the Commission's services.

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

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

Senior Arbitrators

Following the passage of the *Workers Compensation Amendment (Commission Members) Act* 2010, three full-time Senior Arbitrators were appointed by the Attorney General in August 2010. The Senior Arbitrators assist in the training, management and appraisal of Arbitrators, and contribute to the development of practice and procedure in the Commission.

Arbitrators

After a competitive selection process in 2010, the Attorney General appointed 15.8 in-house Arbitrators (12 full-time and four part-time) based on their knowledge and experience in workers compensation law. In addition, the Attorney General also appointed 18 sessional Arbitrators to assist with medical appeals, regional allocations and any overflow in the metropolitan workload. All Arbitrator appointments were for a period of three years.

Approved Medical Specialists

There are approximately 140 Approved Medical Specialists holding appointments with the Commission located throughout New South Wales. Approved Medical Specialists are appointed for a three-year term by the President in consultation with the Workers Compensation and Workplace Occupational Health and Safety Council.

Approved Medical Specialists are highly-experienced medical practitioners from a variety of specialities. To be appointed, they must have completed the necessary training in the WorkCover guidelines to assess whole person impairment. Their applications undergo a rigorous assessment for impartiality. In this way, the Commission seeks to ensure that the Approved Medical Specialists will provide an independent and unbiased opinion about the medical condition or 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 Approved Medical Specialist will examine the worker, consider the appropriate reports and material 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. There are 28 Mediators on the Commission's panel. They are appointed by the President for a three-year term. All the Mediators on the panel have extensive experience in alternative dispute resolution, as well as knowledge of the workers compensation jurisdiction.

Mediators are required to use their best endeavours to bring the parties to a negotiated settlement. They conduct mediation conferences in the Commission's Oxford Street premises and in other regional locations when required.

Medical Appeal Panels

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

Staff

There are approximately 100 full-time equivalent 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.

A copy of the Commission's staffing structure is at Annexure C.

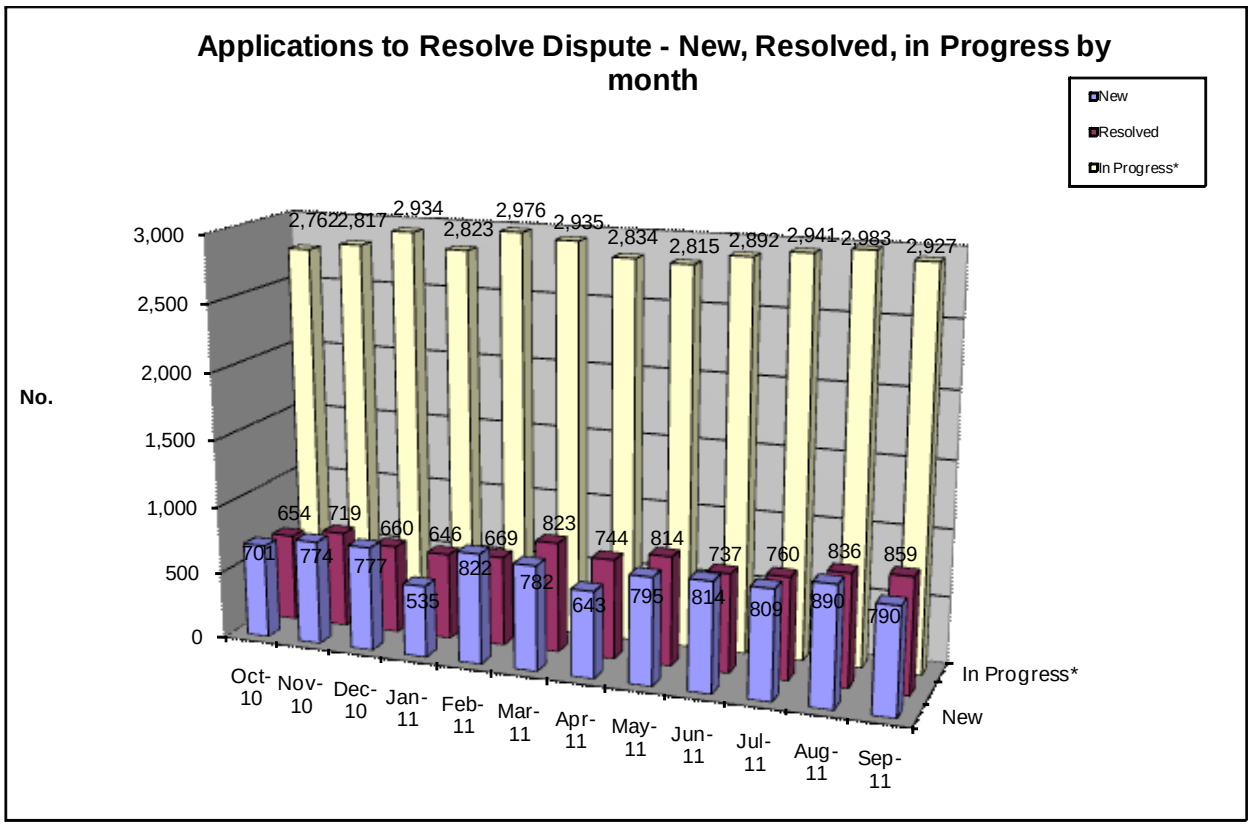
Workload

During 2010, the total number of applications received by the Commission amounted to 11,592. This is a slight increase of one per cent from 2009 and continued a stable workload trend over the past three calendar years.

Application Type	2008	2009	2010
Application to Resolve a Dispute (Form 2)	8,898	8,707	8,921
Expedited Assessments (Form 1 and Form 1A)	558	586	516
Workplace Injury Management Dispute	154	124	139
Registration for Assessment of Costs	245	256	240
Commutations (Form 5A) and Redemptions (Form 5B)	163	267	227
Mediations (Form 11)	598	705	848
Arbitral Appeals (Form 9)	161	185	135
Medical Appeals (Form 10)	655	606	566
TOTAL	**11,432**	**11,436**	**11,592**

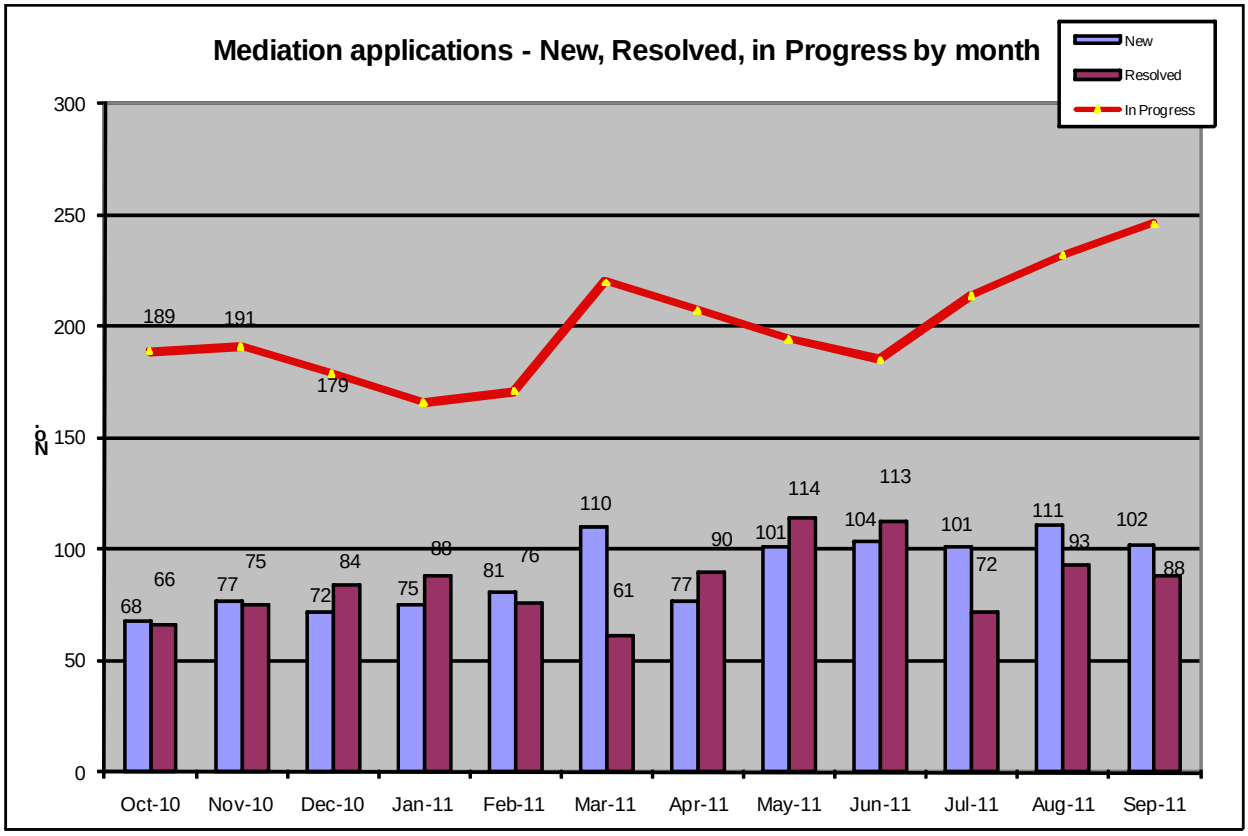
Applications to Resolve Dispute

The Commission has seen a moderate upward trend in Form 2 applications during the current calendar year. For example, Form 2 lodgments have averaged 765 per month, compared to the previous long term average of 750 per month.



Applications to Mediate

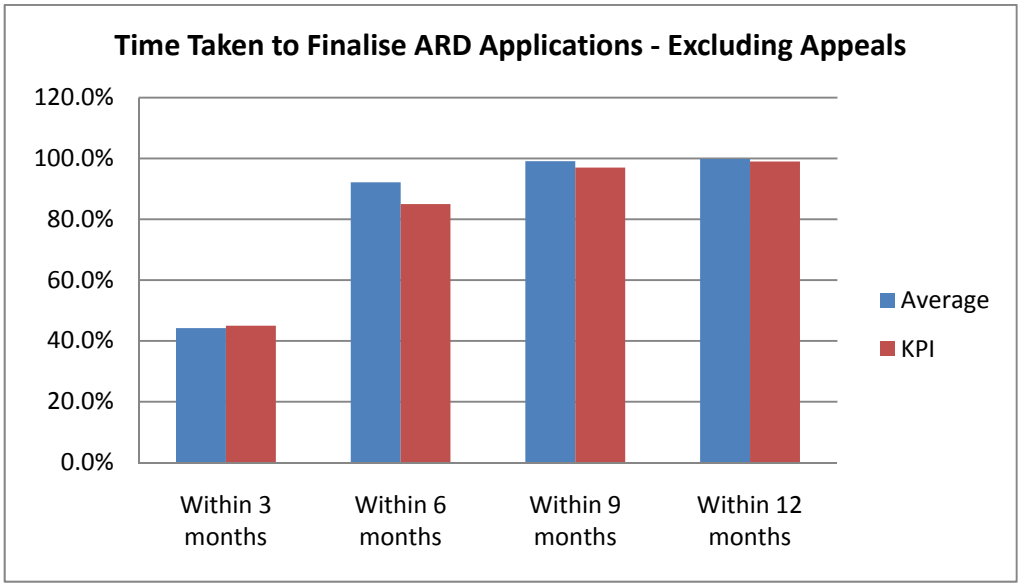
There has been a more marked increase in mediation applications (Form 11) over the past few years. For example, in 2010, there was an increase of 20 per cent from 2009 levels, representing a cumulative increase of 42 per cent from 2008 levels. In 2011, the Commission expects to exceed 1000 mediation applications for the first time.

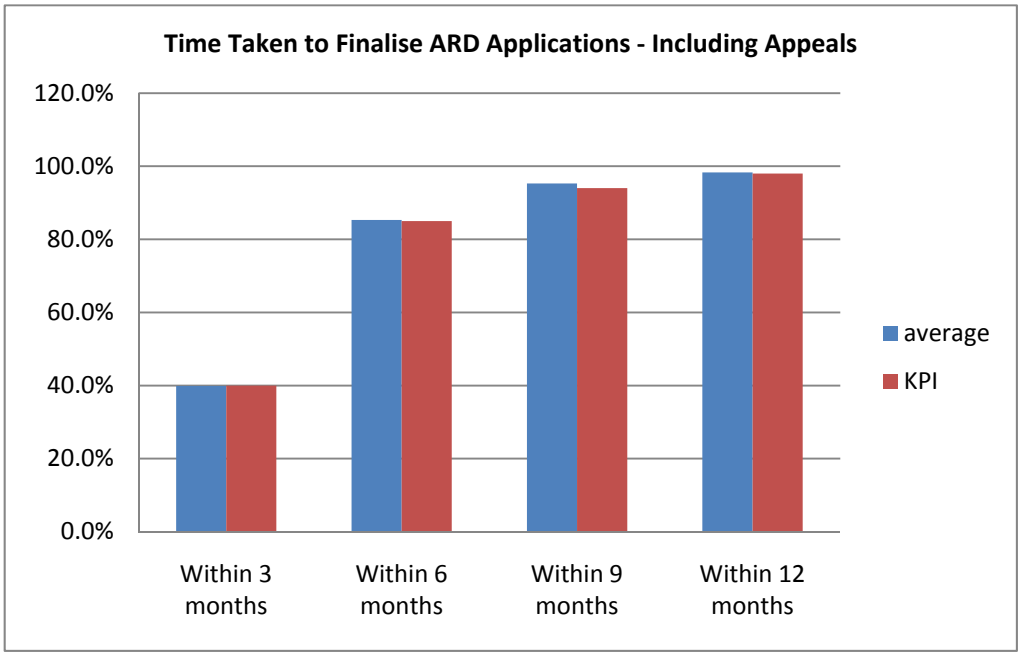


Timeliness

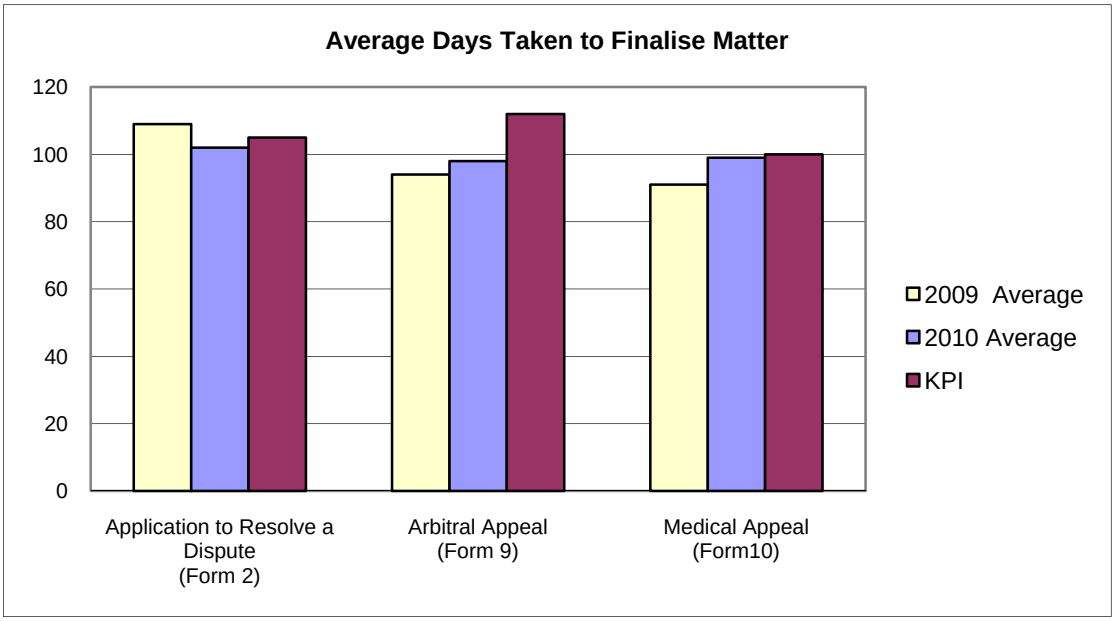
The Commission has developed a series of key performance indicators (KPIs) designed to monitor our effectiveness and efficiency in finalising dispute applications, both including and excluding appeal matters.

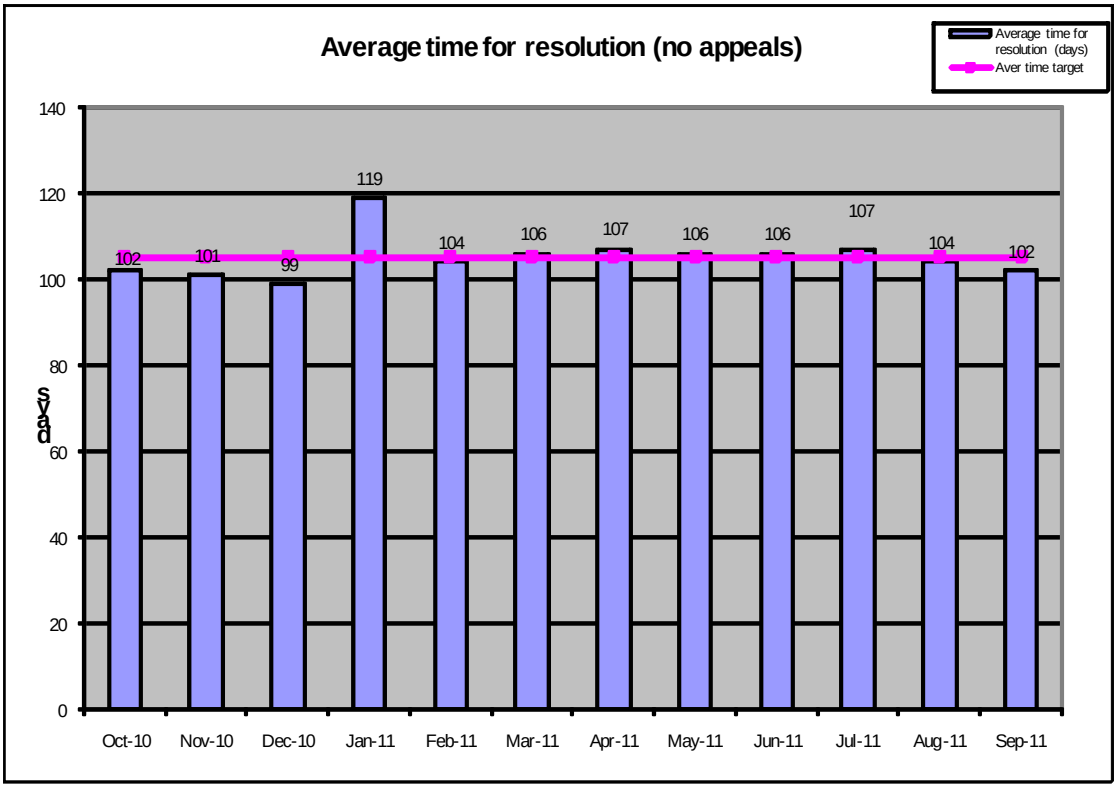
The Commission generally meets or exceeds its KPIs, finalising approximately 44 per cent of all ARD applications (excluding appeals) in three months or less and approximately 90 per cent within six months. All ARD applications are finalised within 12 months, unless they have been the subject of an arbitral or medical appeal.





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





Further data on workload, outcomes and timeliness is available in the Commission's Annual Review (Annexure D).

Annexures

A. PricewaterhouseCoopers Evaluation

B. 2010/2011 Financial Statements

C. Organisational Structure

D. 2010 Annual Review