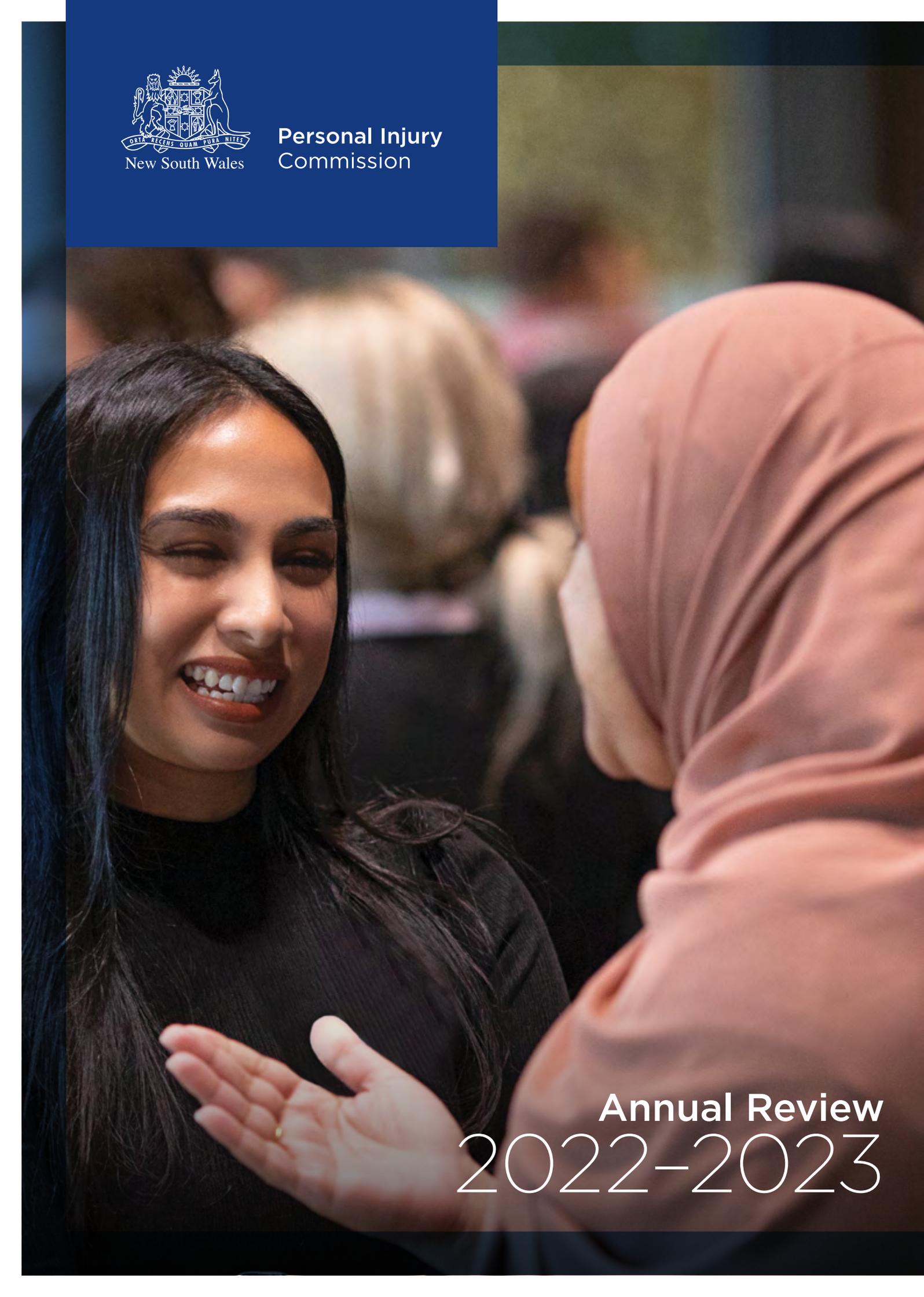




Personal Injury
Commission

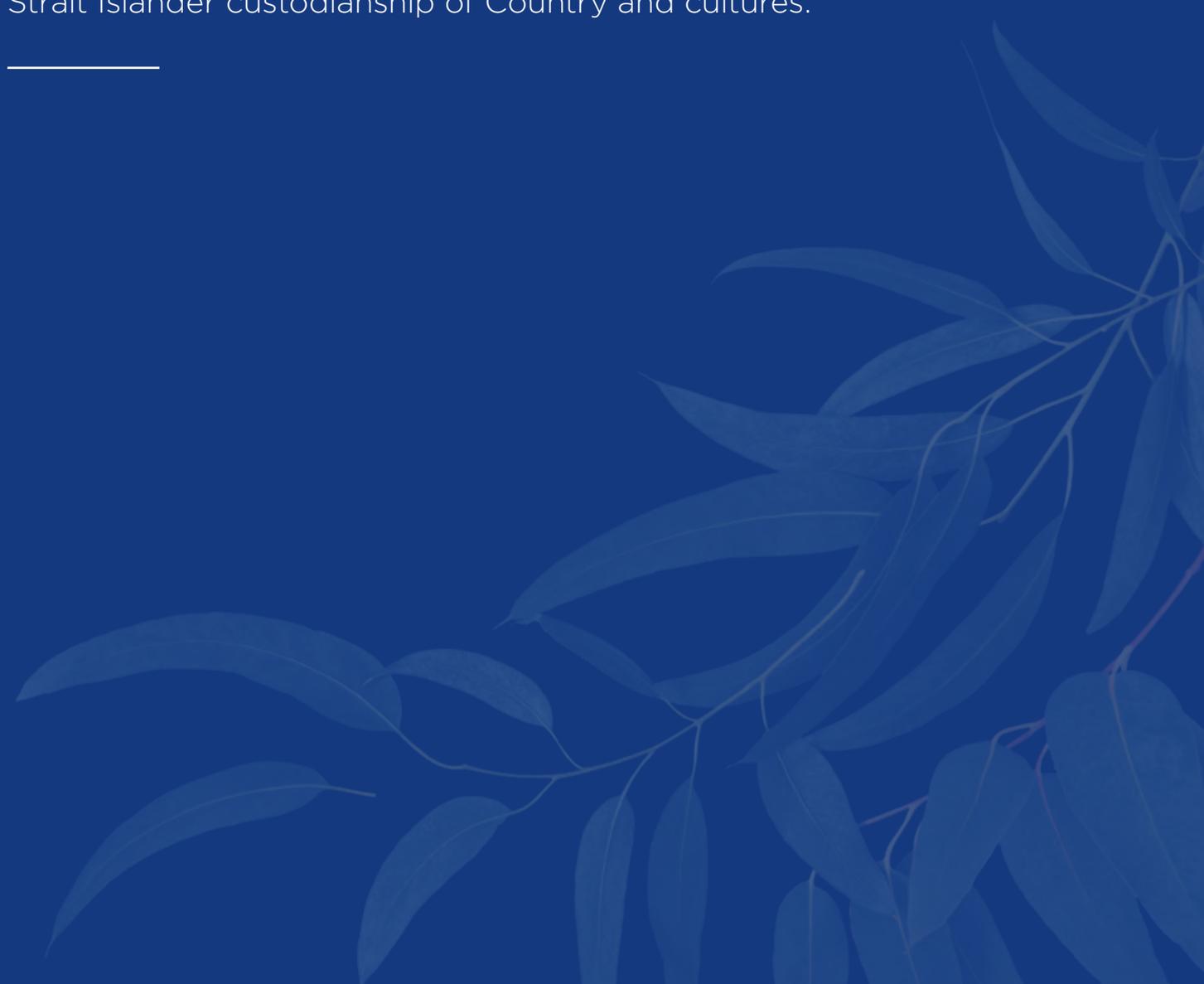
A photograph of two women in conversation. The woman on the left has long dark hair and is smiling, wearing a black top. The woman on the right is wearing a pink hijab and a dark top, with her hand raised as if gesturing. The background is blurred, showing other people in a social setting.

Annual Review
2022-2023

Acknowledgement of Country

The Personal Injury Commission acknowledges, respects and values Aboriginal peoples as the Traditional Custodians of the lands on which we live, walk and work. We pay our respects to Elders past and present. We recognise and remain committed to honouring Aboriginal and Torres Strait Islander peoples' unique cultural and spiritual relationships, and continuing connection to their lands, waters and seas. We acknowledge their history here on these lands and their rich contribution to our society.

We also acknowledge our Aboriginal employees who are an integral part of our diverse workforce, and recognise the knowledge embedded forever in Aboriginal and Torres Strait Islander custodianship of Country and cultures.





Personal Injury Commission

Office of the President

The Hon Anoulack Chanthivong, MP
Minister for Better Regulation and Fair Trading
Minister for Industry and Trade
Minister for Innovation, Science and Technology
Minister for Building
Minister for Corrections
52 Martin Place
SYDNEY NSW 2000

Dear Minister

I am pleased to submit the 2023 Annual Review for the Personal Injury Commission of New South Wales.

This review covers the reporting period from 1 July 2022 through to 30 June 2023.

The review has been prepared in accordance with s 66 of the *Personal Injury Commission Act 2020* (NSW).

Following the tabling of the review in the Parliament, it will be made available for public access on the Commission's website at www.pi.nsw.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gerard Phillips', written over a horizontal line.

His Hon Judge G Phillips
President

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1. The reporting year in review

President's report



Judge Gerard Phillips, President

In accordance with section 66 of the *Personal Injury Commission Act 2020* (the Act), I present the 2022–23 Annual Review. This Review covers the reporting period from 1 July 2022 to 30 June 2023 as required by the Act.

I spent time re-reading last year's Annual Review in the preparation of this President's report. That Review necessarily covered the most intense period of pandemic disruption to our operations. This reporting year started with some pandemic impacts continuing to be felt, but by August 2022, things were beginning to get back to a semblance of normality. But the hangover from the pandemic remained which required a sustained dedicated effort to address. Staff and members had returned in person to 1 Oxford Street, a very pleasing event after two years of remote working. Importantly, in-person medical examinations were able to be scheduled in large numbers, sometimes approaching 1,000 appointments a month across both divisions, in a determined effort to address the pandemic-inspired backlogs.

Standing the two years beside each other reminds me of the first sentence of Dickens' *A Tale of Two Cities*, "It was the best of times, it was the worst of times." And so it has been with the Personal Injury Commission (Commission). We have truly been through a period of both the best and worst. The work undertaken during the hard days of the pandemic is now bearing fruit as a review of this President's report and the following pages will reveal. The number of completed matters during the reporting year was impressive and particularly so for a relatively new institution formed in the middle of the great 2020–22 pandemic.

Firstly, to the backlog of medical disputes in motor accidents matters (pre-1 January 2022 filings). The motor accidents legislation operates a different dispute resolution model from the Workers Compensation Division. In motor accidents, the majority of matters require an in-person medical examination with one of the Commission's expert medical assessors. This is the case even for a very modestly valued claim, for example a medical treatment dispute worth \$500. It is for this reason that the pandemic impact on the Motor Accidents Division was more acute and long lasting. At the commencement of the calendar year 2022, the backlog of motor accidents medical disputes totalled 4,658. By the end of the 2022-23 reporting period that was less than 600, reducing to 486 at the time I was completing this report on 7 August 2023. At the same time the Commission was dealing with the defined backlog, it was still allocating appointments to claims filed in 2022 and 2023. Additionally, for most of the Commission's first two years of operations, motor accidents medical disputes on hand numbered over 4,000. This number was 3,485 at the time of writing and is on track to settle around a much more manageable work on hand number of approximately 2,500 by the end of the 2023-24 financial year.

Once the number of medical dispute applications on hand comes down, waiting times for appointments in the high use specialties will reduce. Until that time, unfortunately, there will continue to be delays in the allocation of appointments in these specialties. The key performance indicators (KPIs) which have been reported upon for the first time in this Review reflect these delays as a result of these challenging circumstances. A review of the KPIs reveals the delays that continue to be experienced and which will last into 2024. But the path out of these delays is clear and their reduction will continue to be a priority activity over the next six to 12 months.

Obviously, one would rather not have cases delayed, knowing that there is an injured person awaiting the finalisation of their dispute. Anne Britton, the Chair of the Council of Australasian Tribunals, put the situation in perspective when addressing the Commission's staff in March 2023. Anne's view was as follows: "The Commission's modest backlog caused by the inability to conduct in-person medical assessments during part of the Sydney lockdown, may keep President Phillips awake at night but it is a backlog that is the envy of those leaders of tribunals and courts managing backlogs with no end in sight."

Anne's full speech can be viewed on the Commission's website¹, and it provides terrific insight on the broader landscape as courts and tribunals emerge from the pandemic.

Secondly, in June 2023, we commissioned our long-awaited new digital platform called 'Pathway'. The Principal Registrar will deal with Pathway's commissioning in more detail later in this Review, but I will say this. This was a complex project which the Commission has been working on for the past 18 months. We are still early in the new platform's life, but all the signs are promising. It is stable, it is working as intended and the feedback both internally and externally has been positive. The first phase of Pathway was delivered on budget with only minor timeline variations to ensure a good user experience. Work is now underway for the commissioning of this platform in the Workers Compensation Division in 2024.

This project has been a marvellous collaboration between our own Digital Transformation Directorate, our service provider SBC IT, and the Department of Customer Service. It positions the Commission as a leader in the wholly electronic delivery of modern dispute resolution services, a practice which, as outlined by Philippe Doyle Gray in the *Law Society Journal*², is likely to spread.

1 <https://pi.nsw.gov.au/resources/papers-and-presentations/speeches-to-the-commission/speech-by-the-anne-britton-at-the-personal-injury-commission-two-year-anniversary>

2 Doyle Gray, Philippe (2023), 'Paperless practice 3: Marshalling documentary evidence without paper', *Law Society Journal Online*, www.lsj.com.au/articles/paperless-practice-3-marshalling-documentary-evidence-without-paper/

1. The reporting year in review (continued)

Thirdly, the reporting period has been busy for the Workers Compensation Division. Filings in that division are up on average 16% as compared to pre-pandemic filings. It was also a year where large numbers of appeals have been filed. Indeed, during this reporting year, the Commission experienced an increase in appeal filings not seen since 2018. In order to deal with these increased filings, we have recruited six new sessional members and an additional Acting Deputy President.

In terms of the Commission's jurisprudence, the Court of Appeal, for the first time, was called upon to consider the application of the principle of *Anshun* estoppel to statutory compensation schemes. In *Miller v Secretary, Department of Communities and Justice* [2022] NSWCA 190 it was held that the *Anshun* principle does indeed have application to such schemes.

Fourthly, the first review of the Act was undertaken by the State Insurance Regulatory Authority. This took place in accordance with section 68 of the Act and was provided to the Parliament in August 2023.

In terms of the year ahead, we will continue our focus on operational performance and cyber security. We are looking forward to more normal operating conditions enhanced by the Pathway system but cyber security will be a priority. The past 12 months has seen our community targeted by threat actors in regular hacking events. The world has become a much more dangerous place when it comes to cyber security and we will be working with our stakeholders to take such steps as we can to protect the Commission's IT integrity.

Later in this Review are two splendid articles by Principal Member John Harris and Senior Member Brett Williams.

Principal Member Harris deals with the federal diversity jurisdiction and Division 3.2 of the Act. Whilst some may consider that this topic has a certain trainspotting quality associated with it, it is an issue which goes to the fundamental question of whether a decision-maker has authority to decide the particular matter before them. This issue has been quite troubling for practitioners to come to terms with. In the Motor Accidents Division, this question has been all but settled by the District Court decision of *Rafiqul Islam v Transport Accident Commission of Victoria and Heather Worldon v Transport Accident Commission of Victoria* [2022] NSWDC 582, which is referred to in the article. I expect that judicial determinations on this issue will be made in relation to workers compensation matters during the coming year.

Senior Member Williams, in a well-researched piece, traces the development of motor accidents jurisprudence since its inception. Surprisingly, there was little in the law reports early in the life of this legislation and, as Brett reports, this was a result of motor accidents cases being heard before juries! The past is indeed a different world.

I record my thanks to the Commission's Executive Leadership Team, Marianne Christmann, Principal Registrar and our Division Heads, Marie Johns and Glenn Capel for their tireless work and commitment during the year. I also pay tribute to our decision-makers, both legal and medical, for another year of high quality and quantity work. Finally, my thanks go to the Commission's staff. This dedicated group of public servants has been through a lot in the past two years. They have emerged from those times with vastly increased skills and enthusiasm for the important work they perform for the injured people of NSW. There is much to look forward to as the Commission enters its next stage of development.

Judge Gerard Phillips
President

Principal Registrar's report



Marianne Christmann,
Principal Registrar

The Personal Injury Commission celebrated its second anniversary on 1 March 2023, a significant milestone for this reporting period. I am immensely proud of all our people and what we have achieved for the injured people and tribunal users of NSW.

We saw all our people – members, merit reviewers, mediators, medical assessors and staff – united in the Commission's mission to lead the way in delivering quality, innovative and cost-effective justice for personal injury disputes. Our people worked tirelessly to lay the foundations for efficient dispute resolution services in the Commission. We also achieved major milestones from our Strategic Plan and began transitioning to a more business-as-usual operating environment as we headed into our third year.

Creating a seamless digital journey for injured people and tribunal users through Pathway

A key achievement has been the development and subsequent launch of the Pathway single digital case management platform for motor accidents users in June 2023. This is an important step in realising our strategic priority to create a seamless digital journey for injured people and tribunal users through a single digital platform. Extensive work was undertaken throughout 2022-23 to build Pathway. We consulted with our stakeholders and users on their needs and collaborated with our service provider, SBC IT, to deliver a platform that met user requirements. Chapter 4 describes that journey in more detail.

The result is a much more intuitive, efficient and user-friendly platform that replaces the legacy motor accidents platform. Early feedback has been positive as our users familiarise themselves with Pathway and we will continue to enhance the platform to improve its useability. We are also on track to bring our workers compensation users onto Pathway towards the middle of 2024, enabling the harmonisation of the digital platform.

Delivering strong performance and reporting on our KPIs for the first time

Through the extraordinary efforts of our people, we exceeded our workflow KPIs with an overall clearance rate of 110% for the Commission for 2022-23, including 127% for motor accidents disputes and 98% for workers compensation. This means we finalised many more disputes than we received. In motor accidents, this was driven predominantly by the resumption of in-person medical assessments for physical injuries. The President in his report highlighted our efforts in significantly reducing the backlog of COVID-19 delayed medical disputes which will be almost eliminated in 2023.

1. The reporting year in review (continued)

We are also tracking well against our KPIs for early dispute resolution, either meeting or exceeding our targets for disputes that are settled without proceeding to formal determination.

However, there is still more work to do, particularly around the time taken to resolve disputes. This will be an area of continued focus in the year ahead and I expect our resolution times will improve, especially as overall matters on hand reduce further. You can view the Commission's performance against each of our KPIs in Chapter 9.

Creating greater accessibility to our services for injured people across NSW

Efforts to ensure the Commission remains accessible and affordable for all injured people, no matter where they live in NSW, continued through 2022-23. Technological upgrades to the hearing rooms at 1 Oxford Street were completed, allowing for in-person, virtual or hybrid dispute resolution events. We also continue to access local courts across regional NSW for dispute resolution events as required.

We launched our pilot hybrid venue in Dubbo, partnering with Service NSW to provide virtual access to the Commission's services in a regional location with access to high-speed internet in a private, soundproof room with specially trained Service NSW staff. Subject to the successful completion of the pilot, the Commission will examine other potential sites in Service NSW regional sites.

We also completed our first full year of operating our purpose-built medical suites in the reporting period, ensuring access to high utility medical assessors such as psychiatrists and orthopaedic specialists for the injured people we serve. More than 1,600 medical assessments have now been conducted in the suites, contributing greatly to the reduction in the medical backlog.

Investing in our people

Our people are what makes the Commission a success, and we have strengthened our commitment to developing a collaborative, inclusive and supportive workplace culture where we invest in our people's future, ensuring they have the right tools and working environment to succeed.

We continued to attract and retain a highly capable specialist workforce through a series of targeted recruitment actions over the year. We were delighted to welcome one Acting Deputy President, six workers compensation sessional members, 18 medical assessors, and several new staff members, bringing the staff number to 164.

We have continued to involve our people in developing and improving our ways of working, through virtual, hybrid and in-person conferences and events. We also invested in our people through ongoing professional development activities. We launched our wellbeing program, with designated champions to drive initiatives and develop a calendar of wellbeing-focused events and education sessions which enable our people to come together with their peers. We will develop a whole-of-Commission Wellbeing Framework in 2023-24.

Our programs over the year have enabled us to grow the strong social fabric, professionalism and reputation of the Commission which are critical to achieving the strategic priorities in our Strategic Plan. This puts us in a strong position to continue to serve the injured people of NSW as we move forward together in our third year of operations.

In conclusion, I can report the Commission made great progress in its second full year, which you will see documented in this Annual Review. I would like to personally thank the President and Division Heads for their support, as well as all the staff, members, merit reviewers, mediators and medical assessors for their commitment, hard work and resilience over this year. I would also like to express my gratitude to all the Commission's users for their patience as we have continued to work through backlogs, refined our practices and procedures and introduced a new case management system.

I am genuinely looking forward to the year ahead to continue to deliver our key programs and services and see the service experience we provide to the injured people of NSW and all tribunal users improve even more.

Marianne Christmann
Principal Registrar



A two-year reflection

The Personal Injury Commission's people came together on 1 March 2023 to reflect on the first two years of operation. It was an opportunity to celebrate the achievements, acknowledge the challenges and recognise the diligent efforts undertaken by all to serve the injured people of NSW.

Anne Britton, Chair of the Council of Australasian Tribunals, delivered the keynote address, describing the Commission's results in those first two years as extremely impressive, particularly when considering the challenges posed by the COVID-19 pandemic.

"At the very best of times, the task of merging individual tribunals is difficult ... Add to those challenges, a pandemic with no apparent end in sight, at least for part of it, and you have the potential for a perfect storm. However, on any measure, unlike many courts and tribunals throughout Australia and New Zealand, the Commission has weathered that storm, and weathered it extremely well," Ms Britton said.

Speaking on the Commission's efforts to address the COVID-induced medical backlog, Ms Britton acknowledged the Commission avoided the major backlogs impacting other courts and tribunals. She also highlighted the Commission's accessibility as a key success factor during the pandemic, saying, "those courts and tribunals, such as the Commission, which before the pandemic, had put in place or made significant moves to put in place, case management systems which enabled parties to engage electronically and to participate in hearings remotely, fared particularly well. I count the Commission on that list."

Ms Britton later added that, "Clever and effective use of technology enabled tribunals such as the Commission to continue to be accessible to the people they were established to serve throughout the pandemic."

But it was the people of the Commission, in particular, who have ensured its success.

"Without the commitment and resilience of members and staff, the figures about which the Commission can now so proudly boast would undoubtedly have been very different," Ms Britton said.

"Congratulations on what you have achieved in the past two years."



Top: Anne Britton addresses the Commission's two-year anniversary event.

Above: The event saw all staff come together in person.

2. Achievements in the reporting year

Applications



15,526

dispute applications registered



17,086

dispute applications finalised

Dispute resolution events



8,458

medical assessments held



6,167

preliminary conferences held



2,039

conciliation conferences/ arbitration hearings held



262

assessment conferences held



1,651

mediation conferences held

Dispute resolution outcomes



93%

of workers compensation disputes resolved without formal determination



71%

of motor accident damages disputes settled without formal determination



70%

of work injury damages cases which proceeded to mediation were settled

Published decisions



64

Presidential decisions published



746

member and merit reviewer decisions published



3

merit review panel decisions published



549

medical appeal panel and medical review panel decisions published



16

Presidential delegate decisions published

Service



19,823

calls to 1800 PIC NSW enquiry line assisted



13,368

emails to help@pi.nsw.gov.au enquiry inbox assisted

Communications and engagement



51

editions of the *Legal Bulletin* published



17

reference group meetings held with Commission stakeholders



20

editions of *Personal Injury Commission News* published

2. Achievements in the reporting year (continued)



One Commission One Vision

- Commenced reporting on the Commission's progress against the Strategic Plan developed in May 2022
- Nominated for the Australian Disputes Centre Alternative Disputes Resolution Innovation of the Year Award
- Delivered various external presentations including the Michael O'Dea Oration and the Personal Injury Commission Update at the UNSW Personal Injury Law Intensive
- Brought staff together to celebrate the two-year anniversary and reflect on the Commission's achievements



Our Users

- Launched Pathway, the new single digital case management platform, to motor accidents users
- Recommended in-person hearings at regional venues to provide an accessible experience for all tribunal users
- Continued to enhance and strengthen the Commission's rules and procedural directions
- Operationalised and communicated changes brought about by amendments to the *Motor Accidents Injury Act 2017*
- Piloted a regional hybrid venue at Service NSW in Dubbo to facilitate the virtual attendance of tribunal users



Our People

- Appointed an additional acting Deputy President
- Appointed six additional sessional members to the Workers Compensation Division
- Recognised the contributions and efforts of staff through a dedicated recognition program
- Commenced development of a staff wellbeing framework



Our Services

- Held more than 1,600 in-person hearings from the Commission's state-of-the-art premises at 1 Oxford Street
- Assessed more than 1,600 injured claimants at our on-site medical suites
- Introduced SMS reminders for medical appointments
- Successfully met all cyber security and data privacy benchmarks set by the Department of Customer Service



Our Performance

- Achieved a clearance rate of 110% with 1,560 more matters finalised than new applications registered
- Published the Commission's inaugural Key Performance Indicators on 1 July 2022 and reported on them for the first time in this review
- Reduced the motor accident medical dispute backlog from 3,176 matters on 1 July 2022 to 572 matters on 30 June 2023
- Continued our focus on early dispute resolution

3. The work of the Commission

Achieving outcomes for the injured people of NSW

The Personal Injury Commission is an independent statutory tribunal within the justice system of NSW. It commenced operations on 1 March 2021, replacing the State Insurance Regulatory Authority's Dispute Resolution Services and the Workers Compensation Commission.

The Commission's primary function is to resolve disputes between people injured in motor accidents or workplaces in NSW and insurers and employers.

The Commission is committed to resolving disputes justly and efficiently in the shortest timeframe possible and works with all parties (injured persons, insurers and employers, where relevant) to discuss ways of achieving this.

In cases where the parties are not able to reach their own resolution, the Commission will decide the dispute. If a party is not satisfied with a decision of the Commission, they may seek an appeal or review.

The Commission's objectives

The Commission's objectives, as set out in the *Personal Injury Commission Act 2020*, are:

- a) to establish an independent Personal Injury Commission of New South Wales to deal with certain matters under the workers compensation legislation and motor accidents legislation and provide a central registry for that purpose,
- b) to ensure the Commission –
 - i) is accessible, professional and responsive to the needs of all of its users, and
 - ii) is open and transparent about its processes, and
 - iii) encourages early dispute resolution,
- c) to enable the Commission to resolve the real issues in proceedings justly, quickly, cost-effectively and with as little formality as possible,
- d) to ensure that the decisions of the Commission are timely, fair, consistent and of a high quality,
- e) to promote public confidence in the decision-making of the Commission and in the conduct of its members,
- f) to ensure that the Commission –
 - i) publicises and disseminates information concerning its processes, and
 - ii) establishes effective liaison and communication with interested parties concerning its processes and the role of the Commission,
- g) to make appropriate use of the knowledge and experience of members and other decision-makers.

Relevant legislation

- *Personal Injury Commission Act 2020*
- Personal Injury Commission Regulation 2020
- Personal Injury Commission Rules 2021
- *Motor Accidents Compensation Act 1999*
- Motor Accidents Compensation Regulation 2020
- *Motor Accident Injuries Act 2017*
- Motor Accident Injuries Regulation 2017
- *Workers Compensation Act 1987*
- *Workplace Injury Management and Workers Compensation Act 1998*
- Workers Compensation Regulation 2016

Procedural directions

Procedural directions provide information on specific issues and complement the relevant legislation. The President of the Commission may give directions relating to the practice and procedures to be followed in proceedings before the Commission, or before medical assessors or medical reviewers. These directions must be complied with by members, medical assessors, merit reviewers and the parties to proceedings, including their representative(s) and agents. Procedural directions are available on the Commission's website.



The Commission's Operational Leadership Group from left to right: Christine Fitzgerald, Director Finance and Organisational Performance; Luke Roberts, Director Medical Services; George Bullock, Director Digital Transformation; Janet Wagstaff, Director Legal and Policy; and Rushdi Gamielidien, Director Registry and Dispute Services.

4. Delivering the Commission's Strategic Plan

The Personal Injury Commission's work is guided by its Strategic Plan – the vision, mission, purpose and values that are aligned to the Commission's legislated objects. Together they create a vital, foundational pillar that defines what the Commission is, what it stands for and where it is heading.

The Commission has continued to deliver on its strategic priorities in 2022-23. Key performance indicators were also developed by the Commission in July 2022, and progress against these is outlined in Chapter 9.

Some of the Commission's key achievements during the reporting period are included on the following pages.



Vision

To lead the way in delivering quality, timely, innovative, and cost-effective justice for personal injury disputes.

Purpose

To make the path to quality justice clear, accessible, timely and cost-effective.

Mission

To deliver just, quick, cost-effective outcomes for injured people, employers, and insurers, in a way that is responsive, timely, fair, consistent and of the highest quality, with as little formality as possible.

Values

NSW Government core values of Integrity, Trust, Service and Accountability.

People: Support our people, so we can deliver service excellence.

Independence: Gaining the trust and respect.

Continuous Improvement: Improving the path to justice through innovation.

One Commission - One Vision

1. Inspire one team, one vision, where all our people contribute.
2. Embrace innovation, excellence in dispute resolution and thought leadership in personal injury law.

Our Users

1. Reduce process trauma for injured people.
2. Be proactive and responsive to the needs of tribunal users.
3. Create a seamless digital journey for users through a single digital platform.
4. Create fit for purpose venues to ensure accessibility and a quality experience for all users.

Our People

1. Inspire an aligned leadership team to achieve the Commission's purpose.
2. Attract and retain a highly capable specialist workforce and foster a high-performance, inclusive work culture.
3. Professional and skills development along with a focus on wellbeing and a great environment for our people to thrive.
4. Workforce planning to promote a diverse and talented workforce and sustain a high-performance work culture.

Our Services

1. Deliver integrated and efficient tribunal services which are responsive to all our users.
2. Transform our medical services through the innovative use of our new medical suites and process redesign.
3. 'Digital' needs of the Commission are successfully delivered with strong cyber security measures.

Our Performance

1. Respected for our independence, the quality and durability of our decisions and excellence in dispute resolution.
2. To meet (and in future exceed) the Commission's key performance indicators.
3. Timely and accurate performance reporting and financial reporting.

4. Delivering the Commission's Strategic Plan (continued)

Single digital platform

Strategic Priority: Our Users – create a seamless digital journey for injured people and tribunal users through a single digital platform, engaging all users in the digital transformation journey and never compromising operational excellence.

The Commission is well on its way to achieving a seamless digital journey for injured people and tribunal users with the launch of Pathway for motor accidents users in June 2023. This is the first phase of delivering a single digital case management platform for all tribunal users.

When the Commission was established on 1 March 2021, it acquired the digital case management platforms from its two legacy entities – the motor accidents platform, which had been impacted by ongoing technical issues, and the workers compensation platform which was nearing the end of its working life. The creation of a new, single digital platform has been one of the Commission's most important strategic priorities since that time.

In 2022-23 the Commission, in collaboration with service provider SBC IT, undertook extensive consultation with tribunal users to ensure the design and development of the new digital platform would meet their needs. The focus was to create a single and consistent way for Commission staff, injured people, legal representatives, insurers and decision-makers to engage online during the life of a dispute from beginning to end.

The Commission continued to collaborate regularly with users throughout Pathway's development and was responsive to feedback, making platform changes to improve useability. Users were invited to Pathway demonstrations and showcases and participated in user acceptance testing prior to the implementation. The launch of the platform was supported by an extensive program of communication, education and training to support all users through the transition, and a comprehensive suite of learning materials remains available on the Commission's website.

During the implementation of Pathway, more than one million documents and 30,000 disputes were migrated from the previous motor accidents platform.

Pathway officially launched on 19 June 2023 and in its first few weeks had achieved the following:

- more than 1,000 user registrations, including 900 legal representatives, 100 legal delegates and 100 CTP insurer staff
- 300 applications lodged
- 200 decisions issued
- over 60 dispute resolution events scheduled.

The Commission continues to enhance the platform for motor accidents users based on feedback and extends its thanks to all users who have helped make Pathway a success. Work is progressing now on the second phase of Pathway which will see all workers compensation matters and users transition to the platform towards the middle of 2024.



4. Delivering the Commission's Strategic Plan (continued)

Making the Commission accessible for all

Strategic Priority: Our Users – create fit for purpose venues, both physical and virtual, for all our dispute resolutions events to ensure accessibility and a quality experience for all users.

The Commission delivers dispute resolution services for injured people and tribunal users across NSW, no matter where they live. The aim of the 'Venue Spaces' strategy is to ensure a mix of in-person, virtual and hybrid venues are available to provide tribunal users a simpler dispute resolution process, with greater access, equity, and speedier outcomes for injured people in NSW. Another aim of this approach is to ensure the regional list progresses at the same speed as the metropolitan list.

Disputes before the Commission can now be conducted in the following ways:

- **In person:** face-to-face conferences, hearings and mediations in the presence of all parties at suitable venues, including the Commission's Sydney headquarters at 1 Oxford Street, Darlinghurst and local court venues in regional NSW.
- **Virtually:** matters which can fairly and efficiently be held online will be listed in this manner. The members' chambers also effectively operate as virtual hearing rooms to facilitate the resolution and hearing of matters.
- **Hybrid:** a mixture of in-person and virtual attendances, for example with one or more parties and witnesses in regional, interstate, or international locations attending in-person conferences, hearings and mediations online.

The Commission has prioritised the provision of secure and convenient venue spaces in rural and regional NSW to promote access to justice for injured persons with disputes, while also ensuring the integrity of its proceedings. The Commission accessed local courts for regional conferences and hearings in NSW. In early 2023, the Dubbo hybrid venue pilot was also launched at the Dubbo Service NSW Centre (see page 23).

As reported last year, the Commission gradually resumed its in-person conferences, hearings and mediations at its newly refurbished 1 Oxford Street premises in April 2022. In this reporting period, further technological upgrades to the original hearing rooms were completed, allowing for in-person, virtual or hybrid dispute resolution events. Microsoft Office Teams continued to be the online audio-visual platform used for all virtual and hybrid dispute resolution events.

Dubbo hybrid venue pilot

The Commission commenced a trial which facilitates the virtual attendance of tribunal users at dispute resolution events from the Service NSW Centre at Dubbo in March 2023. The Dubbo venue is a private room in the Service NSW Centre equipped with technology which enables tribunal users within the region to dial into the Commission's dispute resolution events virtually.

Tribunal users have used the Dubbo hybrid venue on 14 occasions since the pilot's commencement on 1 March 2023, representing an average of almost one event per week.

The facility is equipped with compatible high-definition video conferencing technology in a secure, soundproof, private hearing space. Trained Service NSW staff support users while they are at the centre and ensure the integrity of what occurs in the virtual hearing space, keeping it free from outside interference or prompting.

This venue is also available for claimants or workers needing to confer with their legal representatives who may be based in another regional NSW centre or in Sydney and is available for the Commission's mediations and other proceedings.

If the pilot is successful, the Commission will explore similar opportunities at suitable venues in other regional locations. Satisfaction surveys of venue users will be conducted in the coming months to inform the review of the pilot.



4. Delivering the Commission's Strategic Plan (continued)

State-of-the-art medical suites

Strategic Priority: Our Services – transform our medical services through the innovative use of our new medical suites and process design

The Commission's medical suites opened on 1 June 2022, heralding an important milestone and an expansion of the range of services offered to Commission users.

Medical assessments are an integral component of both the workers compensation and motor accidents dispute resolution schemes. Holding medical assessments on-site at the Commission's premises serves to further reinforce the independence of the medical dispute decision-making process and reduces process trauma for injured persons who are supported by Commission staff in their attendance at the rooms.

Located on Level 8 at the Commission's 1 Oxford Street Darlinghurst premises, the suites feature seven modern consultation rooms where medical assessors and review panels can conduct medical assessments of injured workers and claimants.

Designed according to Australasian Health Facilities Guidelines, the fully-appointed suites can accommodate a variety of medical specialties, with a separate audiometric booth for audiology assessments, and are attended by high-utility medical assessors such as psychiatrists, surgeons and physicians.

In 2022-23, the first full year of operation for the medical suites, the Commission completed 1,634 medical assessments.

A medical assessor's perspective

Dr Nigel Menogue, a musculoskeletal medicine specialist with 22 years' experience as a medical assessor, says there are many benefits for conducting assessments at the Commission's facility.

Dr Menogue, who currently uses the suites two days each week, says the facility is supported by professional front office staff who provide highly professional service to clients and IT support when required.

"The suites are modern, high-quality rooms with the latest equipment and are centrally located within easy access to public transport.

"Importantly, the rooms are readily identifiable with the Commission, reassuring independence with clients and offer a place for professional engagement with colleagues."

He says the primary benefit he gets from conducting assessments in the suites is that it reassures clients that their medical assessments are being conducted in a comfortable, professional environment.

"The top benefit for clients is the identification of independence of the medical assessors and their association with the Commission in a neutral environment," Dr Menogue says.

Reducing medical disputes on hand

Strategic Priority: Our Performance – to meet (and in future exceed) the Commission’s key performance indicators, with the immediate priority being to reduce motor accidents disputes on hand (caused by the COVID-19 pandemic) without compromising the quality of decisions.

The Commission continued its focus on reducing the motor accidents medical disputes backlog during the reporting period. The backlog of medical disputes (pre-1 January 2022 disputes) was the result of the COVID-19 pandemic and the subsequent suspension of in-person medical assessments. This significantly impacted the Commission’s ability to resolve disputes requiring an assessment by a medical assessor.

At 1 July 2022, 3,176 motor accidents medical disputes remained in the backlog. Significant efforts by Commission staff and medical assessors throughout the reporting period have reduced this to 572 as of 30 June 2023. This has also contributed to the reduction of disputes on hand from 4,724 to 3,506 in the same period. This is the lowest number of medical disputes on hand since the commencement of the Commission on 1 March 2021 and is even lower at the time of writing.

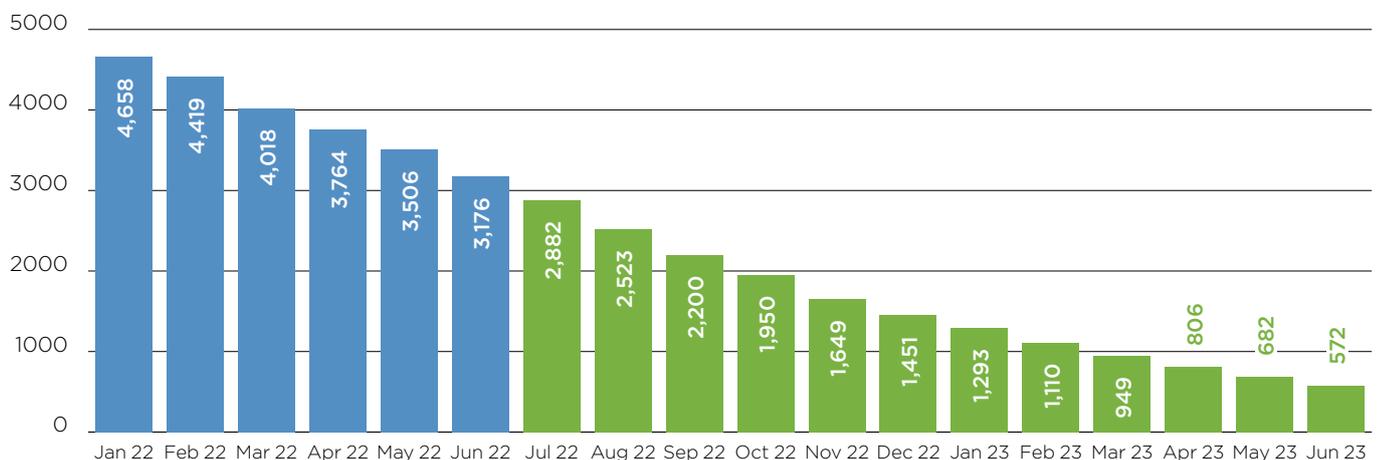
This number is expected to reduce further to approximately 2,500 by the end of the 2023–24 financial year. This will see waiting times for medical assessments reduce.

The Commission remains on track to eliminate the backlog during the remainder of 2023 except for a small residual cohort requiring further intervention to reach resolution which may take additional time. These may include claimants who currently reside overseas and need physical assessment, claimants who are incarcerated or claimants whose condition is not stable enough for assessment.

The highest priority for 2023–24 therefore remains the reduction in medical disputes on hand over time leading to reduced waiting times for medical assessments for injured persons.

Motor accident medical backlog (pre-1 Jan 2022) disputes on hand

The below chart shows the reduction in motor accident medical backlog disputes on hand since January 2022.



● FY 2021-22 from Jan 22 ● FY 2022-23

5. How the Commission delivers its services

Our role

The Commission assists parties to resolve disputes between people who are injured in motor accidents or in their workplaces in NSW and insurers and employers. It is mandated under the *Personal Injury Commission Act 2020* that members use their 'best endeavours' to encourage the early resolution of disputes and resolve the real issues in proceedings justly, quickly, cost-effectively and with as little formality as possible.

Dispute resolution pathways

The Commission deals with a wide range of disputes every day. Disputes lodged with the Commission will follow slightly different pathways depending on the scheme and legislation under which they are lodged, as outlined below. The Commission will work to harmonise these pathways in future years, acknowledging the current differences in enabling legislation.

Workers compensation

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

Expedited assessments – Disputes for past 10 weeks and future 12 weeks of weekly compensation benefits, past medical expenses incurred up to \$10,328.60 (as of 30 June 2023), injury management disputes and disputes regarding work capacity decisions are fast-tracked to a preliminary conference before a delegate of the President. If the parties are unable to resolve the dispute, the delegate will determine the issues and make an interim direction.

Legal disputes – Disputes for weekly compensation exceeding 12 weeks, past and future medical and related expenses exceeding \$10,328.60 (as of 30 June 2023) and all other compensation types are heard by a member and are usually resolved by informal conciliation conferences conducted by an audio-visual link. If a dispute cannot be resolved by conciliation, the member will hold a formal arbitration hearing by an audio-visual link, in person or by a combination of these.

The member will decide whether a claim for workers compensation benefits should be paid, whether a party is liable to pay the claim, and the quantum of any entitlement. The decision will be made orally or in writing.

Medical disputes – Medical disputes in respect of the degree of permanent impairment resulting from an injury are usually referred to a Commission-appointed medical assessor for assessment. In some instances where there is a liability dispute regarding the injury, a claim may be referred to a member for conciliation and/or determination. Medical disputes in respect of past and future medical expenses are usually referred to a member for conciliation and/or determination.

Work injury damages disputes – Mediation of work injury damages disputes by a Commission-appointed mediator is mandatory before an injured worker can commence court proceedings. The mediator must use their 'best endeavours' to bring the worker, employer and insurer to agreement. If the parties are unable to reach an agreement at mediation, the injured worker may then commence court proceedings. The Commission is also responsible for resolving pre-trial disputes relating to thresholds for entitlement to work injury damages, defective pre-filing statements, directions for access to information and premises, and pre-filing strike-out applications.

Appeals

A party to a dispute may lodge an appeal against a member's decision. An appeal is limited to the determination of whether the member's decision is affected by an error of fact, law, or discretion and to the correction of any such error. The appeal is referred to the President, Deputy President or Acting Deputy President of the Commission for determination. A party may also appeal against a medical assessment of permanent impairment. If the President's delegate is satisfied on the face of the application and submissions that a ground of appeal has been made out, the matter is referred for determination to a medical appeal panel, consisting of a member and two medical assessors.

Motor accidents

Motor accident dispute pathways are dependent on the scheme and legislation under which the application is lodged, namely the *Motor Accidents Compensation Act 1999* (1999 scheme) or the *Motor Accident Injuries Act 2017* (2017 scheme).

1999 scheme

Damages assessment – A member will undertake an assessment of a claim for damages which includes an assessment of the issue of liability, unless the insurer accepts liability, and the amount of damages for that liability. A certificate and statement of reasons are issued.

Further damages claims assessments –

A claim for damages may be remitted by the District Court (the Court) to the member who determined the matter if the Court considers that evidence provided in the proceedings may have materially affected the assessment made by the member if it had been made available to the member when the initial claims assessment was made. A further certificate and statement of reasons are issued.

Exemption of a claim from assessment –

A mandatory exemption application is determined by the President, who, if satisfied, may issue an exemption certificate which allows the parties to proceed to the Court for determination of the claim.

A member may make a recommendation to the President regarding whether a claim is unsuitable for assessment. If the President approves the member's recommendation, an exemption certificate will be issued which allows the parties to proceed to the Court for determination of the claim.

Special assessment of certain disputes in connection with a claim –

These disputes include whether a late claim can be made, whether there has been due search and enquiry to establish the identity of the motor vehicle, or whether a claim is taken to have been withdrawn. The dispute is determined by a member and a certificate and statement of reasons are issued.

Medical disputes – Medical disputes include whether the degree of permanent impairment resulting from an injury caused by the motor accident is over 10% or whether the treatment provided or to be provided is reasonable and necessary and related to the injuries caused by the accident. Such disputes are determined by a medical assessor. A binding certificate is issued to the parties.

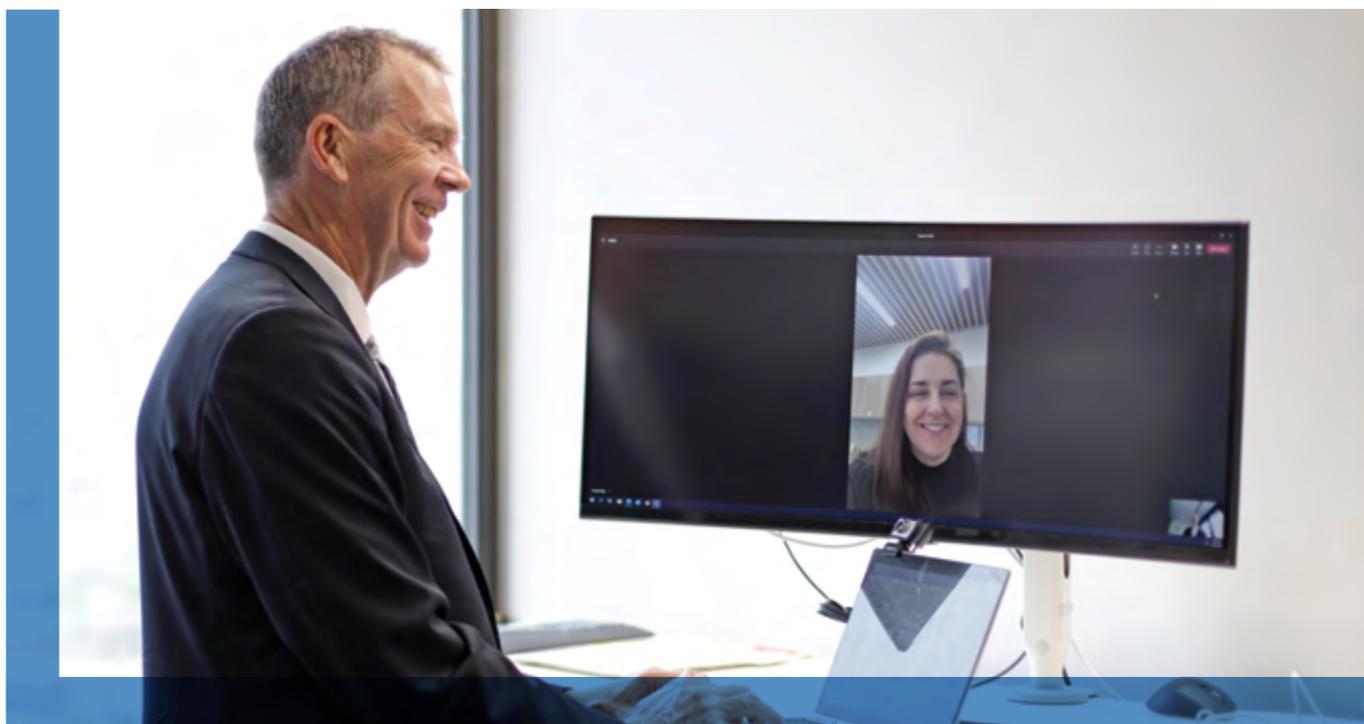
Medical reviews – Reviews are available if it is shown that the medical assessment is incorrect in a material respect. If a delegate of the President is satisfied that the review application can proceed, the matter will be referred to a medical review panel constituted by two medical assessors and one member who will conduct a new assessment. Unlike a medical appeal in the Workers Compensation Division, the review is not limited to only that aspect of the assessment which is alleged to be incorrect, rather it is a new assessment of all matters with which the medical assessment is concerned. A new certificate will be issued which will either confirm the certificate of assessment of the single medical assessor or revoke that certificate.

Further medical assessment – A party may apply for a further medical assessment on the grounds that deterioration of the injury or additional relevant information about the injury, is capable of having a material effect on the outcome of the previous assessment. A delegate of the President determines whether the further medical assessment application can proceed. If it can proceed, a medical assessor, the same who conducted the original assessment, if possible, will consider the dispute by way of a fresh examination, or, if suitable, on the papers. A new certificate and statement of reasons will be issued.

2017 scheme

Merit reviews – A claimant may apply for a merit review of a decision made by an insurer. The types of disputes that can be considered for review include the amount of statutory benefits payable, whether the cost of treatment and care is reasonable and necessary, and whether the insurer has given the required notice before suspending or ending weekly payments. The review is undertaken by a merit reviewer and a certificate and statement of reasons are issued. All motor accident members are dually appointed as merit reviewers.

5. How the Commission delivers its services (continued)



Merit review panel – A claimant or an insurer may apply to the President to refer a decision of a single merit reviewer determining a merit review application to a review panel of merit reviewers for review, on the grounds that the decision was incorrect in a material respect. The review panel may confirm the decision of the single merit reviewer or set aside the decision and make a decision in substitution for the decision the review panel set aside.

Miscellaneous claims assessment – A variety of disputes may be referred to the Commission for assessment by a member. These include whether the accident was mostly caused by the injured person, whether the insurer is entitled to reduce the statutory benefits payable in respect of the motor accident, and whether a late claim can be made.

Damages assessments and exemption of a claim from assessment – These disputes follow the same pathway as under the 1999 scheme.

Damages settlement approvals – The Commission must approve the proposed settlement of a claim for damages in which a claimant is not represented by an Australian legal practitioner. A member will consider the proposed settlement and may approve the proposed settlement, reject the proposed settlement or approve an amended proposed settlement. A certificate and statement of reasons are issued.

Medical disputes – As with the 1999 scheme, disputes may concern permanent impairment and/or treatment matters. Disputes under this scheme also arise in relation to whether an injury is a ‘threshold injury’. Such disputes are determined by a medical assessor. A binding certificate is issued to the parties.

Medical reviews – Reviews follow the same pathway as under the 1999 scheme.

Further medical assessment – As with the 1999 scheme, applications can be made on the grounds that deterioration of the injury or additional relevant information about the injury is capable of having a material effect on the outcome of the previous assessment. A limit of one further assessment per medical dispute is imposed by the 2017 scheme, and the process is the same as under the 1999 scheme.

How disputes are resolved

The Commission employs a combination of informal alternative dispute resolution methods, such as conciliation and mediation, and more formal hearings in the Workers Compensation Division to reach outcomes for the parties to disputes. Many of the Commission's disputes are resolved by alternative dispute resolution during preliminary conferences without the need to proceed to formal hearings. Medical assessments are undertaken for disputes about the degree of impairment in the Workers Compensation Division. In the Motor Accidents Division, medical assessors determine both causation and the extent of impairment of the injuries caused by the motor vehicle accident.

Preliminary conferences

Members conduct preliminary conferences at an early stage with the parties. This provides a forum to discuss the legal issues and resolution of the dispute. A preliminary conference is usually the first step in the dispute pathway. Members use their skills to assist the parties to identify the real issues in the dispute, explore settlement options, and attempt to find a solution acceptable to all parties.

Conciliation

If a legal dispute has not resolved at the preliminary conference, the parties will meet again at a conciliation conference in the Workers Compensation Division. These are held via audio-visual link, in person or in a combination of these formats. A member, usually the same member who held the preliminary conference, tries to assist the parties to reach a resolution. Each party can move to private rooms with their lawyers to discuss settlement options and explore ways to resolve the dispute. The member is neutral and does not communicate with one party without the other party also being present.

Hearings and assessment conferences

If a dispute is not resolved through conciliation in the Workers Compensation Division, the member will make a binding determination following an arbitration hearing. In some circumstances, the dispute might be determined on the papers without a formal hearing.

In the Motor Accidents Division, if a damages assessment matter is not resolved at the preliminary conference, the member will conduct an assessment conference with the parties and undertake an assessment of damages. A certificate and statement of reasons are issued.

Other disputes in the Motor Accidents Division, such as special assessments under the 1999 scheme and merit reviews and miscellaneous claims assessments under the 2017 scheme, may be determined on the papers, or may involve a preliminary conference or hearing.

Mediation

The Commission's mediators conduct mediations to assist the parties to reach a settlement in work injury damages disputes. The mediator's role is to facilitate discussion between the parties to reach a resolution, not to give advice or make decisions. The mediator may have separate private conversations with each of the parties, if necessary, as this can help in resolving deadlocks in the negotiations. If the parties are unable to reach an agreement, the injured worker may then commence court proceedings.

5. How the Commission delivers its services (continued)

Medical assessments

Medical assessments usually involve a Commission-appointed medical assessor conducting an examination of the injured person to gain an understanding of the circumstances and extent of their injury, their medical history, and treatments they may have received. A medical assessor reviews the medical reports from the doctors who have provided opinions for the insurer and the injured person, as well as any investigations such as X-rays, MRI scans, ultrasounds, CT scans and other documents that may help them understand the injury and its effects. In some circumstances, the assessment may be conducted on the papers. After completing their assessment, a medical assessor prepares a certificate that sets out their opinion, and the dispute is then resolved based on that assessment. There is an appeal process available if a party believes that there is an error in the certificate.

How the Commission ensures excellence in decision-making

Excellence in decision-making is a high priority for the Commission in delivering its services for the injured people of NSW. The *Personal Injury Commission Act 2020* requires the Commission to:

- ensure that the decisions of the Commission are timely, fair, consistent and of a high quality,
- promote public confidence in the decision-making of the Commission and in the conduct of its members, and
- make appropriate use of the knowledge and experience of members and other decision-makers.

The Commission employs multifaceted strategies to achieve these objectives, including the following:

Recruiting and retaining the right people

The Commission recruits and retains highly skilled decision-makers who are selected using rigorous and competitive merit-based appointment practices. They are retained based on performance reviews conducted in advance of reappointment.

Responding to the changing environment

The Commission, like many tribunals, increased its use of online hearing venues during the COVID-19 pandemic and will continue to use a mix of audio-visual and in-person events, or a combination of these formats. The Commission has trained and supported its decision-makers to ensure their efficient and effective use of technology and the continued delivery of excellent decisions in challenging circumstances.

Building a culture of excellence

The Commission is building a culture that demands the ongoing development and maintenance of core decision-making skills. This includes formal training and instruction about hearing processes, evidence and principles of administrative law, as well as continuing updates on developments in law and policy within the Commission and its jurisdictions.

The Commission requires its decision-makers to continuously improve their decision-making processes in relation to timing issues, the formal requirements of a decision, burden and standard of proof, using Commission knowledge, structuring decision-making, making findings of fact, assessing credibility, evaluating expert information, weighing evidence, exercising discretion, and providing reasons.

Ensuring consistency

Consistency in decision-making is critical to the Commission meeting its objective of being open and transparent about its processes. Consistency in decision-making means that similarly situated claimants and workers receive similar treatment and outcomes. This in turn means that parties with comparable disputes experience the similar range of procedural treatment, from case management broadly to conciliation and different forms of hearing processes more specifically.

Consistency is promoted through tools such as style guides and through encouraging interaction between members, assisted by electronic document management. However, consistency does not mean that all members share identical views and perspectives on all issues. Rather, the Commission is comprised of members who represent the diverse and varied backgrounds for which it is responsible. The Commission understands that consistency is not solely obtained by requiring members to observe certain protocols. The Commission is building a culture that values consistency, coupled with support for the robust exchange of different views.

Managing community expectations

Community expectations are managed through written formal communications such as the rules, procedural directions, newsletters and manuals. If the parties and their representatives have a clear set of expectations around process and issues of law and policy, these expectations will be expressed in the way in which cases are prepared and presented to members.

Publishing decisions

The Commission is required to publish the details of its decisions under s 58 of the *Personal Injury Commission Act 2020*, subject to any successful application for de-identification or redaction of publishable decisions. Publication of decisions promotes open justice and helps to ensure the Commission is open and transparent about its processes, as specified in the Act.

The Commission is committed to open justice because it is a fundamental attribute of a fair hearing.³ The High Court has said that, “the rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances”.⁴

The Commission promotes awareness of its decisions by giving easy access to decisions through the weekly publication of the *Legal Bulletin*, which provides links to the Commission’s latest decisions. Stakeholders are encouraged to subscribe to the *Legal Bulletin*.

³ *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, 476–477 (McHugh JA, Glass JA agreeing).

⁴ *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5; 316 ALR 378, [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

6. How the Commission supports and engages its users

The Personal Injury Commission places the needs of the injured people of NSW and all tribunal users at the centre of everything it does and is responsive in its engagement with all parties and users. In addition to meeting its legislative requirements to educate staff and decision-makers, the Commission values and proactively fosters open and effective relationships and communication with the communities it interacts with on an ongoing basis. To achieve this, it provides substantial engagement, education and support for each stakeholder group across the year through a variety of channels.

Personal Injury Commission website

The Commission's website at www.pi.nsw.gov.au provides information about how to access Commission services, news updates and practice and procedure information relating to the Commission's work. It is complemented by dedicated extranets for the Commission's members, merit reviewers, mediators and medical assessors. The Commission plans to review and enhance its website in the next reporting year.



Medical Assessor Dr Melissa Barrett provides feedback at the Commission's Medical Assessor Forum.

The following updates are also available via the Commission website:

- *Personal Injury Commission News*: a subscription-based newsletter which provides stakeholders with information and updates about the Commission's operations and changes that impact the dispute resolution process
- *Legal Bulletin*: a weekly legal bulletin which lists all recent decisions including headnotes, and
- *Appeal Case Summaries*: an overview of the most recent Presidential and Court of Appeal decisions.

Reference groups

The Commission meets regularly with its four standing reference groups to discuss changes in the Commission's rules and procedures, provide updates, consult on key issues, gather feedback and answer questions. Reference group members participate on behalf of the key stakeholder groups they represent and serve as a conduit for their cohorts' views. This participation and collaboration is invaluable to the Commission's work.

The Commission's external reference groups are:

- Stakeholder Reference Group, with representatives from the legal profession peak bodies, insurance industry, unions, the State Insurance Regulatory Authority and icare, and
- CTP (compulsory third party) Insurer Reference Group, with representatives from multiple CTP motor accident insurance companies, their legal representatives, and the insurance industry peak body.

The Commission's internal reference groups are:

- Medical Assessor Reference Group, with representatives from the Commission's medical assessor panel, and
- Mediator Reference Group, with representatives from the Commission's cohort of mediators.

Reference group membership as at 30 June 2023 is shown in Appendices G–J.

Industry consultation, education and engagement

The Commission regularly consults and engages with stakeholders outside of its reference groups, given their key role in the disputes process. This includes education and communications about the Commission and its rules and procedures, engagement about proposed changes to operations and legal instruments, and representation of the Commission at key events within the community. The Commission is responsive to any concerns raised. Engagements include:

- the President meets with the Insurance Council of Australia (ICA) as required on key issues impacting the insurance industry
- the President and Principal Registrar meet with icare quarterly
- the President engages with the NSW Self-Insurers Association on invitation, delivering a presentation on key Commission topics within the reporting period, and
- the President engages with Unions NSW regarding Commission updates as required and attended the Day of Mourning for workers who have died in work-related accidents.

Legal profession consultation, education and engagement

As representatives of the parties to disputes, legal professionals play a major role in the dispute resolution process. The Commission recognises the importance of a collegiate relationship with the profession and that legal professionals need a good understanding of how the Commission works and what is required of them to ensure the smooth progression of disputes through the resolution process.

The Commission provides a variety of engagement and education opportunities throughout the year to complement the profession's representation on the Stakeholder Reference Group. These include:

- the President consults regularly with the New South Wales Bar Association and the Law Society of New South Wales regarding its operations and proposed changes to legal instruments and values their collegiate engagement and support

- the Commission's Division Heads conduct regular roadshows with a variety of legal firms to educate them about changes in the Commission's rules and procedures and encourage positive two-way communication
- the President and Division Heads regularly participate in legal profession conferences, forums and other educational events
- the President regularly engages with the NSW Chapter of the Council of Australasian Tribunals and is an Executive Member of the National branch, regularly appearing at its annual conferences, and
- the President delivers speeches at legal events, such as the annual UNSW Personal Injury Law Intensive, and contributes articles to legal industry publications. On 8 May 2023 the President delivered the 2023 Michael O'Dea Oration at the University of Notre Dame.

Engagement and consultation with NSW Government entities

The Commission regularly engages with representatives of the NSW Government and its departments and agencies to update them about the Commission's operations and consult with them on cross-agency matters. These include:

- Office of the NSW Attorney General
- Office of the Minister for Finance
- Office of the Minister for Customer Service and Digital Government (former)
- NSW Department of Communities and Justice
- District Court of NSW
- NSW Department of Customer Service
- State Insurance Regulatory Authority, and
- Independent Review Office.

7. The Commission's people



Left to right: Glenn Capel, Workers Compensation Division Head; Marianne Christmann, Principal Registrar; Judge Gerard Phillips, President; and Marie Johns, Motor Accidents Division Head.

Executive leadership team

President

Judge Gerard Phillips is the President of the Personal Injury Commission and a Judge of the District Court of NSW. The President is appointed by the Attorney General under the *Personal Injury Commission Act 2020*. The President works closely with the Principal Registrar and Division Heads to provide strategic leadership to the Commission. He is responsible for appointing medical assessors, merit reviewers and mediators, recommending the appointment of members of both divisions to the Attorney General, hearing appeals against decisions made by members in the Workers Compensation Division, issuing procedural directions, and other administrative and legal tasks. The President also exercises a variety of functions under legislation, which can be delegated to members of the Commission or staff. In addition, the President also determines novel or complex questions of law.

Principal Registrar

Ms Marianne Christmann is the Principal Registrar of the Commission. The Principal Registrar provides high-level, executive strategic leadership and strategic advice to the President and supports the President in managing the business and affairs of the Commission. The Principal Registrar leads the Commission's staff and is responsible for the Commission's registry, dispute services, operations and administrative functions and the Commission's medical assessors. The Principal Registrar also focuses on strategic and operational planning, governance, and evaluation of service delivery performance.

Division Heads

Ms Marie Johns is the Motor Accidents Division Head, responsible for the motor accidents members and merit reviewers, and Mr Glenn Capel is the Workers Compensation Division Head, responsible for the workers compensation members and mediators.

The Division Heads manage the business of the Commission in each division under the President's direction. A key part of their role is ensuring there is specialised jurisprudence, knowledge, practice and procedures appropriate to the divisions.

Organisational structure

The Commission's structure reflects two streams:

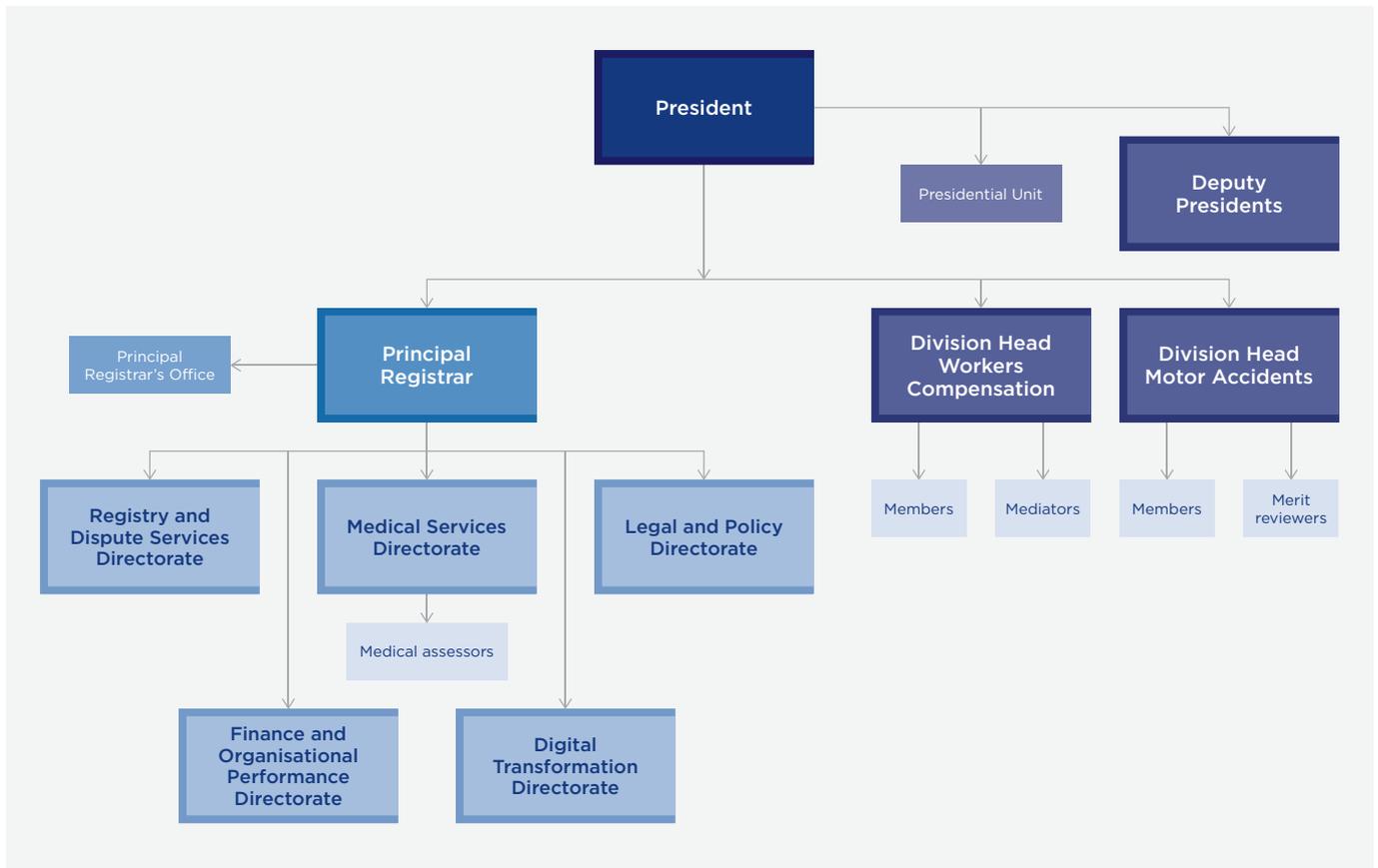
- the two divisions, led by the Division Heads and comprising the members, mediators and merit reviewers, and
- the Personal Injury Commission Registry, led by the Principal Registrar and comprising the Commission's staff and medical assessors.

The Commission had a total of 415 members, mediators, merit reviewers, medical assessors and staff as at 30 June 2023, comprising:

- 60 members (including the President, Deputy Presidents and Division Heads)
- 24 mediators*
- two merit reviewers**
- 165 medical assessors
- 164 staff (including the Principal Registrar)

* In addition, six Workers Compensation Division members are also appointed as mediators.

** In addition, all members of the Motor Accidents Division (25 members) also hold a dual appointment as a merit reviewer.



7. The Commission's people (continued)

Members, merit reviewers, mediators and medical assessors

Deputy Presidents

The Deputy Presidents are Presidential members who are appointed by the Attorney General under the *Personal Injury Commission Act 2020*. They hear appeals against decisions made by members in the Workers Compensation Division.

See Appendix B for a list of the Commission's Deputy Presidents as at 30 June 2023.

Members

Members are experienced, independent decision-makers who are appointed to resolve disputes. The Commission's members include Presidential members, principal members, senior members and general members. They are experts in the motor accidents and/or the workers compensation jurisdiction.

Members aim to conduct Commission proceedings in a way that is fair to all parties. At each stage, the member will encourage and assist parties to resolve their dispute by finding a solution that is agreeable to everyone involved. If the parties cannot agree on a solution, the member will decide the dispute, after hearing the submissions of the parties and considering the evidence filed.

Members also sit on appeal panels and review panels, which determine appeals and reviews of decisions made by medical assessors and merit reviewers.

See Appendix B for a list of the Commission's members as at 30 June 2023.

Merit reviewers

The Commission's merit reviewers exercise functions in the Motor Accidents Division. They determine statutory benefit disputes under Schedule 2, 1 of the *Motor Accident Injuries Act 2017*.

All members of the Motor Accidents Division also hold a dual appointment as a merit reviewer.

See Appendix C for a list of the Commission's merit reviewers as at 30 June 2023.

Mediators

The Commission's mediators exercise functions in the Workers Compensation Division. They assist parties to resolve work injury damages disputes.

See Appendix D for a list of the Commission's mediators as at 30 June 2023.

Medical assessors

Medical assessors are highly experienced medical and allied health practitioners who are qualified in a range of specialties. They conduct medical assessments to determine certain aspects of a dispute, such as assessing the degree of permanent impairment resulting from an injury. They can also provide decisions about an injured person's medical condition, threshold injury, the provision of medical treatment and fitness for employment.

Medical assessors are engaged directly by the Commission as a statutory appointment and are independent of any party to a dispute. They are appointed to provide independent assessments and do not give clinical advice or provide treatment to the injured person.

Medical assessors also sit on medical appeal panels and medical review panels. Medical assessors may be appointed to one or both divisions of the Commission.

See Appendix E for a list of the Commission's medical assessors as at 30 June 2023.

Opposite page: Clockwise from top: Workers Compensation Division Head Glenn Capel meets with Motor Accidents Division Head Marie Johns; President Judge Gerard Phillips and Deputy Presidents Michael Snell and Elizabeth Wood; Medical Assessor Dr Sikander Khan; Principal Member John Harris and Medical Assessor Dr Wayne Mason.



7. The Commission's people (continued)

Staff

The Commission's staff are employed by the Department of Customer Service and report to the Principal Registrar through five directorates and two support offices, as described below.

See Appendix L for a brief staff profile.

Registry and Dispute Services Directorate

The Registry and Dispute Services Directorate is the Commission's largest directorate and is the 'front door' of the Commission. The team:

- provides frontline services to tribunal users, including claimants, workers, legal representatives, employers and insurers, via the Commission's reception, telephone enquiry line and email enquiry inbox
- registers applications, processes documents received through the digital case management platforms, and streams applications to the appropriate area of the Commission
- case-manages motor accidents claims, merit and miscellaneous disputes and all workers compensation disputes
- supports members and internal stakeholders throughout the life of proceedings to facilitate the fair, timely and cost-efficient disposition of matters.

Medical Services Directorate

The Medical Services Directorate oversees the Commission's medical disputes and medical assessor panel. The team:

- provides case management services to support the delivery of timely decisions in motor accidents medical disputes and supports the workers compensation disputes team with medical assessor availability
- leads the recruitment, engagement and support of the Commission's medical assessor panel
- provides performance management, education and continuous improvement of the medical assessor panel to ensure high-quality and robust single medical, medical review and medical appeal panel decisions
- manages the Commission's on-site medical suites including all the facilities and the scheduling of appointments.

Legal and Policy Directorate

The Legal and Policy Directorate makes decisions and delivers legal advice, policy and governance services. The team:

- makes decisions under enabling and related legislation/rules, and privacy and access laws
- provides legal advice about business issues including work health and safety, delegations, inter-agency arrangements, privacy and protected interest disclosures
- delivers legal advice about practice and procedure, case management and jurisdiction, together with procedural directions, protocols and templates
- conducts various projects, including reviews of the rules and delegations
- delivers secretariat services to the Rule Committee and training to medical assessors and staff
- reviews publishable decisions against the Decisions Style Guide and publishes the *Legal Bulletin*
- ensures the proper representation of the Commission when its decisions are appealed.



Finance and Organisational Performance Directorate

The Finance and Organisational Performance Directorate manages important whole-of-Commission functions, including finance, organisational performance reporting, continuous process improvement and business support.

The team:

- maintains a robust, accurate and compliant finance function for the Commission and provides accurate financial and organisational performance reporting, internally and externally
- creates and maintains processes and procedures, identifies continuous improvement opportunities and oversees audit and compliance functions
- manages the office accommodation and provides procurement and contract support
- ensures the Commission has guidelines and mechanisms to capture and utilise corporate knowledge
- supports and enables the divisions and directorates of the Commission to achieve their business outcomes.

Digital Transformation Directorate

The Digital Transformation Directorate drives strategic and operational digital and information technology outcomes for the Commission. The team:

- leads the digital transformation strategy for the Commission, including the design, development and implementation of Pathway, the Commission's new single digital case management platform
- ensures the stability, performance, cyber security and data privacy of the Commission's core technology systems and manages governance of all data and system changes, aligning with the Department of Customer Service's Chief Information Security Officer to ensure best practices are deployed across all technology
- provides timely support for end users of the Commission's systems and ensures support requirements are met using appropriate channels and processes
- collaborates with the Commission's divisions and directorates to ensure service levels, systems and processes meet business needs.

7. The Commission's people (continued)

Presidential Unit

The Presidential Unit is a small, specialist unit whose staff supports the Commission's Presidential members in the exercise of their appellate and leadership functions. The team supports the administration of high-quality decision-making through the provision of legal and administrative support, including advice to Presidential members, legal research, case-managing appeals and other matters. The staff assist in supporting the President's leadership and other functions, such as the appointment of members, merit reviewers and mediators, and stakeholder engagement.

Principal Registrar's Office

The Principal Registrar's Office provides executive support functions for the Principal Registrar to enable the effective operations of the Commission as a whole. The team manages liaison with the Minister's Office, the Department of Customer Service and other government agencies, coordinates and prepares stakeholder correspondence, manages communications, stakeholder engagement, events and media liaison, undertakes strategic planning and project manages Commission-wide projects.



Clockwise from top left: Directors Luke Roberts and Rushdi Gamielidien with Principal Registrar Marianne Christmann at an all-staff event; staff celebrated Harmony Day as part of the Commission's wellbeing calendar of events; the Principal Registrar's Office and Presidential Unit competed in a step challenge.

Supporting our people

All the Commission's members, merit reviewers, mediators, medical assessors and staff play a vital role in contributing to the just, timely and cost-effective resolution of personal injury disputes. The Commission undertakes a variety of conferences, events and meetings to build the culture and social fabric of the organisation and provide education and professional development opportunities, as outlined below.

Members, merit reviewers and mediators

The Commission's annual conferences for members, merit reviewers and mediators provide an opportunity for professional networking, updates on the Commission's policies and operations and an opportunity to hear from external experts in personal injury and vicarious trauma. The Commission also:

- conducted regular briefings, education and professional networking sessions, including the Twilight lecture series
- invested in ongoing skills development via relevant professional education courses and access to professional subscriptions e.g. LexisNexis legal analytics
- invested in attendance at professional conferences for full-time members, including Council of Australasian Tribunals (COAT) events
- provided an on-site legal library at the Commission's premises and a comprehensive Decisions Style Guide
- developed a dedicated extranet containing information and reference material to support members, merit reviewers and mediators.

Medical assessors

The Commission provided a comprehensive education program for medical assessors to meet its obligations under s 37 of the *Personal Injury Commission Act 2020* and promote high quality decision-making in medical disputes. The medical panel officer team also supported medical assessors with all aspects of their role. Activities undertaken included:

- a comprehensive induction and mentorship program for newly appointed medical assessors
- bi-monthly virtual education and briefing sessions
- face-to-face and online myPathway training for all medical assessors and their support staff
- an e-newsletter that details aspects of the Commission's policies and operations relevant to medical assessors
- a dedicated extranet containing information and reference material to support medical assessors
- a dedicated help desk for medical assessor enquiries.

Staff

The Commission supports staff with wellbeing, learning and professional development and inclusion initiatives, including:

- wellbeing programs and workshops and implementation of the Healthy Hybrid Habits program
- in-person and online all-staff events, including an annual in-person strategic planning session and monthly organisation-wide team meetings
- an official recognition program aimed at acknowledging and celebrating the contribution of staff and teams
- ongoing learning and development opportunities.

8. The Commission's operations

– Section 66 requirements

Section 66 of the *Personal Injury Commission Act 2020* prescribes not only the timetable for the provision of this Annual Review but details (subsection 4) the metrics and information that must be reported on in the Annual Review:

- a) the number and type of proceedings instituted in each Commission division during the year
- b) the sources of those proceedings
- c) the number and type of proceedings that were made during the year but not dealt with
- d) the extent to which the operations of the Commission are funded by each operational fund
- e) any other information that the President considers appropriate to be included or the Minister directs to be included.

This section reports on the above requirements to meet the Commission's obligations under the Act while Chapter 9 reports more fully on the Commission's performance in handling dispute applications.

Operational funds

The Commission resolves dispute applications which are funded from three operational funds:

- a) the Motor Accidents Operational Fund (the SIRA Fund) under the *Motor Accident Injuries Act 2017*
- b) the Motor Accidents Operational Fund under the *Motor Accidents Compensation Act 1999*
- c) the Workers Compensation Operational Fund under the *Workplace Injury Management and Workers Compensation Act 1998*.

The *Motor Accidents Compensation Act 1999* scheme is in its run-off stage, and the Commission continues to experience a steady trickle of lodgments from this scheme. It is anticipated this will continue into next year and then cease.

The Commission must demonstrate how much of its operations are funded by each operational fund. This is because, under the enabling legislation, money from these funds can be used only for a fund purpose.

Cost distribution methodology

The Commission has developed a cost distribution methodology which drives funding allocation and cost distribution to meet its reporting obligations under s 66(4)(d).

The expenditure reported has been subject to an *ASA 805 Special Considerations – Audits for Single Financial Statements and Specific Elements, Accounts or Items of a Financial Statement* performed by KPMG and found to be presented fairly, in all material respects.

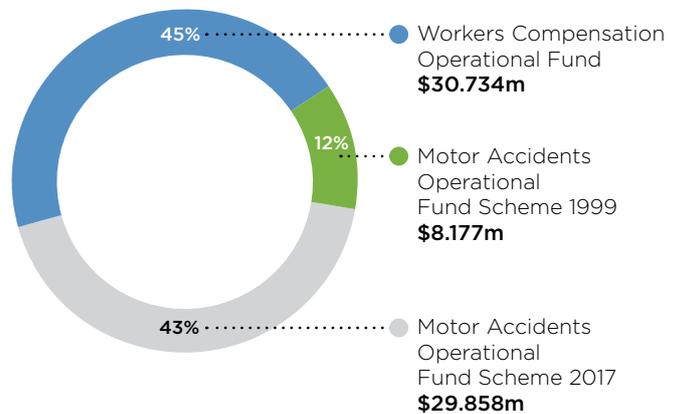
With rises and falls in filings across the schemes and the residual impact of pandemic delays, the contribution is a changeable figure depending upon the point in time it is observed. However, the formula under which the methodology is based is a reasonable and appropriate means of calculating each scheme's contribution.

Wherever possible, when an expenditure is incurred, it is accounted for in either a workers compensation or motor accidents scheme cost centre. Other shared costs are isolated in general cost centres and distributed between the three schemes, based on the proportion of matters finalised within each.

Contributions by operational fund

In the financial year from 1 July 2022 to 30 June 2023, 45% (\$30.734m) of the total cost (\$68.769m) was attributed to the Workers Compensation Operational Fund (WCOF), 12% (\$8.177m) to the Motor Accidents Operational Fund Scheme 1999 (MAOF Scheme 1999), and 43% (\$29.858m) to the Motor Accidents Operational Fund Scheme 2017 (MAOF Scheme 2017).

Cost distribution



Details of the operating expenses and income related to each operational fund are shown on page 44. It is important to note that these figures include increased service provider costs. Medical assessments that were postponed during COVID-19 disruptions were being, and continue to be, progressed by the Commission. This has resulted, and will continue to result, in higher than usual service provider and related costs.

8. The Commission's operations – Section 66 requirements (continued)

Operating expenses and income related to each operational fund

Personal Injury Commission	2023 \$'000	WCOF \$'000	MAOF Scheme 2017 \$'000	MAOF Scheme 1999 \$'000
Expense				
Personnel services				
Salaries and allowances (including annual leave) ⁵	26,015	10,908	11,859	3,248
Agency short term staff ⁶	2,760	1,216	1,212	332
Total personnel services	28,775	12,124	13,071	3,580
Other operating expenses				
Accommodation expenses ⁷	5,147	2,326	2,215	606
Payments to service partners ⁸	25,535	11,964	10,653	2,918
Software expenses ⁹	2,485	911	1,236	338
Other miscellaneous expenses ¹⁰	6,827	3,409	2,683	735
Total other operating expenses	39,994	18,610	16,787	4,597
Total expenditure	68,769	30,734	29,858	8,177
Income				
Contributions (WCOF)	30,734	30,734	-	-
Contributions (MAOF Scheme 2017)	29,858	-	29,858	-
Contributions (MAOF Scheme 1999)	8,177	-	-	8,177
Total income	68,769	30,734	29,858	8,177
Net result	-	-	-	-

5 The Motor Accident Operational Funds contributed more towards personnel services than the Workers Compensation Operational Fund as higher numbers of staff were required to manage the motor accidents portfolio. This is a true reflection of the personnel engaged in activities for their respective funds.

6 'Agency short term staff' are contractor expenses. This includes contractors temporarily engaged to deliver Pathway, the Commission's new single digital case management platform for motor accident matters, implemented on 19 June 2023.

7 With the Commission's staff and members returning to the office in April 2022, there has been an increase in accommodation expenses in FY23. This includes building maintenance, cleaning, security, etc which were higher as the office experienced a full year of operation for the first time since FY19. Rent increased in line with contractual annual increases.

8 Payments to service partners comprise those to sessional members, medical assessors, mediators and sessional merit reviewers.

9 The legacy case management systems and supporting software packages have remained and will partly remain in place noting the Commission implemented Pathway for motor accident matters, on 19 June 2023. The legacy motor accident system was complex and had higher software expenses to support its multifunctional capabilities. Workers compensation matters will be moved onto the new platform towards the end of FY2023-24.

10 'Other miscellaneous expenses' represent other operating expenses incurred, including strategic operational costs and continued design and implementation of the single digital platform.

Section 66(4)(a), (b) and (c) reporting obligations

The following tables summarise the number and type of proceedings instituted in each division during the year, the number and type of proceedings that were made during the year but not dealt with (in progress), and the source of those proceedings.

Motor accidents proceedings 2022-23

Legislation	Jurisdiction	Instituted	In progress
1999 MACA	Medical assessment service	394	445
1999 MACA	Claims assessment and resolution service	121	399
1999 MACA	Total	515	844
2017 MAIA	Medical assessment	3,562	3,061
2017 MAIA	Merit review	121	40
2017 MAIA	Claims assessment	1,881	1,703
2017 MAIA	Misc. claims assessment	126	53
2017 MAIA	Total	5,690	4,857
Total		6,205	5,701

Workers compensation proceedings 2022-23

Application type	Instituted	In progress
Application to resolve a dispute (Form 2 and 2D)	6,289	1,896
Application for expedited assessment (Form 1)	379	35
Workplace injury management dispute (Form 6)	18	4
Application for assessment of costs (Form 15)	6	2
Registration of commutation (Form 5A)	50	5
Application for mediation (Form 11C)	1,972	276
Application to cure a defective pre-filing statement (Form 11B)	2	0
Application for assessment by a medical assessor (Form 7)	106	54
Appeal against decision of a member (Form 9)	82	74
Appeal against a decision of medical assessor (Form 10)	417	147
Total	9,321	2,493

The source of proceedings by division

Source of proceedings	Workers compensation	Motor accidents
Legally-represented claimant	98%	84%
Self-represented claimant	1.8%	4%
Insurer	0.2%	12%

9. The Commission's performance

How performance is reported

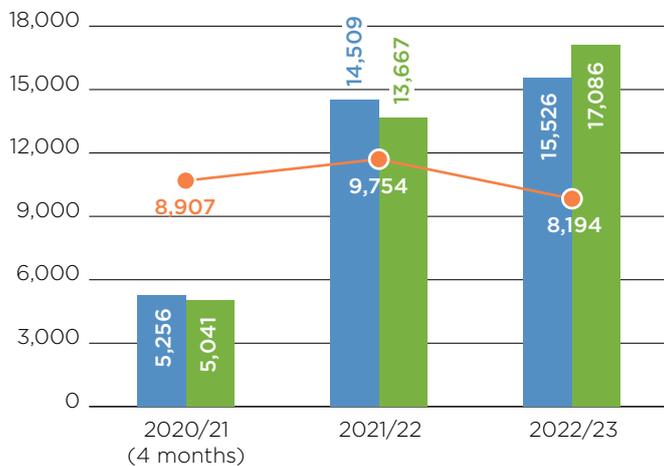
The Commission's performance data is reported for the second full year of operation, from 1 July 2022 to 30 June 2023.

Data is presented for the Commission as a whole and for its two distinct operational areas, the Motor Accidents Division, which resolves motor accidents disputes, and the Workers Compensation Division, which resolves workers compensation disputes.

Dispute applications registered, finalised and in progress

For the year 2022–23 the Commission as a whole:

- had 9,754 dispute applications in progress as at 1 July 2022
- registered 15,526 new dispute applications
- finalised 17,086 dispute applications
- had 8,194 in progress dispute applications on hand at 30 June 2023.



● Registered ● Finalised — In progress

Dispute applications registered increased by 7% and dispute applications finalised increased by 25% from the previous year. There were 1,560 more dispute applications finalised in the year than were lodged and work in progress reduced as a result.

In the Motor Accidents Division, the Commission successfully reduced work in progress by 24% from the previous year. A focus on reducing disputes with delayed medical assessments caused by the COVID-19 pandemic meant timeframes to finalise disputes continued to be impacted, however, this has shown some improvement throughout the year.

In the Workers Compensation Division, there was a 16% increase in dispute applications registered from the previous year. Despite this increase, the Commission maintained strong performance in the timely resolution of workers compensation disputes and only recorded a modest increase in the work in progress at the end of the year.

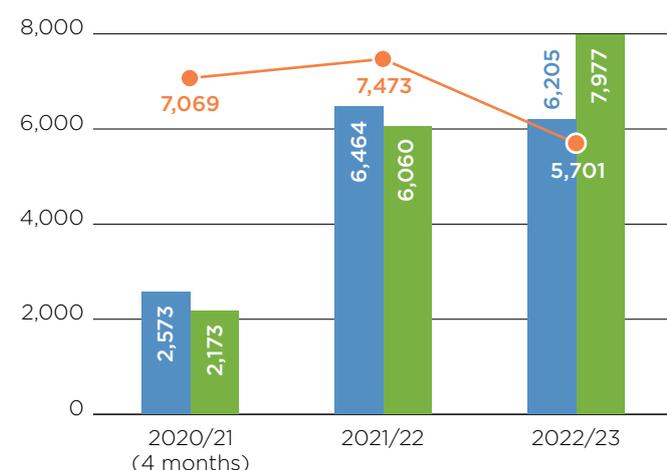
Motor Accidents Division

The majority of motor accidents dispute applications related to claims under the *Motor Accident Injuries Act 2017* (92%). Dispute applications for claims under the *Motor Accidents Compensation Act 1999* continued to decline, accounting for only 8% of all dispute registrations in the year.

In 2022–23, motor accident dispute applications registered decreased slightly (-4%) from the previous year, while dispute applications finalised increased significantly (+32%). As a result, the volume of disputes in progress reduced. At 30 June 2023 there were 5,701 motor accident disputes in progress. This is shown in the table below.

Motor accidents dispute applications		2022-23		
Legislation	Jurisdiction	Registered	Finalised	In progress
1999 MACA	Medical assessment service	394	968	445
1999 MACA	Claims assessment and resolution Service	121	570	399
1999 MACA	Total	515	1,538	844
2017 MAIA	Medical assessment	3,562	4,190	3,061
2017 MAIA	Merit reviews	121	166	40
2017 MAIA	Claims assessment	1,881	1,902	1,703
2017 MAIA	Misc. claims assessment	126	181	53
2017 MAIA	Total	5,690	6,439	4,857
Total		6,205	7,977	5,701

Motor accidents dispute applications registered, finalised and in progress



● Registered ● Finalised — In progress

9. The Commission's performance (continued)

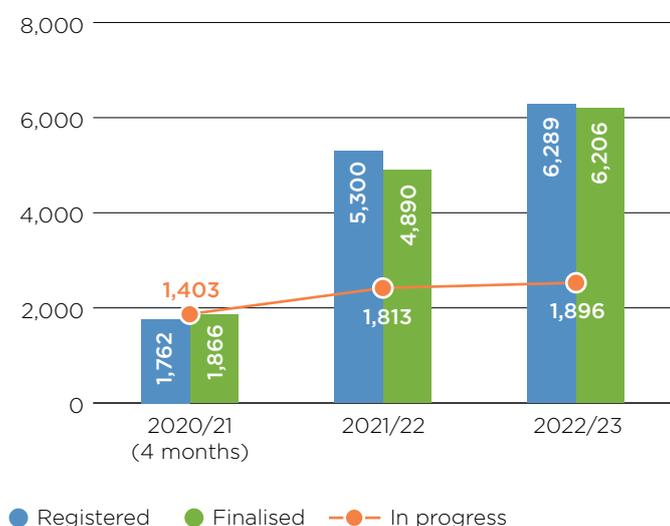
Workers Compensation Division

Most (67%) workers compensation dispute applications registered with the Commission are Form 2 applications to resolve a dispute (including Form 2D: application in respect of death of worker). This is shown in the table below.

Workers compensation dispute applications	2022-23		
	Registered	Finalised	In progress
Application to resolve a dispute (Form 2 and 2D)	6,289	6,206	1,896
Application for expedited assessment (Form 1)	379	369	35
Workplace injury management dispute (Form 6)	18	14	4
Application for assessment of costs (Form 15)	6	5	2
Registration of commutation (Form 5A)	50	49	5
Application for mediation (Form 11C)	1,972	1,925	276
Application to cure a defective pre-filing statement (Form 11B)	2	2	0
Application for assessment by a medical assessor (Form 7)	106	98	54
Appeal against decision of a member (Form 9)	82	67	74
Appeal against decision of a medical assessor (Form 10)	417	374	147
Total	9,321	9,109	2,493

In 2022-23, Form 2 applications registered increased by 19% from the previous year. In the same period the number of Form 2 applications finalised increased by 27%. At 30 June 2023, there were 1,896 Form 2 dispute applications in progress, a slight increase (+5%) on the previous year.

Form 2 dispute applications registered, finalised and in progress



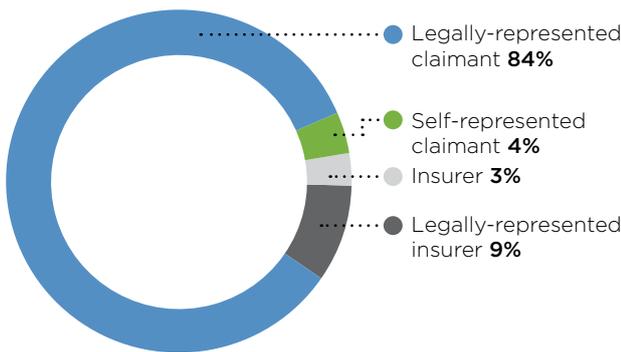
Source of dispute application registrations

The Commission receives dispute applications from a combination of legally-represented motor accidents claimants and workers, self-represented motor accidents claimants and workers, insurers and legally-represented insurers.

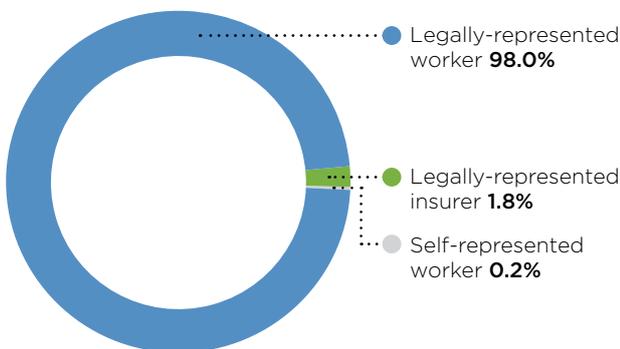
The sources of registrations by operational division are detailed below.

Source of applications

Source of applications - Motor Accidents Division



Source of applications - Workers Compensation Division



In the Motor Accidents Division, 84% of dispute applications were lodged by claimant legal representatives. Self-represented claimants registered 4% of applications, insurers registered 3% of applications, and 9% of applications were registered by insurer legal representatives. For applications for panel review of a single medical assessment, 34% were lodged by insurers or insurer legal representatives.

In the Workers Compensation Division, 98% of dispute applications were lodged by legal representatives of injured workers. Self-represented workers accounted for 0.2% of applications. The remaining 1.8% of applications were lodged by insurers. Arbitral appeals and medical appeals had higher percentages of applications lodged by the insurers, at 63% and 27% respectively.

9. The Commission's performance (continued)

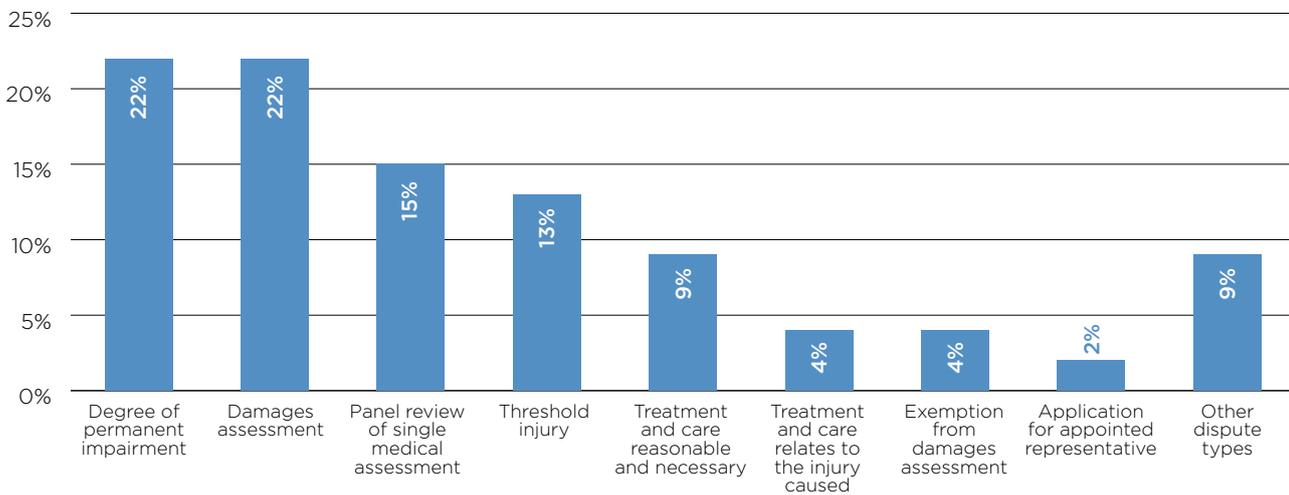
Dispute types and outcomes

Motor Accidents Division

Medical disputes across the two schemes account for 64% of all motor accident disputes registered, with disputes about permanent impairment, threshold injury and treatment and care being the most common.

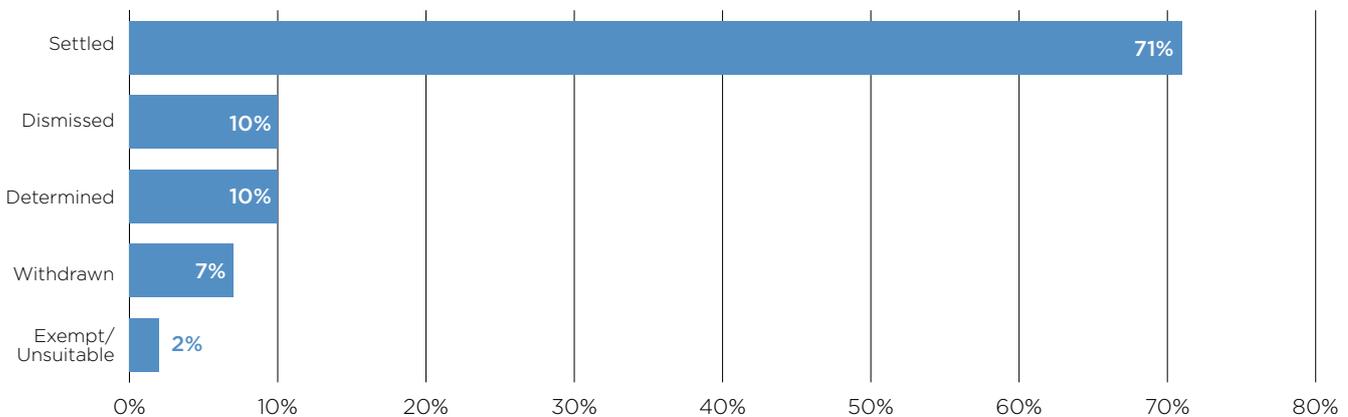
Permanent impairment disputes now equal damages assessment disputes as the most frequently registered dispute types, with each accounting for 22% of all disputes registered.

Dispute types registered



Most damages assessments are resolved prior to a decision being made. Of the damages assessments finalised in the year, 71% were settled by the parties and 10% were determined by a member.

Damages assessment outcomes

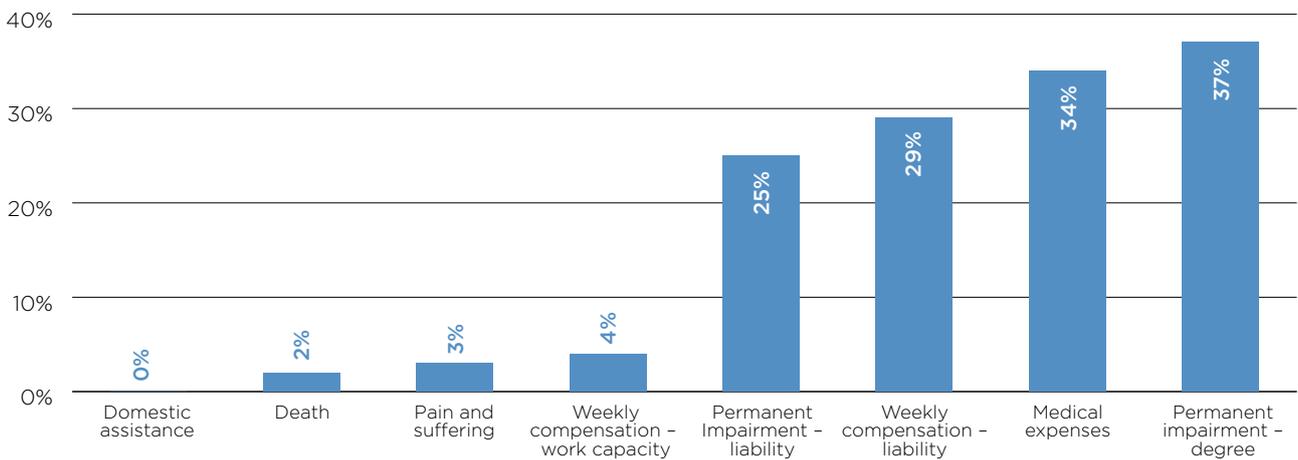


Workers Compensation Division

Most workers compensation dispute applications registered in the Commission are applications to resolve a dispute (Form 2 including 2D).

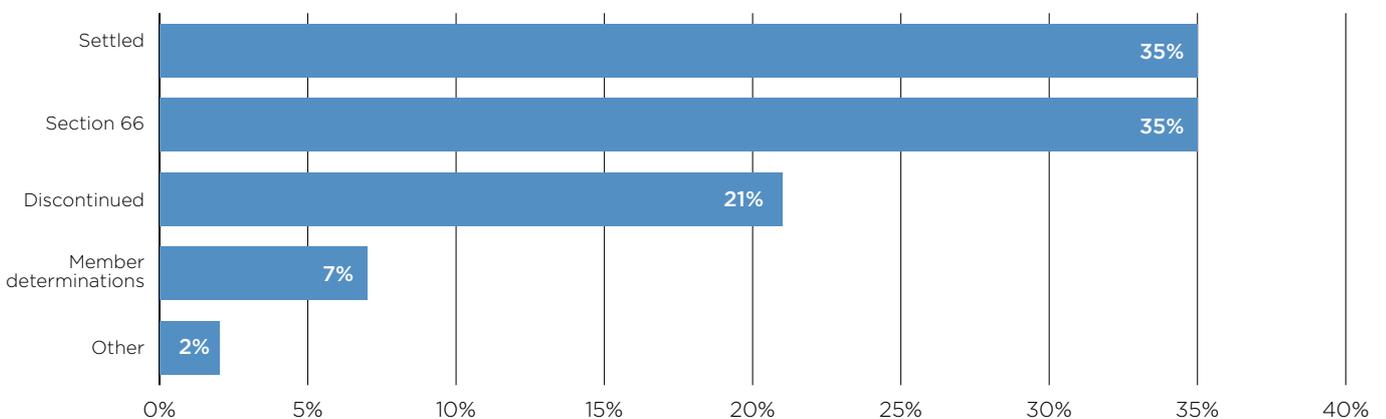
Weekly compensation, medical and related expenses compensation and permanent impairment compensation remain the most frequently disputed compensation types as shown in the chart below. In 2022-23 there was a 20% increase from the previous year in Form 2 applications with the degree of permanent impairment in dispute. Many Form 2 applications involve claims for more than one type of compensation benefit, and as such the figures total more than 100%.

Form 2 - compensation in dispute



Disputes limited to the degree of permanent impairment (quantum only) made up 35% of all resolutions for Form 2 dispute applications. Settlements accounted for 35% of all resolutions. Members were only required to determine 7% of disputes that were finalised.

Form 2 - outcomes



The Commission also plays a significant role in resolving work injury damages claims through pre-trial case management and mediation services. A total of 1,972 applications for mediation to resolve a work injury damages claim (Form 11C) were registered by the Commission. Mediation conferences were held in 1,651 matters, of which 1,153 (70%) were settled.

9. The Commission's performance (continued)

Appeals

Motor Accidents Division

Medical reviews

There were:

- 4,341 reviewable medical certificates issued
- 954 applications for panel review of single medical assessment made
- 820 applications for panel review of single medical assessment finalised, of which 338 were determined by a medical review panel.

Judicial review of decisions

There were 18 applications for judicial review of motor accident decisions registered in the Supreme Court of New South Wales.

In the same period, 19 applications for judicial review were finalised of which:

- five applications were dismissed
- nine applications resulted in the original decision being set aside
- five applications were discontinued.

Workers Compensation Division

Arbitral appeals

A total of 82 applications to appeal against a decision of a member (Form 9) were registered, and Presidential members determined 64 appeals.

Overall, 5% of appellable decisions by members were revoked on appeal.

Medical appeals

There were:

- 2,335 appellable medical assessment certificates issued
- 417 applications to appeal against decision of a medical assessor (Form 10) registered
- 374 medical appeals finalised, of which 319 were determined by a medical appeal panel.

Judicial review of decisions

A total of 17 applications for judicial review of workers compensation decisions were registered in the Supreme Court of New South Wales.

Of those matters, 16 were against decisions of medical appeal panels and one was against a decision of a President's delegate.

In the same period, 12 applications for judicial review of workers compensation decisions were finalised, of which:

- eight applications were dismissed
- three applications resulted in the original decision being set aside
- one application was settled by consent.

Appeals to the Court of Appeal from Presidential decisions

In 2022-23, three appeals against Presidential decisions were made to the Court of Appeal. In the same period, the Court of Appeal finalised five appeals against Presidential decisions, all of which had been lodged the year prior. Of these five, four appeals were dismissed by the Court of Appeal and one was discontinued. No Presidential decisions were overturned.

Key performance indicators

The Commission published a comprehensive set of key performance indicators (KPIs) on 1 July 2022. These are used to quantify and monitor performance and track how the Commission is meeting its statutory objectives, set out at s 3 of the *Personal Injury Commission Act 2020*. They also provide Commission users with indicative information about the timeframes, quality and efficiency they can expect when dealing with the Commission's services.

The KPIs were developed acknowledging the practice and procedures in the legacy organisations that preceded the Personal Injury Commission and set consistent standards across major areas of operation in both the Motor Accidents and Workers Compensation divisions. The Commission consulted with the NSW Bar Association, the Law Society of NSW, icare and the members of the Commission's CTP Insurer Reference Group.

This is the first year the Commission will report against these KPIs.

Workflow

The following workflow measures monitor the Commission's performance in meeting the demands for Commission services and in reducing the volume of work on hand.

Through 2022-23, the Commission has focused on reducing delayed motor accidents medical disputes. In the Motor Accidents Division, the Commission is pleased to report a clearance rate for the year of 127%, meaning more disputes were finalised throughout the year than registered.

In the Workers Compensation Division, the Commission achieved a clearance rate of 98%. Throughout the year, the Commission saw a 16% increase in dispute applications registered and at the end of the year only a modest increase (9%) of disputes in progress.

Overall, the Commission achieved a clearance rate of 110% in 2022-23, with 1,560 more disputes finalised than registered and a 16% reduction in the volume of disputes in progress.

KPI measure	Q3-22	Q4-22	Q1-23	Q2-23	FY23
Finalisations are greater than or equal to registrations - clearance rate >100%					
Personal Injury Commission	101%	101%	110%	121%	110%
Motor Accidents Division	112%	112%	136%	139%	127%
Workers Compensation Division	93%	100%	95%	112%	98%

9. The Commission's performance (continued)

Lifecycles

Lifecycle measures monitor the time taken to finalise the Commission's most frequently registered disputes.

In 2022-23, the Commission continued to focus on finalising motor accidents medical disputes which had been delayed throughout the COVID-19 pandemic when in-person medical assessments could not take place. For this reason, average finalisation times remained longer than the Commission would like. Almost half (49%) of all medical disputes were finalised in 12 months, and the average lifecycle for medical disputes finalised was 385 days.

Motor accident damages assessment disputes were similarly impacted, often due to the delay with related medical disputes. Almost half (48%) of all damages assessment disputes were finalised in 12 months and the average time to finalise was 511 days.

Workers compensation applications to resolve a dispute (Form 2 and 2D) experienced modest delays in 2022-23 with an average lifecycle of 149 days. The Commission finalised 95% of Form 2 and 2D applications within 12 months.

KPI measure	Q3-22	Q4-22	Q1-23	Q2-23	FY23
Disputes are resolved within the target timeframes					
Motor accidents – medical disputes					
The average lifecycle is less than 120 days	419	377	375	370	385
45% are resolved in 3 months	13%	19%	19%	17%	17%
85% are resolved in 6 months	21%	27%	31%	26%	26%
97% are resolved in 9 months	29%	37%	41%	42%	37%
99% are resolved in 12 months	40%	48%	53%	54%	49%
Motor accidents – damages disputes*					
The average lifecycle is less than 120 days	532	530	477	493	511
45% are resolved in 3 months	14%	18%	10%	25%	16%
85% are resolved in 6 months	27%	31%	32%	43%	32%
97% are resolved in 9 months	33%	40%	48%	52%	42%
99% are resolved in 12 months	40%	46%	55%	58%	48%
Workers compensation – Form 2/2D					
The average lifecycle is less than 120 days	138	158	148	151	149
45% are resolved in 3 months	55%	55%	41%	54%	51%
85% are resolved in 6 months	83%	83%	83%	79%	82%
97% are resolved in 9 months	91%	93%	93%	90%	92%
99% are resolved in 12 months	95%	96%	96%	93%	95%

* Motor accidents damages dispute data excludes matters that have been stood over.

Quality

The quality of the Commission's decision-making is measured in terms of the proportion of decisions appealed and the proportion of decisions revoked, either internally in the Commission or through the court system.

Motor accident medical decisions experienced slightly higher appeal rates with the proportion of review applications received for medical certificates issued in the year at 22%.

Despite relatively high appeal rates the proportion of certificates revoked remained relatively stable and within the Commission's target, being less than 10%.

Each year the Commission issues thousands of medical assessor, member, review panel and delegate of the President decisions, of which only a very small number are challenged in the NSW Supreme Court or the NSW Court of Appeal. In 2022–23, less than 1% of all appellable decisions were appealed or revoked in a higher court.

KPI measure	Q3-22	Q4-22	Q1-23	Q2-23	FY23
Appeal rate is less than 20%					
Motor accidents medical decisions with a review application lodged	22%	22%	20%	22%	22%
Workers compensation appellable member decisions with an appeal	20%	26%	18%	18%	20%
Workers compensation appellable medical certificates with an appeal	16%	19%	17%	20%	18%
Revocation rate is less than 10%					
Motor accidents medical decisions revoked on review	5%	5%	6%	8%	8%
Workers compensation appellable member decisions revoked on appeal	5%	5%	5%	5%	5%
Workers compensation appellable medical certificates revoked on appeal	6%	7%	7%	7%	7%
'Appeal rate' of the Commission's appellable decisions to a higher court is less than 10%					<1%
% of the Commission's appellable decisions set aside by a higher court is less than 5%					<1%

9. The Commission's performance (continued)

Outcomes

The Commission's success in encouraging early dispute resolution is measured by the percentage of disputes successfully settled without proceeding to formal determination.

The Commission met the settlement targets in each of the key dispute types in 2022-23.

KPI Measure	Q3-22	Q4-22	Q1-23	Q2-23	FY23
Settlement rate is greater than target					
More than 70% of workers compensation Form 11C proceeding to mediation are settled	70%	69%	71%	69%	70%
More than 35% of workers compensation Form 2/2D are settled	36%	36%	37%	34%	35%
More than 60% of motor accidents damages assessment disputes are settled	72%	71%	66%	70%	70%

User expectation

User expectation performance indicators are used to monitor the Commission's performance in meeting expected timeframes of key events throughout the dispute resolution process.

In the Motor Accidents Division, performance indicators were impacted by the focus on reducing the volume of work on hand. The Commission prioritised scheduling medical assessments for disputes delayed during the COVID-19 pandemic and, as a result, was unable to schedule medical assessments for new applications within the target 35 days of registration.

Target timeframes for key events in the Workers Compensation Division were impacted, in part, by the 16% increase in the volume of new disputes registered and a reduction in the availability of members due to illness, leave and other commitments. The Commission recruited six new sessional members to address this. There was also a greater increase in disputes requiring medical assessment, particularly for psychiatric assessments.

The Commission is committed to improving performance against these measures in 2023-24.

KPI measure	Q3-22	Q4-22	Q1-23	Q2-23	FY23
90% of key dispute events occur within the target timeframe					
Workers compensation					
Form 2/2D with a listing with a member within 28 days of registration	59%	39%	30%	29%	39%
Medical assessments that are scheduled within 35 days of registration	9%	12%	6%	9%	9%
Medical assessor decisions issued within 14 days	79%	80%	79%	77%	78%
Member decisions issued within 21 days	49%	45%	26%	43%	41%
Motor accidents					
Damages assessment disputes with a listing with a member within 28 days of registration	69%	63%	28%	58%	55%
Medical assessments that are scheduled within 35 days of lodgment	0%	0%	0%	0%	0%
Medical assessor decisions issued within 14 days	70%	71%	69%	64%	69%
Member decisions issued within 21 days	41%	33%	78%	72%	55%

10 The law in focus

Motor Accident Injuries Act 2017 amendments

The *Motor Accident Injuries Act 2017* applies to all accidents that occurred on or after 1 December 2017.

The Act was amended by the *Motor Accident Injuries Amendment Act 2022* which came into effect on 28 November 2022. Some changes came into effect on that date, with others taking effect as of 1 April 2023.

Some of the relevant changes include:

As of 28 November 2022:

- Requirement for internal reviews before medical assessment applications was removed in whole person impairment disputes.
- Time limits for making damages claim were removed.
- Time limits for referring claims for assessment were changed.
- Restrictions on settlement of claims were removed.

As of 1 April 2023:

- The term “minor injury” was omitted and is known as “threshold injury”.
- Payments of weekly benefits increased from 26 weeks to 52 weeks for those injured who are at fault or who have threshold injuries.
- Several amendments to dispute types in Schedule 2, including the removal of some dispute types completely, and changes to some medical assessment matters and claims assessment matters.

The Commission responded by amending the Personal Injury Commission rules and procedural directions where necessary to reflect these changes, revising processes internally and communicating the changes with users through the *Personal Injury Commission News*.

Notable decisions

The Commission and related courts have produced many notable decisions during the review period. Here is a selection of key decisions that address the determination of pre-accident weekly earnings, that there is no implied obligation to provide reasons for a decision referring a review application to a review panel, determination of the main contributing factor of an injury, the referral of medical disputes rather than medical assessments, the applicability of *Anshun* estoppel, and apprehended bias.

Haouli v Insurance Australia Limited t/as NRMA Insurance [2023] NSWPICMR 26

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWPICMR/2023/26.html>

Personal Injury Commission, 21 April 2023
Merit Reviewer Brett Williams

Summary

This decision deals with the determination of pre-accident weekly earnings (PAWE) in accordance with Sch 1 of the *Motor Accident Injuries Act 2017* (MAI Act). It was found that Sch 1 cl 4(3) of the MAI Act did not apply where the claimant had returned to work after a hiatus due to the COVID-19 lockdowns. It was found that the term “earnings circumstances”, as used in Sch 1 cl 4(3), refers to circumstances involving an earner who is earning at the time the change in circumstances occurs.

The fact that the claimant was not earning during the COVID-19 lockdowns was a relevant fact to consider when determining which sub-clause in Sch 1 cl 4 of the MAI Act applied, but it was just one fact to be taken into consideration with all other relevant facts.

Detail

Mr Haouli was injured in a motor accident on 28 May 2022. He made a claim for statutory benefits under the MAI Act. The insurer admitted liability to pay statutory benefits for up to 26 weeks.

On 2 August 2022, the insurer determined that Mr Haouli's PAWE was \$1,527.32. Mr Haouli sought internal review of that decision. On 16 November 2022, an internal reviewer determined that Mr Haouli's PAWE was \$942.31. Mr Haouli lodged an application with the Commission disputing that decision.

Prior to the accident, Mr Haouli was self-employed as a boilermaker. Due to the COVID-19 lockdowns, he ceased working on 21 July 2021 and was not able to return to any type of work until 6 October 2021. Mr Haouli argued in these circumstances PAWE should be determined:

1. in accordance with Sch 1 cl 4(2)(a) or,
2. in the alternative, Sch 1 cl 4(2)(b), on the basis that Sch 1 cl 4(3) was engaged.

Merit Reviewer Williams determined that Mr Haouli was not precluded from relying on Sch 1 cl 4(2)(a) as a result of *Allianz Insurance Australia Limited v Shahmiri* [2022] NSWSC 481 (*Shahmiri*). He found that the facts in this case were different to those in *Shahmiri* – unlike the claimant in that case, Mr Haouli was earning continuously on the day of the accident. Further, in *Shahmiri* there was no dispute between the parties that PAWE was to be determined in accordance with cl 4(1), and that case turned on the construction of that clause.

It was found that Sch 1 cl 4(3) did not apply. Merit Reviewer Williams found that the term “earnings circumstances”, as used in Sch 1 cl 4(3), refers to circumstances involving an earner who is earning at the time the change in circumstances occurs. When Mr Haouli returned to work there was a change in circumstances in that he went from receiving no earnings to receiving earnings. However, there was no change in “earnings circumstances” as he was not earning immediately before he had returned to work or since 21 July 2021. That being the case, it was found Sch 1 cl 4(3) did not apply.

Merit Reviewer Williams determined that Mr Haouli's PAWE was to be determined in accordance with Sch 1 cl 4(2)(a). He found that on the day of the accident Mr Haouli had not been earning continuously for at least 12 months; he was not earning during the period 21 July 2021 and 6 October 2021 and started continuously earning from 7 October 2021. In reaching this finding, Merit Reviewer Williams stated:

That an individual was not earning because they were in lockdown is a relevant fact when determining which sub-clause in cl 4 applies. But it is one fact to be taken into consideration together with all other relevant facts.

Merit Reviewer Williams set aside the insurer's decision of 16 November 2022 and remitted the matter back to the insurer to make a decision in accordance with his reasons.

***Pinarbasi v AAI Ltd t/as GIO* [2023] NSWSC 80**

<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NWSC/2023/80.html>

Supreme Court of NSW, 14 February 2023
Schmidt AJ

Summary

There is no implied obligation to provide reasons for a decision referring a review application to a review panel under section 7.26(5) of the *Motor Accident Injuries Act 2017* (MAI Act).

The existence of and failure to agree with opposing medical opinions relied upon by a party cannot alone give rise to reasonable cause to suspect that the medical assessment was incorrect in a material respect.

Detail

Mr Pinarbasi was injured in a motor accident on 30 July 2018. Mr Pinarbasi made a claim under the MAI Act which was rejected by the insurer who determined that he had suffered only minor injuries¹¹ caused by the accident.

¹¹ Due to recent legislative amendments the term “threshold injury” has now replaced “minor injury” under the MAI Act.

10. The law in focus (continued)

In a certificate dated 7 April 2022, Medical Assessor Herald found that Mr Pinarbasi suffered injury to his right shoulder which was not a minor injury within the meaning of the MAI Act. The insurer sought to have that assessment referred to a review panel. A delegate of the President found, pursuant to section 7.26(5) of the MAI Act, that there was reasonable cause to suspect that the medical assessment was incorrect in a material respect having regard to the particulars set out in the application.

Mr Pinarbasi sought judicial review of that decision and raised two grounds of review:

1. that there was an implied obligation for the delegate to provide reasons for the decision made pursuant to section 7.26(5) of the MAI Act, and
2. the insurer's application could not have resulted in the required conclusion that there was reasonable cause to suspect that the medical assessment was incorrect in a material respect.

The Court held that there was no obligation imposed by section 7.26(5) of the MAI Act to give reasons. Schmidt AJ noted that Parliament had expressly required that reasons be given for other decisions made under the statutory scheme and that guidelines may also require the giving of reasons. However, no reasons are expressly required for a decision made pursuant to section 7.26(5) of the MAI Act.

Schmidt AJ referred to *Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission (NSW)* [2007] NSWCA 149 where it was found that a delegate was not under any duty to provide reasons for a decision pursuant to section 327(4) of the *Workplace Injury Management and Workers Compensation Act 1998* which was noted to be a similar provision. Schmidt AJ held that both 'gateway functions' are administrative in character, neither required the correctness of the medical assessment to be determined, did not determine ultimate rights or liabilities, or attract any appeal rights.

In relation to the second ground, it was found that even though the delegate was not required to give reasons, as brief reasons were given, they must be considered. *Insurance Australia Ltd v Marsh* [2022] NSWCA 31 at [12] was applied in respect of the proposition that the existence of conflicting opinions does not of itself provide a basis for referral to a review panel.

Schmidt AJ held that the assessor's failure to agree with the medical opinions on which the insurer had relied did not give rise to reasonable cause to suspect that the medical assessment was incorrect in a material respect having regard to the particulars set out in the application. The delegate's decision was quashed.

***Wood v Insurance Australia Group Ltd t/as NRMA Insurance* [2022] NSWSC 1290**

<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2022/1290.html>

Supreme Court of NSW, 6 October 2022

Wright J

Summary

The Court determined that section 60 of the *Motor Accidents Compensation Act 1999* (MAC Act) established that it is not the medical assessment matter which is referred to a medical assessor for assessment but the 'medical dispute'. Further, what is required pursuant to section 61(1) of the MAC Act to be the subject of the certificate is not the general medical assessment matter as referred to in section 58(1) of the MAC Act but the specific issue about the matter which arises in the particular case.

The Court held that the medical assessor was required to give a certificate only as to whether the degree of impairment was greater than 10%. The medical assessor was not required to give a certificate as to causation as this was not in dispute between the parties and not referred for assessment.

Detail

Mr Wood claimed injuries to his lumbar spine, right hip and psychological injuries as a result of a motor accident on 10 June 2015.

Mr Wood underwent spinal surgery on 5 April 2018. A disagreement arose between Mr Wood and the insurer regarding whether the spinal surgery was reasonable and necessary in the circumstances and whether it was related to the injury caused by the accident. On 13 February 2020, Medical Assessor Machart issued a certificate determining that the treatment related to the injuries caused by the accident and was reasonable and necessary in the circumstances.

Mr Wood's claim proceeded to claims assessment under the MAC Act. In a summary report of a telephone conference that took place on 9 September 2020, the claims assessor noted that Mr Wood had contended, and the insurer did not dispute, that there was no disagreement that he suffered spinal injury as a result of the accident which caused a disc protrusion and that spinal surgery was causally related to the injury sustained in the accident. It was noted that the only remaining medical dispute was whether the degree of impairment as a result of the injury was greater than 10%. This dispute was referred to Medical Assessor Harrington for assessment.

In a certificate dated 11 June 2021, Assessor Harrington found soft tissue injuries to the lumbar spine and right hip were caused by the accident and had resolved. Therefore, an assessment of the degree of permanent impairment was not required. In giving reasons, the medical assessor opined that he did not accept there was a causal link between Mr Wood's diagnosis of sciatica and subsequent treatment for this condition.

Mr Wood applied under section 63(1) of the MAC Act to have this assessment referred to a review panel for review. He asserted that the certified findings of Assessor Machart were of continuing effect and there was no issue in relation to whether the subject injuries had been caused by the accident. A delegate of the President dismissed this application.

Mr Wood sought judicial review of the delegate's decision. The grounds relied upon included:

1. the delegate's decision to refuse to refer the medical assessment to a review panel revealed a misunderstanding of the gatekeeper function conferred by section 63(2B) of the MAC Act and the decision was legally unreasonable
2. the delegate failed to observe that no dispute regarding causation was before Assessor Harrington. Assessor Harrington's adverse findings as to causation should have caused the delegate to form the opinion that there was reasonable cause to suspect that the medical assessment was incorrect in a material respect.

Wright J found that the 'medical dispute' referred to Assessor Harrington was whether the degree of permanent impairment, as a result of the spinal injury which was accepted as having been caused by the motor accident and which required surgery, was greater than 10%. The certificate did not deal with the correct issue because Assessor Harrington formed the view that the injury which required surgery was not caused by the accident. Reasonable cause to suspect the assessment was incorrect in a material respect on this basis was in substance raised in Mr Wood's application.

The Court made orders setting aside the delegate's decision and remitting the matter back to the Commission to arrange for the medical assessment to be referred to a review panel.

10. The law in focus (continued)

Bjekic v State of New South Wales (Western Sydney Area Local Health District) [2023] NSWPCPD 27

<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWPICPD/2023/27.html>

Personal Injury Commission, 10 May 2023

Deputy President Elizabeth Wood

Summary

Section 4(b)(ii) of the *Workers Compensation Act 1987* (the 1987 Act) provides that a disease injury means the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease. In this case the injured worker's employment was not considered to be the main contributing factor to the aggravation, acceleration, exacerbation, or deterioration of his pre-existing sinusitis condition. Rather, the directive issued by the NSW Government mandating the wearing of a face mask was determined to be the main contributing factor.

Detail

The injured worker, Mr Bjekic, was employed as a security officer at Mount Druitt Hospital by the State of New South Wales (Western Sydney Area Local Health District) (the employer).

In October 2020 Mr Bjekic was advised that he was required to wear a face mask for the entirety of his shift owing to a public health order issued by the NSW Government requiring the wearing of a mask in all public hospitals and community settings.

Mr Bjekic had a pre-existing sinus condition which he alleged was aggravated by wearing a face mask. The employer arranged for Mr Bjekic to be medically examined by an occupational physician, who advised that Mr Bjekic was not able to wear a mask covering his nose because of his sinus condition. Mr Bjekic was stood down because of his inability to properly wear a mask. He claimed weekly compensation from 24 June 2021.

The employer disputed the claim and the matter proceeded to an arbitration hearing before a member. The member issued a certificate of determination on 13 May 2022 in which he found that Mr Bjekic's employment was not a substantial or the main contributing factor to his injury and he entered an award for the employer.

The member concluded that employment was neither a substantial contributing factor, nor the main contributing factor, to the appellant's injury.

The decision was appealed by Mr Bjekic in which the following two grounds were ultimately pressed:

1. the member was in error to conclude that section 4(b)(ii) of the 1987 Act was not satisfied in the circumstances of the case; and
2. the member was in error by taking into account irrelevant considerations when making his decision and failed to take into account relevant considerations.

On appeal, Wood DP referred to the test in *AV v AW [2020] NSWCCPD 9 (AV v AW)* where Snell DP considered whether the test of main contributing factor to the aggravation of a disease "involves an evaluative process ... both work and non-work related". Wood DP noted the test of "the main contributing factor" is more stringent than the test of "a substantial contributing factor". She held that the basis for the member's determination was that the injury was caused by the directives from the Government of New South Wales and not by the respondent. The conclusion was arrived at by noting the "common ground" between the parties, a consideration of the available evidence, and the application of the principles enunciated in *AV v AW*. She concluded there was no error in that approach. Wood DP also noted that although there was significant medical evidence to support Mr Bjekic's claim, none of the medical experts addressed the question of whether Mr Bjekic's employment was the main contributing factor.

The mandating of the requirement to wear a mask was not a direction from the employer and as the wearing of the mask was the causative factor, it could not be said that the employment was the main contributing factor. The member's decision was confirmed.

Miller v Secretary, Department of Communities and Justice [2022] NSWCA 190

<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2022/190.html>

New South Wales Court of Appeal,
23 September 2022

Ward P, Brereton JA and Mitchelmore JA

Summary

The NSW Court of Appeal examined the applicability of *Anshun* estoppel as a defence to statutory entitlements consistent with the scheme of the *Workers Compensation Act 1987* (the 1987 Act) and the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) and concluded that the *Anshun* doctrine applied to proceedings under these Acts.

Anshun estoppel is a principle arising from the decision of the High Court of Australia in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

The first claim for compensation pleaded the injury in the workplace as an asthma attack. This claim was unsuccessful. The second claim brought pleaded the injury as cardiac arrest and anoxia. Under consideration was whether *Anshun* estoppel precluded the bringing of the second claim.

Detail

Ms Miller (the deceased), who was known to be asthmatic, was employed by the Department of Communities and Justice (the employer). Her duties principally involved office work but also driving duties when other drivers were unavailable. While driving a community bus in the course of her employment in April 2011, Ms Miller suffered a severe asthma attack. After about 30 minutes, the severity of the attack caused anoxia and cardio-pulmonary arrest. Ms Miller was taken to Nyngan Hospital, where she was pronounced dead. In May 2014, the Coroner found death due to anoxia resulting from a severe asthma attack.

In November 2016, the deceased's husband, Mr Miller, applied for the lump sum death benefit, claiming the 'injury' which caused her death was an asthma attack. The injury was particularised as a disease, and the claim was brought as a claim for "aggravation, acceleration, exacerbation or deterioration" of a disease pursuant to s 4(b)(ii) of the 1987 Act. Mrs Miller's dependant son, Mr Tuhi, was joined as a respondent.

Following an arbitration hearing, an arbitrator of the former Workers Compensation Commission issued a certificate of determination in March 2017 in favour of the employer. The arbitrator was not satisfied that Ms Miller's employment was a substantial contributing factor to the injury, within the meaning of s 9A(1) of the 1987 Act, because she had suffered from asthma all her life, and it was accepted that the driving of the bus in April 2011 did not cause the asthma attack. The arbitrator considered that a severe attack was likely to happen at any time, and he found that the cause of Ms Miller's injury was a pre-existing medical condition, which was not aggravated by her employment.

On appeal, Parker SC ADP confirmed the arbitrator's determination on the basis that no error had been demonstrated in the arbitrator's reasons. An appeal to the Court of Appeal Against Parker SC ADP's decision was dismissed.

Mr Miller and Mr Tuhi brought a second claim in the former Workers Compensation Commission in May 2019 in respect of an injury described as anoxia and cardiac arrest arising during Ms Miller's employment.

The arbitrator accepted that the relevant injury was cardio-pulmonary arrest and he found that it was causally connected to Ms Miller's employment, as the remote location in which she was required to work deprived her of prompt access to treatment for her asthma attack that would have averted the cardio-pulmonary arrest and death. The member rejected arguments that Mr Miller and Mr Tuhi were estopped from bringing the second claim, essentially because the pleaded injury was different, so there was no inconsistency with the earlier determination.

10. The law in focus (continued)

On appeal, the arbitrator's conclusions as to injury and causation were not disturbed, but Phillips P held that the arbitrator had erred in his consideration of the defence of estoppel and *Anshun* estoppel. He remitted the matter for determination by a different arbitrator, confined to the questions of issue estoppel and *Anshun* estoppel.

On remitter, another arbitrator determined that Mr Miller and Mr Tuhi were not barred by issue estoppel because the second application was for a different injury occurring at a slightly different time some 30 minutes later, but that *Anshun* estoppel was established. The arbitrator concluded that it was unreasonable that Mr Miller and Mr Tuhi had not relied on anoxia and cardiac arrest as relevant injuries because they had knowledge of the existence of the injuries during the prior hearing. After this decision, and before the appeal was determined, the Workers Compensation Commission was abolished and this matter was transferred to the Personal Injury Commission where the appeal was determined.

On appeal, Snell DP confirmed the arbitrator's decision, observing his approach was consistent with the High Court in *Anshun*. Mr Miller and Mr Tuhi appealed this decision to the NSW Court of Appeal.

The Court of Appeal found that there is no reason in principle why *Anshun* estoppel ought not apply to the legislative schemes established by the 1987 and 1998 Acts. It followed that, in appropriate circumstances, *Anshun* may be applied in the Commission.

It was noted that what the authorities establish is that a worker is not required to bring forward at once all claims for all types of compensation in respect of all injuries arising out of the one event, and may pursue different types of compensation and in respect of different injuries separately, but may not in a later application claim, on an alternative basis, the same relief as has earlier been denied – which was what the appellants in this case had sought to do.

Askew v Donald Noel Spence t/as Don's Guttering and Roofing Services [2023] NSWPCPD 13

<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWPCPD/2023/13.html>

Personal Injury Commission, 22 March 2023

Deputy President Elizabeth Wood

Summary

This case confirmed that the approach adopted by the High Court of Australia in the cases *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (*Jamsek*), is applicable to oral agreements when determining whether someone undertaking work is a “worker” as defined in s 4 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

These authorities established that the focus of the enquiry must be on the legal rights and obligations created by the contractual relationship between the parties, rather than on the history of the relationship between the parties throughout the life of the contract.

Detail

Mr Askew had been working in his own roofing business since 1986 performing roof repairs for various clients. In about 2018 or 2019, he began to perform work in the roof and gutter repair business of Donald Noel Spence t/as Don's Guttering and Roofing Services (the respondent). In May 2021, Mr Askew stepped backwards and fell to the ground below while performing roof repair work for the respondent. He suffered serious injuries including permanent paraplegia.

Mr Askew made a claim for workers compensation alleging that he was a “worker” as defined in s 4 of the 1998 Act, but the claim was denied. The respondent asserted that Mr Askew was conducting his own business and was not a worker.

Mr Askew commenced proceedings in the Personal Injury Commission. The matter proceeded to an arbitration hearing and a member determined that Mr Askew was an independent contractor and not a worker for the purposes of the 1998 Act. He entered an award for the respondent.

The member indicated that the correct approach was to consider the totality of the evidence. There were no set hours of work, no supervision, and no prohibition on Mr Askew doing other work, which he had in fact undertaken when engaged by the respondent. The only elements of control were the commencement and completion dates of the contract. His taxation returns identified business income and he claimed business expenses. The rate of pay at the respondent was for a set fee payable at the completion of the work, and he could refuse work. The respondent did not deduct taxation or pay superannuation, holiday, or other leave. There was no hourly rate or overtime. The member considered that these facts were consistent with Mr Askew being a sub-contractor who owned and operated an independent business.

The member indicated that the fact that the respondent provided and paid for materials did not mean that Mr Askew was not operating his own business. Further, the signage on Mr Askew's vehicle and the respondent's website content was consistent with Mr Askew being a sub-contractor. He concluded that Mr Askew was operating as an entrepreneur in his own business when performing work for the respondent. Mr Askew appealed the decision.

On appeal, Wood DP noted that the High Court of Australia had delivered two decisions, *Personnel Contracting* and *Jamsek*, that concerned the approach to be adopted in assessing whether a contract to perform work constitutes a contract of service or a contract for services.

Although both parties submitted that the High Court decisions had no direct application because there was no written contract, Wood DP disagreed. She indicated that the High Court's observations applied to the construction of oral contracts and the question as to whether the contract is an employment contract.

Wood DP concluded that the focus of the inquiry when seeking to characterise the relationship as being one of employer and employee, or one involving the engagement of an independent contractor, is the legal rights and obligations created by the contractual relationship between the parties, rather than upon the history of the relationship between them (including the manner of performance of the contract).

Wood DP confirmed the certificate of determination. She was satisfied that the member had considered all available evidence when determining the "worker" issue and she found that he had determined the matter by applying the evidence relevant to the terms of the oral contract, consistent with the principles in *Jamsek* and *Personnel Contracting*.

***Mills v Martin-Brower Australia Pty Ltd* [2023] NSWSC 253**

<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NWSC/2023/253.html>

Supreme Court of New South Wales,
23 March 2023

Adamson JA

Summary

This case stated that it is well established that the principles relating to bias apply not only to judicial officers but also to administrative decision-makers, such as the appeal panel in this case. It had considered whether there was apprehended bias where a member of the Commission was also a member of the appeal panel that assessed a worker's degree of permanent impairment.

The test for apprehended bias as articulated by the High Court in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 was endorsed, namely whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question he or she is required to decide.

10. The law in focus (continued)

Detail

Mr Mills sustained an injury to his hip and his employer's insurer accepted liability and paid weekly compensation and medical expenses. Mr Mills made a claim for lump sum compensation pursuant to s 66 of the 1987 Act for permanent impairment of his right hip and lumbar spine. The employer denied liability in respect of Mr Mills' lumbar spine. Mr Mills commenced proceedings in the Commission.

Following an arbitration hearing, a member determined that Mr Mills had suffered an injury to his right hip and a consequential condition in his iliopsoas muscle and lower back. He remitted the matter to the President for referral to a medical assessor to assess the degree of whole person impairment.

A medical assessor issued a medical assessment certificate (MAC) in respect of 18% whole person impairment of the right lower extremity (hip) and 0% whole person impairment in respect of the lumbar spine. Mr Mills lodged an appeal against the MAC. The medical appeal panel confirmed the decision of the medical assessor.

Mr Mills sought a judicial review of the decision of the medical appeal panel on the grounds that the member who had determined the dispute was also a member of the medical appeal panel and ought to have recused himself, that there was a denial of procedural fairness because Mr Mills was not advised that the member would be on the medical appeal panel and he was not given an opportunity to object. Mr Mills also relied on other grounds regarding the medical appeal panel decision.

Adamson JA of the Supreme Court of NSW held that Mr Mills had not established any error of law based on apprehended bias or denial of procedural fairness. He noted that although the parties were not notified of the composition of the medical appeal panel, it could not be inferred that the member did not appreciate that he had made the decision to refer the matter for assessment given that he was identified as the member in the certificate of determination.

Adamson JA noted that the question that the member had to address during the arbitration hearing was different to the matter that he was required to determine as part of the medical appeal panel.

Adamson JA stated that there was no apprehension of bias given that an observer could appreciate the different roles played by the Commission when determining a liability dispute, and the medical assessor and medical appeal panel when determining a medical dispute. He was not satisfied there was any failure to abide by the terms of the referral or to apply the guidelines, so the medical appeal panel was entitled to confirm the MAC.

Motor accidents – principles and practice

Brett Williams, Senior Member, Personal Injury Commission

Damages claims arising from motor accidents in this state have provided fertile ground for the development of the law in Australia. Initially these claims were governed wholly by the common law. They were mostly heard by juries. Over time they became the subject of legislation that addressed both process and entitlements. As jury trials in civil matters became less and less common, judges were required to make findings of fact. Those findings were then subject to appellate review.

The President's paper to the NSW Bar Association¹² traversed the path from the *Motor Vehicles (Third Party) Insurance Act 1942* to the *Motor Accident Injuries Act 2017* (MAI Act) (via the short-lived *Transport Accidents Compensation Act 1987*,¹³ the *Motor Accidents Act 1988* and the *Motor Accidents Compensation Act 1999*).

Following the introduction of statutory benefits in the MAI Act, the range of matters that are now the subject of disputation and determination has significantly broadened.

The publication of decisions made at both appellate level and by first instance decision-makers is critical to parties and their legal representatives. Appellate decisions set the legal boundaries within which parties, their lawyers, and first instance decision-makers, operate. First instance decisions provide them with practical insight.

At the apex of the judicial system, claims arising from motor accidents have kept the High Court occupied for the best part of a century. In 1934, five members of the High Court found that a jury had awarded a sum as general damages that was so inadequate as to require a new trial.¹⁴ Other cases have been of greater significance. In *Todorovic v Waller*¹⁵ the court addressed whether, when there is an assessment of damages for future economic loss, it is proper to make an allowance for future inflation and, if so, then how is this to be done. The court (by majority) held that a discount rate of 3% should be applied. Because of the practical importance of this decision, the court published a statement as to its effect.¹⁶ In *Derrick v Cheung*,¹⁷ the court reminded decision-makers that:

“[13] ... Few occurrences in human affairs, in retrospect, can be said to have been, in absolute terms, inevitable. Different conduct on the part of those involved in them almost always would have produced a different result. But the possibility of a different result is not the issue and does not represent the proper test for negligence. That test remains whether the plaintiff has proved that the defendant, who owed a duty of care, has not acted in accordance with reasonable care.”

12 Paper delivered for the NSW Bar Association on 4 April 2022.

13 Operating between 1 July 1987 and 30 June 1989.

14 *Rowe v Edwards* (1934) 51 CLR 351 (Rich, Starke, Dixon, Evatt and McTiernan JJ).

15 (1981) 150 CLR 402.

16 The following statement was read by the Chief Justice when judgment was delivered:

“In an action for damages for personal injuries, evidence as to the likely course of inflation, or of possible future changes in rates of wages or of prices, is inadmissible. Where there has been a loss of earning capacity which is likely to lead to financial loss in the future, or where the plaintiff's injuries will make it necessary to expend in the future money to provide medical or other services, or goods necessary for the plaintiff's health or comfort, the present value of the future loss ought to be quantified by adopting a discount rate of 3 per cent in all cases, subject, of course, to any relevant statutory provisions. This rate is intended to make the appropriate allowance for inflation, for future changes in rates of wages generally or of prices, and for tax (either actual or notional) upon income from investment of the sum awarded. No further allowance should be made for these matters.”

17 [2001] HCA 48.

10. The law in focus (continued)

*Tame v New South Wales*¹⁸ concerned a pure mental harm case and the scope of the duty of care. McHugh J issued the following salient warning at [101]:

“[101]... I think that the time has come when this Court should retrace its steps so that the law of negligence accords with what people really do, or can be expected to do, in real life situations. Negligence law will fall – perhaps it already has fallen – into public disrepute if it produces results that ordinary members of the public regard as unreasonable. Lord Reid himself once said “[t]he common law ought never to produce a wholly unreasonable result”. And probably only some plaintiffs and their lawyers would now assert that the law of negligence in its present state does not produce unreasonable results.”

And it was a damages claim arising from a motor accident that provided the High Court with an opportunity to articulate the fact finding framework to be applied by decision-makers. In *Fox v Percy* [2003] HCA 22 the court held at [31]¹⁹ that (emphasis added):

“[31] ... in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses **and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events.** This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical.”

There is also *Joslyn v Berryman; Wentworth Shire Council v Berryman* [2003] HCA 34, *Allianz Australia Insurance Limited v GSF Australia Pty Limited* [2005] HCA 26, *Nominal Defendant v GLG Australia Pty Limited* [2006] HCA 11 (GLG), *Imbree v McNeilly; McNeilly v Imbree* [2008] HCA 40, all cases involving damages claims arising out of motor accidents in this state.

In *GLG*, Kirby J emphasised at [41] that “[d]ecisions based on ... statutory language, as applied to particular facts, represent no more than ‘individual instances’. They do not provide binding precedents to be used in resolving cases that involve different facts.”

All of these decisions are important. But equally important are the first instance decisions now published by the Commission, as required by s58 of the *Personal Injury Commission Act 2020* (PIC Act).

Prior to the establishment of the Commission, and until the Dispute Resolution Service (DRS) started publishing de-identified cases under the MAI Act on 17 May 2018,²⁰ decisions about motor accident damages claims (and statutory benefits claims) were not published unless they were the subject of a court decision or a case summary of de-identified non-economic loss damages awarded published by the State Insurance Regulatory Authority. This meant that practitioners and their clients were, other than through word of mouth and limited publication, in the dark as to what they might expect from decision-makers operating in Claims Assessment Resolution Services (CARS) and the DRS.

18 [2002] HCA 35.

19 Gleeson CJ, Gummow and Kirby JJ.

20 *AAA v NRMA Insurance Ltd* [2018] NSWIRADR 1 (merit review) <http://classic.austlii.edu.au/au/cases/nsw/NSWSIRADRS/2018/1.html>.

The first damages assessment published was in *AIF v NRMA Insurance* [2020] NSWIRADR 6 (12 February 2020) <http://classic.austlii.edu.au/au/cases/nsw/NSWSIRADRS/2020/6.html>

The publication of decisions took on greater significance after the MAI Act, which introduced a scheme of statutory benefits, came into operation. New concepts, such as “pre-accident weekly earnings”, or variations of familiar concepts, such as “wholly or mostly at fault”, were introduced. The approach taken by first instance decision-makers to the meaning and application of these new concepts, enables the staking of the boundaries within which individual disputes under the MAI Act are likely to be decided.

Equally important are the decisions in the Motor Accidents Division about procedural matters under the MAI Act, the PIC Act, the Commission rules and procedural directions; the latter being of particular significance in a newly established tribunal.

Different decision-makers take different approaches to decision-making, and reasonable minds differ. Accepting these variables, the publication of decisions provides insight into the thinking of decision-makers and allows parties to order their affairs accordingly; appropriate compromises may be made and settlement of disputes achieved.

The publication of decisions in motor accident disputes is a welcome and long overdue development. It puts the parties and their lawyers on an even playing field when it comes to the preparation and conduct of cases. The publication of the decisions of members, and other decision-makers in the Commission, encourages honesty and candour, and is a public statement of their accountability for their decisions.²¹

The publication of decisions in motor accident disputes is a welcome and long overdue development. It puts the parties and their lawyers on an even playing field when it comes to the preparation and conduct of cases.

21 Matters addressed by the President in his speech to the to the NSW Bar Association Conference 20 February 2021, prior to the Commission commencing its operations.

10. The law in focus (continued)

Federal jurisdiction and the Commission

John Harris, Principal Member, Personal Injury Commission

Chapter three of the Constitution of the Commonwealth of Australia (the Constitution) provides that the judicial power of the Commonwealth is vested in the High Court and such other federal courts created by Parliament. Sections 75 and 76 of the Constitution refer to nine categories of “matters” which are within the original jurisdiction of the High Court. Section 77(iii) of the Constitution provides that Parliament may invest any court of a State with federal jurisdiction.

I will limit the discussion in this article to s 75(iv) of the Constitution, that is, matters “between States, or between residents of different States, or between a State and a resident of another State”. Through the combined operation of ss 38 and 39 of the *Judiciary Act 1903* (Cth), matters between residents of different States or between a State and a resident of another State can be heard by a court of a State.

The issue of whether the Personal Injury Commission (the Commission) may be exercising “federal jurisdiction” was recognised by Division 3.2 of the *Personal Injury Commission Act 2020* (the 2020 Act) which provides for matters to be heard in the District Court if the determination by the Commission “would involve an exercise of federal jurisdiction”. The application must first be made to the President or the Commission.²²

The issue of whether the Commission may be exercising federal jurisdiction arose from the majority decision of the High Court in *Burns v Corbett*²³ which determined that a State may not confer “State adjudicative authority” on a body that is not categorised as a court of a State.²⁴ The issue is not new to the Commission and the issue was discussed in the former Workers Compensation Commission²⁵ after *Burns* had been decided.

There are three requirements in determining whether a claim is potentially federally impacted under s 75(iv) of the Constitution. They are:

- (a) jurisdiction can only be exercised by a court of a State;
- (b) the matter is between residents of different States, or between a State and a resident of another State, and
- (c) the determination of the matter involves the exercise of judicial power.

A tribunal cannot decide whether the determination involves an exercise of federal jurisdiction and should only express a view consistent with the test set out in *Citta Hobart Pty Ltd v Cawthorn*.²⁶ That is, a member of the Commission may only decide whether the defence that federal jurisdiction exists is arguable, colourable or the argument otherwise amounts to judicial nonsense.

If the matter is potentially federally impacted, then a court of a State will decide whether the determination does in fact involve an exercise of federal jurisdiction. The distinction is discussed later.

²² Section 26(3)(a) of the 2020 Act.

²³ [2018] HCA 15; 265 CLR 304 (*Burns*).

²⁴ Kiefel CJ, Bell and Keane JJ, [55], Gageler J, [119].

²⁵ *Bilal v Haidar* [2019] NSW WCC 312.

²⁶ [2022] HCA 16 (*Citta-Hobart*) at [35]–[37] per Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ.

Criterion (a): Court of a State

The Commission is not a court of a State within the meaning of s 77 of the Constitution such that all matters before it may be federally impacted (subject to the satisfaction of the other two criteria).

In *Orellana-Fuentes v Standard Knitting Mill Pty Ltd*²⁷ the Court of Appeal held that the former Workers Compensation Commission was not a court. In *Attorney-General for New South Wales v Gatsby*, the Court made a similar finding with respect to the New South Wales Civil and Administrative Tribunal.²⁸

The Commission is not comprised of judges and members do not have the same independence held by members of the judiciary.²⁹ Members do not have security of tenure as they are appointed for a “term”,³⁰ and may be removed by the Minister on advice of the President.³¹ The 2020 Act does not require that members be legally qualified.³² The Commission is otherwise not designated as a court of record. All these matters were considered relevant and discussed in *Orellana-Fuentes*³³ and *Gatsby*.³⁴

As a generalisation, there are no material differences between the creation of the Commission and appointments of members and Presidential members with the former Workers Compensation Commission. There is no rational basis to suggest a different finding pertaining to the Commission with that decided in *Orellana-Fuentes* to the status of the former Workers Compensation Commission, that is, the Commission clearly is not a court of a State.

Criterion (b): State and a resident of another State

Basic propositions

The High Court determined that the meaning of “residents of different States” refers to natural persons and not corporations: *Australasian Temperance and General Mutual Assurance Society Ltd v Howe*.³⁵ Leave was refused to entertain an application to reconsider *Howe* in *Crouch v Commissioner for Railways (Queensland)*.³⁶

There is longstanding High Court authority that the relevant date of residency is when the proceedings are instituted.³⁷

Correct identification of the parties

There have been misconceptions as to the identification of the relevant party for the purposes of determining whether federal jurisdiction is being exercised.

In *Searle*, Kirk JA stated (at [24]):

“There is a wide range of disputes that may arise under statutory schemes such as the [*Motor Accident Injuries Act 2017*] and the workers compensation legislation. For some disputes the relevant disputants may be the claimant and the insurer of the other person involved (ie the other driver or the employer). Insofar as the dispute is properly characterised as being directly with the insurer, then whether or not the matter might be in federal jurisdiction will turn on the residence of the claimant and the nature of the insurer, and not depend on the residence or nature of the person insured.”

27 [2003] NSWCA 146; 57 NSWLR 282 (*Orellana-Fuentes*).

28 [2018] NSWCA 254 (*Gatsby*).

29 *Orellana-Fuentes*, [48].

30 Section 9(3)(b) of the 2020 Act.

31 Section 16(1)(f) of the 2020 Act.

32 Section 10 of the 2020 Act.

33 At [43].

34 At [187], [202]–[203].

35 [1922] HCA 50; 31 CLR 290 (*Howe*).

36 [1985] HCA 69; 159 CLR 22 (*Crouch*), 27 and 34.

37 The relevant authorities are collected in *Ritson v State of New South Wales* [2021] NSWPIA 409, [33]–[39].

See also *Searle v McGregor* [2022] NSWCA 213 (*Searle*), [23].

10. The law in focus (continued)

In the Motor Accidents Division of the Commission, the relevant parties are the claimant and the insurer. In the Workers Compensation Division, the respondent is the employer not the insurer. It is the employer that is considered for the purposes of determining whether there is an issue of federal jurisdiction.

In *Lee v Fletcher International Exports Pty Ltd*³⁸ the District Court remitted a workers compensation matter to the Commission holding that federal jurisdiction did not exist. The Court noted that the obligation to pay compensation is on the employer under s 9 of the *Workers Compensation Act 1987* (the 1987 Act) and the fact that the respondent is a self-insurer was irrelevant.³⁹ This decision means that the self-insurer's submission that it is a State would probably be unarguable if it is re-agitated before the Commission.

For similar reasons, no issue of federal jurisdiction arises if the respondent is a company holding compulsory insurance under the New South Wales statutory scheme.⁴⁰ In *Watts* the proposition was rejected as unarguable that the compulsory workers compensation insurer, arguably an emanation of the State, was the relevant legal entity for determining the issue of federal jurisdiction.

What is a State

In *Bank of New South Wales v The Commonwealth*⁴¹ Dixon J (as his Honour then was) stated:⁴²

“From beginning to end [the Constitution] treats the Commonwealth and States as organizations or institutions of government possessing distinct individualities. Formally they may not be juristic persons, but they are conceived as politically organized bodies having mutual legal relations and amenable to the jurisdiction of courts upon which the responsibility of enforcing the Constitution exists.”

These observations were cited with approval by Gibbs CJ in *Crouch*⁴³ and by an unanimous full bench in *Deputy Commissioner of Taxation v State Bank of New South Wales*⁴⁴ which accepted that the reference in the Constitution to the Commonwealth or States must include “references [that] are wide enough to denote a corporation which is an agency or instrumentality of the Commonwealth or the State as the case may be”.⁴⁵

The Court then stated:⁴⁶

“The activities of government are carried on not only through the departments of government but also through corporations which are agencies or instrumentalities of government.”

Consistent with these authorities, the State Insurance Regulatory Authority (The Nominal Defendant) was found to be the State of New South Wales to enliven federal jurisdiction (Motor Accidents Division).⁴⁷

38 [2023] NSWDC 71 (*Lee*).

39 *Lee*, [33]-[34].

40 *Watts v BKFY Pty Ltd* [2022] NSWPICT 700 (*Watts*).

41 [1948] HCA 7; 76 CLR 1 (*Bank of NSW*).

42 *Bank of NSW*, 363.

43 *Crouch*, 28-29.

44 [1992] HCA 6; 174 CLR 219 (*State Bank*), [17].

45 At [20].

46 *State Bank*, [20].

47 *Ritchie v The Nominal Defendant*, unreported, District Court of NSW, Gibb DCJ, 5 November 2021.

Alternatively, the courts have held that various private insurers are not a State, including Insurance Australia Ltd (NRMA);⁴⁸ Allianz Australia Insurance Ltd; CIC Allianz Insurance Ltd; Youi Pty Ltd; RACQ Insurance Ltd; QBE Insurance (Australia) Ltd; AAI Ltd t/as GIO, and Gordian Runoff Ltd.⁴⁹

Various state-run motor accident schemes in Tasmania, Victoria and Western Australia are likely to be emanations of the State and potentially federally impacted. Consistent with the interpretation given to the meaning of a State, it is likely that the statutory body representing and liable for payment of damages in the schemes in Victoria, Tasmania and Western Australia also fall within the meaning of a State.

The Transport Accident Commission (TAC) is a statutory corporation under the *Transport Accident Act 1986* (Vic). TAC is responsible for all claims under the Victorian system and the High Court has found that it has the “characteristics which bring it within the constitutional description of the State of Victoria for the purposes of s 75(iv) of the Constitution”.⁵⁰ The Insurance Commission of Western Australia is a statutory corporation and the only insurer responsible for motor accident claims for personal injury in Western Australia.⁵¹ The Tasmanian system is administered by the Motor Accidents Insurance Board under the *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas). The Motor Accidents Insurance Board (MAIB) is a Tasmanian Government Enterprise.

Recently the District Court held that a local council is an emanation of the State of New South Wales which enlivened the issue of federal jurisdiction.⁵²

Criterion (c): Exercise of judicial power

As Beech-Jones CJ observed in a recent paper, the concept of “matter is very much bound up with the exercise of judicial power”.⁵³

This criterion is probably the most critical because if the Commission does not exercise judicial power as defined in the constitutional sense, then it cannot be exercising federal jurisdiction. The issue has been discussed by the Court of Appeal (*Searle*) and returns to that Court for argument later in August this year from an appeal from a Presidential member. Once the Court delivers reasons, much of what is written below will probably be irrelevant.

Classifying an exercise of power as administrative or judicial is not straightforward. In *Citta-Hobart* the plurality described the test as:⁵⁴

“A ‘matter’ referred to in s 75 or s 76 of the Constitution encompasses a justiciable controversy about a legal right or legal duty having an existence that is not dependent on the commencement of a proceeding in the forum in which that controversy might come to be adjudicated.”⁵⁵

In *Searle* Kirk JA expressed obiter comments whether the determination of a claim for statutory benefits in the Workers Compensation Division of the Commission is an exercise of judicial power and noted that this was “open to substantial doubt”.⁵⁶ His Honour left that question open whilst making observations about the exercise of various powers in the Motor Accidents Division. In *Orellana-Fuentes*, Ipp JA opined that the Workers Compensation Commission was “undoubtedly” exercising judicial powers.⁵⁷ Sackville AJA expressed similar observations in *Sabanayagam v St George Bank Ltd*.⁵⁸

48 *Stanton v Winning* [2022] NSWDC 104.

49 *Condon v Bartley; Hayes v RACQ Insurance Limited; Smith v Allianz Australia Insurance Ltd; Ward v QBE Insurance (Australia) Ltd; Hackett v Allianz Australia Insurance Ltd* [2022] NSWDC 282.

50 *Sweedman v Transport Accident Commission* [2006] HCA 8; 226 CLR 362, [12].

51 *Insurance Commission of Western Australia Act 1986* (WA).

52 *Stanley v Lachlan Shire Council* [2023] NSWDC 262.

53 The Constitution and State Tribunals, p 4.

54 At [31].

55 The quote cited in a footnote “*Fencott v Muller* (1983) 152 CLR 570 at 603 (citing *In re Judiciary and Navigation Acts* [1921] HCA 20; (1921) 29 CLR 257 at 265), 608.”

56 *Searle*, [21].

57 At [39], Spigelman CJ and Handley JA agreeing.

58 [2016] NSWCA 145, [123].

10. The law in focus (continued)

A worker's cause of action and the employer's liability vests at the time of injury even though the entitlements are not immediately ascertainable.⁵⁹ Settlements can otherwise be made outside the forum such as s 66A complying agreements or by way of deed. This indicates, adapting the test in *Citta-Hobart* referenced above, that the controversy between the parties concerning workers' entitlements exists independently of the forum.

Workers compensation decisions are "final and binding"⁶⁰ subject to rights of reconsideration and an appeal to a presidential member. Alternatively, the inquisitorial nature of the arbitration hearing is suggestive of an administrative process.

Kirk JA referred to damages assessments under the motor accidents legislation by the Commission as an "advisory opinion"⁶¹ and that it was incorrect to say that the Commission "determines" damages.⁶² Under both the *Motor Accident Injuries Act 2017* (the MAI Act) and the workers compensation legislation, Kirk JA noted that "it is for courts ultimately to determine the damages claim".⁶³

In *Rafiqul Islam v Transport Accident Commission of Victoria and Heather Worldon v Transport Accident Commission of Victoria*,⁶⁴ the District Court subsequently held that the Commission does not exercise judicial power in assessing a claim for damages under the MAI Act. That question was decided after and without reference to the observations in *Searle*.

The suggestion that medical assessments, including reviews and appeals, involve an exercise of judicial power was described in *Searle* as "counter-intuitive".⁶⁵ This observation is consistent with authority that the nature of the function may be judicial or administrative depending on by whom it is exercised (the chameleon doctrine).⁶⁶ Indeed, the medical assessment process involving an examination without the presence of the parties' legal practitioners is far removed from the notion that medical assessors exercise judicial power.

In *Campbelltown City Council v Vegan*,⁶⁷ Basten JA observed that appeal panels constituted under the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) "might not constitute an exercise of judicial power for the purposes of the federal Constitution, but they are functions properly characterised as judicial in nature, for the purposes of determining their incidents."⁶⁸ In *Islam and Worldon*, the District Court otherwise held that a medical assessment under the MAI Act does not involve the exercise of judicial power.

The observations by Basten JA are consistent with the distinction between a determination which is final and binding in adversarial proceedings without that determination being considered an exercise of judicial power: *Tomlinson v Ramsey Food Processing Pty Ltd*.⁶⁹

There is every reason to accept that the finding that medical assessments in the Motor Accidents Division are not exercising judicial power would equally apply to the Workers Compensation Division of the Commission.

59 *Hochbaum v RSM Building Services Pty Ltd; Whitton v Technical and Further Education Commission t/as TAFE NSW* [2020] NSWCA 113.

60 Section 56 of the 2020 Act

61 *Searle*, [36].

62 *Searle*, [92].

63 *Searle*, [44].

64 [2022] NSWDC 582 (*Islam and Worldon*).

65 *Searle*, [80].

66 See *Thomas v Mowbray* [2007] HCA 33; 233 CLR 307.

67 [2006] NSWCA 284; 67 NSWLR 372 (*Vegan*).

68 *Vegan*, [117].

69 [2015] HCA 28; 256 CLR 507 (*Tomlinson*), [21].

In *Searle*, Kirk JA expressed an opinion considered obiter about other types of disputes where the Commission was not exercising judicial power. Examples include that the exercise of a power to exempt a claim for assessment under the motor accidents legislation because it falls within a mandatory exemption could not be characterised as judicial.⁷⁰ Further, State tribunals are not forbidden from taking steps of resolving issues which do not involve the exercise of judicial power, even if the dispute might otherwise be seen to fall within the scope of what is federal jurisdiction.⁷¹ An example is an attempt at conciliation.⁷²

This then leads to the recent Presidential decision of *State of New South Wales v Kanajenhalli*⁷³ which has been appealed to the Court of Appeal. The worker then claimed various compensation entitlements due to psychological injury. The only defence ultimately pressed before the member was whether the injury was caused by reasonable action taken by the employer with respect to discipline or performance appraisal within the meaning of s 11A of the 1987 Act. The member rejected the employer's defence under s 11A and made various orders for weekly compensation and medical expenses and otherwise referred the claim for impairment for assessment by a medical assessor.

On appeal, the issue of whether the determination involved the exercise of federal jurisdiction was raised by the Presidential member. It was not in issue that the Commission was not a court, the employer was self-evidently the State of New South Wales, and the worker was a resident in Queensland when proceedings were instituted.

The Presidential member expressed an opinion, consistent with the test in *Citta-Hobart*, that the member determined the matter without jurisdiction, holding that it was "arguable" that the member was exercising "judicial power". The Commission did not determine that it exercised judicial power although the grounds of appeal were framed in terms of contesting such a finding.

It is of course unknown whether the Court of Appeal addresses the limits of whether the Commission is exercising judicial power or whether it notes that the decision was limited to one of whether the issue was arguable. This was raised in *Citta-Hobart*⁷⁴ and recently noted by the Court of Appeal in *Attorney-General for New South Wales v FJG*.⁷⁵

The appeal was listed for hearing in August and judgment may be delivered prior to the publication of this paper. In these circumstances I do not express a concluded opinion having earlier noted factors which suggest the outcome is uncertain. It is sufficient to note that if the Court of Appeal decides that the determination of a liability issue generally or under s 11A of the 1987 Act does not involve the exercise of judicial power, then the question of whether the Commission exercises federal jurisdiction is largely otiose.

Conclusion

The classes of cases that may be federally impacted in the Commission is diminishing and probably non-existent in the Motor Accidents Division. The forthcoming Court of Appeal decision in *Kanajenhalli* may determine whether there are similarly no remaining federal jurisdiction issues in the Workers Compensation Division.

70 *Searle*, [81].

71 *Searle*, [14].

72 *Searle*, [20] applying *Gaynor v Attorney-General of New South Wales* [2020] NSWCA 48 at [94]–[99], [124], [138].

73 [2023] NSWPCPD 1 (*Kanajenhalli*).

74 *Citta Hobart*, [45]–[46].

75 [2023] NSWCA 34, [89]–[91].

Appendices

Appendix A – Executive Leadership Team

President

Judge Gerard Phillips

Division Heads

Division Head, Motor Accidents Division

Ms Marie Johns

Division Head, Workers Compensation Division

Mr Glenn Capel

Principal Registrar

Ms Marianne Christmann

Appendix B – Members

Presidential members

Deputy Presidents

Mr Michael Snell

Ms Elizabeth Wood

Acting Deputy Presidents

Mr Geoffrey Parker SC

Ms Kylie Nomchong SC

Mr Michael Perry

Dual principal members

Ms Josephine Bamber

Mr John Harris

Senior members

Ms Elizabeth Beilby

Ms Kerry Haddock

Mr Brett Williams

General members

Full-time

Workers Compensation Division	Motor Accidents Division	Dual appointment
Mr Cameron Burge	Mr Alexander Bolton	Ms Susan McTegg
Ms Rachel Homan	Ms Belinda Cassidy	Mr Terence O'Riain
Mr John Isaksen	Mr Raymond Plibersek	
Ms Jacqueline Snell		
Mr Gaius Whiffin		

Sessional

Workers Compensation Division	Motor Accidents Division	Dual appointment
Mr Brett Batchelor	Mr Stephen Boyd-Boland	Mr Michael Inglis
Ms Diana Benk	Mr Terrence Broomfield	Mr Anthony Scarcella
Mr Stephen Churches	Mr Maurice Castagnet	Mr Cameron Thompson
Mr Marshal Douglas	Mr Allan Cowley	Mr Philip Young
The Honorable Lea Drake	Mr Robert Foggo	
Ms Karen Garner	Mr David Ford	
Ms Anne Gracie	Mr Hugh Macken	
Ms Catherine McDonald	Ms Elizabeth Medland	
Mr Michael McGrowdie	Ms Bridie Nolan	
Ms Deborah Moore	Mr Gary Patterson	
Mr Michael Moore	Ms Shana Radnan	
Ms Jane Peacock	Mr Terence Stern	
Mr Richard Perrignon	Ms Elyse White	
Ms Carolyn Rimmer		
Mr Paul Sweeney		
Ms Jill Toohey		
Mr John Turner		
Mr Christopher Wood		
Mr Michael Wright		
Mr Christopher Wynyard		

Notes:

- Six sessional members are also appointed as mediators as listed on page 78.
- All members of the Motor Accidents Division (25 members) also hold a dual appointment as a merit reviewer as listed on page 78.

Appendix C – Merit reviewers

Ms Josephine Bamber
Mr Alexander Bolton
Mr Stephen Boyd-Boland
Mr Terrence Broomfield
Ms Belinda Cassidy
Mr Maurice Castagnet
Mr Allan Cowley
Mr Robert Foggo
Mr David Ford
Mr John Harris
Mr Michael Inglis
Mr Hugh Macken
Ms Susan McTegg
Ms Elizabeth Medland
Ms Bridie Nolan
Mr Terence O’Riain
Mr Gary Patterson
Mr Raymond Plibersek
Ms Shana Radnan
Ms Katherine Ruschen
Mr Anthony Scarcella
Mr Kriesen Seeneevassen
Mr Terence Stern
Mr Cameron Thompson
Ms Elyse White
Mr Brett Williams
Mr Philip Young

Appendix D – Mediators

Mr Ross Bell
Ms Lara Bishkov
Professor Laurence Boulle
Mr Jak Callaway
Mr Philip Carr
Ms Janice Connelly
Ms Catherine Davidson
Ms Geri Ettinger
Mr David Flynn
Mr Robert Foggo
Ms Nina Harding
Mr John Ireland
Ms Kathryn Ireland
Dr Katherine Johnson
Dr John Keogh
Ms Bianca Keys
Mr Stephen Lancken
Ms Margaret McCue
Mr Michael McGrowdie
Mr John McGruther
Mr Garry McIlwaine
Mr Chris Messenger
Mr Dennis Nolan
Ms Philippa O’Dea
Mr Richard Perrignon
Mr Anthony Scarcella
Mr Paul Sweeney
Mr John Tancred
Mr John Whelan
Mr Christopher Wood

Appendix E - Medical assessors

Medical Assessor	Specialty	Division
Dr Nigel Ackroyd	General Surgery	Workers Compensation and Motor Accidents
Ms Lauren Alach	Occupational Therapy	Workers Compensation and Motor Accidents
Dr Martin Allan	Psychiatry	Workers Compensation and Motor Accidents
Dr Timothy Anderson	Occupational Medicine	Workers Compensation
Dr Douglas Andrews	Psychiatry	Workers Compensation and Motor Accidents
Dr Mohammed Assem	Rehabilitation Medicine	Workers Compensation and Motor Accidents
Dr John Baker	Psychiatry	Workers Compensation and Motor Accidents
Dr Leslie Barnsley	Rheumatology	Motor Accidents
Dr Melissa Barrett	Psychiatry	Motor Accidents
Dr Jennifer Batchelor	Neuropsychology	Workers Compensation and Motor Accidents
Dr Neil Berry	General Surgery	Workers Compensation and Motor Accidents
Dr Tim Berry	Psychiatry	Workers Compensation and Motor Accidents
Dr Rahul Bharadwaj	Psychiatry	Workers Compensation
Dr Graham Blom	Psychiatry	Workers Compensation
Dr James Bodel	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Dr Mark Burns	Occupational Medicine	Workers Compensation
Dr Gregory Burrow	Orthopaedic Surgery	Workers Compensation
Professor Ian Cameron	Rehabilitation Medicine	Workers Compensation and Motor Accidents
Dr Christopher Canaris	Psychiatry	Workers Compensation and Motor Accidents
Dr Malcolm Capon	Ophthalmology	Motor Accidents
Professor John Carter	Endocrinology	Workers Compensation and Motor Accidents
Ms Anna Castle-Burton	Occupational Therapy	Workers Compensation and Motor Accidents
Dr Norman Chan	Gynaecology	Workers Compensation and Motor Accidents
Dr Wing Chan	Occupational Medicine	Motor Accidents
Dr Gerald Chew	Psychiatry	Workers Compensation and Motor Accidents
Ms Fiona Condie	Physiotherapy	Motor Accidents
Dr Michael Couch	Occupational Medicine	Workers Compensation and Motor Accidents
Dr James Cowlshaw	Gastroenterologist	Workers Compensation
Dr Terry Coyne	Neurosurgery	Workers Compensation and Motor Accidents
Dr David Crocker	Occupational Medicine	Workers Compensation and Motor Accidents
Dr Geoffrey Paul Curtin	Plastic and Reconstructive Surgery	Workers Compensation and Motor Accidents
Dr Michael Davies	Neurosurgery	Workers Compensation
Dr Russel Davies	Psychiatry	Workers Compensation and Motor Accidents
Dr Sathish Dayalan	Psychiatry	Workers Compensation and Motor Accidents
Dr Drew Dixon	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Dr Alan Doris	Psychiatry	Workers Compensation and Motor Accidents

Appendices (continued)

Medical Assessor	Specialty	Division
Dr Sylvester Fernandes	ENT	Workers Compensation and Motor Accidents
Adjunct Professor Robin Fitzsimons	Neurology	Workers Compensation and Motor Accidents
Dr Paul Friend	Psychiatry	Workers Compensation and Motor Accidents
Dr Atsumi Fukui	Psychiatry	Workers Compensation and Motor Accidents
Dr John Garvey	General Surgery	Workers Compensation and Motor Accidents
Dr Peter Giblin	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Dr Margaret Gibson	Occupational Medicine	Workers Compensation and Motor Accidents
Dr John Giles	Plastic and Reconstructive Surgery	Workers Compensation and Motor Accidents
Professor Nicholas Glozier	Psychiatry	Workers Compensation and Motor Accidents
Dr David Gorman	General Medicine	Workers Compensation and Motor Accidents
Dr Todd Gothelf	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Associate Professor Christopher Grainge	Respiratory Medicine	Workers Compensation and Motor Accidents
Dr Ron Granot	Neurology	Workers Compensation and Motor Accidents
Dr Rhys Gray	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Dr Graham Gumley	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Dr Richard Haber	Cardiology	Workers Compensation and Motor Accidents
Dr Peter Haertsch	Plastic and Reconstructive Surgery	Workers Compensation and Motor Accidents
Dr Christopher Harrington	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Dr Henley Harrison	ENT	Workers Compensation
Dr Peter Heathcote	Urology	Workers Compensation and Motor Accidents
Dr Jonathan Herald	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Dr Samuel Herman	Cardiology	Workers Compensation and Motor Accidents
Dr Roland Hicks	Orthopaedic Surgery	Workers Compensation
Dr Yiu-Key Ho	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Dr Adeline Hodgkinson	Rehabilitation Medicine	Workers Compensation and Motor Accidents
Dr Alan Home	Occupational Medicine	Workers Compensation and Motor Accidents
Dr Michael Hong	Psychiatry	Workers Compensation and Motor Accidents
Dr Nigel Hope	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Dr Kenneth Howison	ENT	Workers Compensation and Motor Accidents
Dr Murray Hyde-Page	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Dr Louis Izzo	Gynaecology	Workers Compensation and Motor Accidents
Dr Mark Jones	General Medicine	Workers Compensation
Dr Matthew Jones	Psychiatry	Motor Accidents
Dr Gregory Kaufman	Respiratory Medicine	Workers Compensation and Motor Accidents
Dr Clive Kenna	Musculoskeletal Medicine	Motor Accidents

Medical Assessor	Specialty	Division
Dr Sikander Khan	General Surgery	Workers Compensation and Motor Accidents
Dr Edward Korbel	Urology	Workers Compensation and Motor Accidents
Dr John Korber	Diagnostic Radiology	Workers Compensation and Motor Accidents
Dr Robert Kuru	Orthopaedic Surgery	Workers Compensation
Dr Sophia Lahz	Rehabilitation Medicine	Workers Compensation and Motor Accidents
Dr John Lam-Po-Tang	Psychiatry	Workers Compensation
Mr Andrew Leaver	Physiotherapy	Workers Compensation and Motor Accidents
Dr David Lewington	Rehabilitation Medicine	Workers Compensation
Dr Samuel Lim	Psychiatry	Workers Compensation and Motor Accidents
Dr James Linklater	Diagnostic Radiology	Workers Compensation and Motor Accidents
Dr Malcolm Linsell	Plastic and Reconstructive Surgery	Workers Compensation and Motor Accidents
Dr Thomas Long	General Surgery	Workers Compensation and Motor Accidents
Dr Jane Lonie	Neuropsychology	Workers Compensation and Motor Accidents
Dr Frank Machart	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Mr Anup Mangipudi	Occupational Therapy	Workers Compensation and Motor Accidents
Dr Wayne Mason	Psychiatry	Workers Compensation and Motor Accidents
Dr Tommasino Mastroianni	Occupational Medicine	Workers Compensation
Dr Andrew McClure	Psychiatry	Workers Compensation and Motor Accidents
Dr Michael McGlynn	Plastic and Reconstructive Surgery	Workers Compensation and Motor Accidents
Dr David McGrath	Occupational Medicine	Workers Compensation and Motor Accidents
Dr Gregory McGroder	Occupational Medicine	Workers Compensation
Dr John McKee	General Surgery	Workers Compensation and Motor Accidents
Dr Kerrie Meades	Ophthalmology	Workers Compensation
Dr Ross Mellick	Neurology	Workers Compensation and Motor Accidents
Dr Nigel Menogue	Musculoskeletal Medicine	Motor Accidents
Ms Lisa Middleton	Occupational Therapy	Workers Compensation and Motor Accidents
Dr Geoffrey Miller	General Surgery	Workers Compensation and Motor Accidents
Dr Robin Mitchell	Occupational Medicine	Workers Compensation and Motor Accidents
Dr Shane Moloney	Musculoskeletal Medicine	Motor Accidents
Dr Patrick Morris	Psychiatry	Workers Compensation
Dr Abhishek Nagesh	Psychiatry	Workers Compensation and Motor Accidents
Dr Anil Nair	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Dr Jonathan Negus	Orthopaedic Surgery	Workers Compensation
Dr Thomas Newlyn	Psychiatry	Motor Accidents
Dr Bradley Ng	Psychiatry	Workers Compensation and Motor Accidents
Dr Paul Niall	ENT	Workers Compensation

Appendices (continued)

Medical Assessor	Specialty	Division
Dr Paul Nichols	Dentistry	Workers Compensation and Motor Accidents
Dr Christopher Oates	Occupational Medicine	Workers Compensation and Motor Accidents
Dr John O'Neill	Neurology	Workers Compensation and Motor Accidents
Dr Shannon Paisley	Psychiatry	Workers Compensation and Motor Accidents
Dr Robert Payten	ENT	Workers Compensation and Motor Accidents
Ms Dawn Piebenga	Occupational Therapy	Workers Compensation and Motor Accidents
Dr Roger Pillemer	Orthopaedic Surgery	Workers Compensation
Dr Andrew Porteous	Occupational Medicine	Workers Compensation and Motor Accidents
Dr Daniel Posel	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Dr Sally Preston	Rheumatology	Motor Accidents
Dr Thandavan Raj	ENT	Workers Compensation and Motor Accidents
Dr Adam Rapaport	General Surgery	Workers Compensation and Motor Accidents
Associate Professor Trudy Rebbeck	Physiotherapy	Workers Compensation and Motor Accidents
Dr Loretta Reiter	Rheumatology	Workers Compensation and Motor Accidents
Dr Sharon Reutens	Psychiatry	Motor Accidents
Dr Christopher Rikard-Bell	Psychiatry	Workers Compensation and Motor Accidents
Dr Samson Roberts	Psychiatry	Workers Compensation and Motor Accidents
Dr Tania Rogers	Occupational Medicine	Workers Compensation and Motor Accidents
Dr Thomas Rosenthal	Occupational Medicine	Workers Compensation and Motor Accidents
Dr Doron Samuell	Psychiatry	Workers Compensation and Motor Accidents
Dr John Schmidt	Gynaecology	Workers Compensation and Motor Accidents
Dr Joseph Scoppa	ENT	Workers Compensation
Dr Siddarth Sethi	Gastroenterology	Workers Compensation
Dr Farhan Shahzad	Occupational Medicine	Workers Compensation and Motor Accidents
Dr Glen Sheh	Pain Medicine	Workers Compensation and Motor Accidents
Dr Yu-Tang Shen	Psychiatry	Workers Compensation and Motor Accidents
Dr Doron Sher	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Dr Himanshu Singh	Psychiatry	Workers Compensation
Dr Alexey Sidorov	Psychiatry	Workers Compensation and Motor Accidents
Dr Clayton Smith	Psychiatry	Workers Compensation
Dr Glen Smith	Psychiatry	Workers Compensation and Motor Accidents
Dr Peter Spittaler	Neurosurgery	Workers Compensation and Motor Accidents
Dr Michael Steiner	Ophthalmology	Workers Compensation and Motor Accidents
Dr John Brian Stephenson	Orthopaedic Surgery	Workers Compensation
Dr Jeanette Stewart	Neuropsychology	Workers Compensation and Motor Accidents
Dr Geoffrey Stubbs	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Dr Aman Suman	Psychiatry	Workers Compensation and Motor Accidents

Medical Assessor	Specialty	Division
Dr David Sykes	Dentistry	Workers Compensation and Motor Accidents
Dr Ash Takyar	Psychiatry	Workers Compensation
Dr Bernard Tamba-Lebbie	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Dr Stephen Thornley	Endocrinology	Workers Compensation and Motor Accidents
Dr Philip Truskett	General Surgery	Workers Compensation and Motor Accidents
Dr Ahamed Veerabangsa	Rehabilitation Medicine	Motor Accidents
Dr Surabhi Verma	Psychiatry	Workers Compensation and Motor Accidents
Dr Raymond Wallace	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Dr Tai-Tak Wan	Rehabilitation Medicine	Motor Accidents
Mr Michael Ward	Physiotherapy	Motor Accidents
Mr Andrew Webster	Physiotherapy	Workers Compensation and Motor Accidents
Dr Ian Wechsler	Ophthalmology	Workers Compensation and Motor Accidents
Dr Nelukshi Wijetunga	Occupational Medicine	Workers Compensation and Motor Accidents
Dr Brian Williams	ENT	Workers Compensation and Motor Accidents
Ms Jennifer Wise	Occupational Therapy	Workers Compensation and Motor Accidents
Dr James Wong	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Associate Professor Siu Kin Cyril Wong	General Surgery	Workers Compensation and Motor Accidents
Dr Alexander Woo	Orthopaedic Surgery	Workers Compensation and Motor Accidents
Mr David Young	Physiotherapy	Workers Compensation and Motor Accidents
Dr Peter Young	Psychiatry	Workers Compensation and Motor Accidents
Dr Peter Yu	Occupational Medicine	Workers Compensation and Motor Accidents

Appendix F – Rule Committee

Chair

Judge Gerard Phillips, President

Membership

Representative	Organisation represented
Ms Marie Johns, Division Head, Motor Accidents Division	Personal Injury Commission
Mr Glenn Capel, Division Head, Workers Compensation Division	Personal Injury Commission
Mr Adam Dent	State Insurance Regulatory Authority (SIRA)
Ms Natasha Flores	Unions NSW
Ms Elizabeth Greenwood	Ai Group, Australian Federation of Employers and Industries, NSW Business Chamber
Ms Elizabeth Welsh	Council of the NSW Bar Association
Mr Ross Stanton	Council of the NSW Bar Association
Mr Ian Jones	Council of the Law Society of NSW
Mr Shane Butcher	Council of the Law Society of NSW
Adjunct Professor Robin Fitzsimons	Royal Australasian College of Physicians (RACP), The Royal Australian and New Zealand College of Psychiatrists (RANZCP) and The Royal Australasian College of Surgeons (RACS)

Secretariat

Ms Janet Wagstaff

Appendix G – Stakeholder Reference Group

Chair

Judge Gerard Phillips, President

Membership

Representative	Organisation represented
Ms Marianne Christmann, Principal Registrar	Personal Injury Commission
Ms Marie Johns, Division Head, Motor Accidents Division	Personal Injury Commission
Mr Glenn Capel, Division Head, Workers Compensation Division	Personal Injury Commission
Ms Helen Wall	NSW Bar Association
Mr Timothy Concannon	The Law Society of New South Wales
Mr Leigh Davidson	The Law Society of New South Wales
Mr Stephen Harris	The Law Society of New South Wales
Ms Katherine Toshack	The Law Society of New South Wales
Mr Joshua Dale	Australian Lawyers Alliance
Ms Madeleine Hibberd	Insurance Council of Australia
Ms Mary Maini	icare NSW
Ms Sheri Hayward	Unions NSW
Dr Petrina Casey	State Insurance Regulatory Authority (SIRA) Motor Accidents Insurance Regulation
Mr Darren Parker	State Insurance Regulatory Authority (SIRA) Workers & Home Building Compensation Regulation

Appendix H – CTP Insurer Reference Group

Chair

Ms Marie Johns, Division Head, Motor Accidents Division

Membership

Representative	Organisation represented
Ms Marianne Christmann, Principal Registrar	Personal Injury Commission
Ms Betty Taleski	Allianz Australia Insurance Ltd
Ms Diana Farah	Carroll & O'Dea Lawyers
Mr Scott Frazer	Enstar Australia
Ms Annette Buterin	icare NSW
Ms Megan McDonald	icare NSW
Ms Madeleine Hibberd	IAG
Mr Tom Lunn	Insurance Council of Australia
Mr John Cooper	Moray & Agnew
Mr James Dunwoody	QBE Insurance Group
Ms Jane Toole	QBE Insurance Group
Mr Darren Chew	Suncorp
Mr Peter Tran	Suncorp
Ms Rachel Ford	Suncorp
Ms Elizabeth Marinopoulos	Transport Accident Commission (TAC)
Ms Lauren Johnson	Transport Accident Commission (TAC)
Mr Glen Robinson	Youi
Ms Julia Allcock	Youi
Ms Courtney Archer	Youi

Appendix I – Medical Assessor Reference Group

Chair

Ms Marianne Christmann, Principal Registrar

Membership

Representative	Specialty
Mr Luke Roberts, Director Medical Services	Personal Injury Commission
Mr John Barlow, Manager Medical Services	Personal Injury Commission
Dr Neil Berry	General Surgery
Dr Mark Burns	Occupational Medicine
Professor Ian Cameron	Rehabilitation Medicine
Dr Michael Couch	Occupational Medicine
Dr Drew Dixon	Orthopaedic Surgery
Dr John Garvey	General Surgery
Dr Peter Giblin	Orthopaedic Surgery
Dr Margaret Gibson	Occupational Medicine
Professor Nicholas Glozier	Psychiatry
Dr Henley Harrison	Ear, Nose and Throat
Dr Chris Oates	Occupational Medicine
Associate Professor Trudy Rebbeck	Physiotherapy
Dr Nel Wijetunga	Occupational Medicine

Appendix J – Mediator Reference Group

Chair

Mr Glenn Capel, Division Head, Workers Compensation Division

Membership

Representative	Organisation represented
Ms Marianne Christmann, Principal Registrar	Personal Injury Commission
Mr Philip Carr, Mediator	Personal Injury Commission
Ms Geri Ettinger, Mediator	Personal Injury Commission
Ms Nina Harding, Mediator	Personal Injury Commission
Ms Bianca Keys, Mediator	Personal Injury Commission
Mr John McGruther, Mediator	Personal Injury Commission
Ms Philippa O’Dea, Mediator	Personal Injury Commission
Mr Jak Callaway, Mediator	Personal Injury Commission
Mr David Flynn, Mediator	Personal Injury Commission

Appendix K – KPMG Independent Auditor’s Report



Independent Auditor’s Report

To the Principal Registrar of the Personal Injury Commission (“the Commission”)

Report on the audit of the Operating Expenses and Income Statement

Opinion

We have audited the annual Operating Expenses and Income Statement (the **Statement**) of the Personal Injury Commission (the **Commission**) for the year ended 30 June 2023.

In our opinion, the accompanying **Statement** (Appendix A) of the Personal Injury Commission for the year ended 30 June 2023 presents fairly, in all material respects, in accordance with the attached **Basis of Preparation** (Appendix B).

The Statement comprises the **Commission’s** reporting in accordance with section 66 of the *Personal Injury Commission Act 2020* (NSW) (the **Act**).

Basis for opinion

We conducted our audit in accordance with *Australian Auditing Standards*. We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our opinion.

Our responsibilities under those standards are further described in the *Auditor’s responsibilities for the audit of the Statement* section of our report.

We are independent of the Commission in accordance with the ethical requirements of the *Accounting Professional and Ethical Standards Board’s APES 110 Code of Ethics for Professional Accountants (including Independence Standards)* (the Code) that are relevant to our audit of the Statement in Australia. We have fulfilled our other ethical responsibilities in accordance with these requirements.

Emphasis of matter – basis of preparation and restriction on use and distribution

We draw attention to the attached *Basis of Preparation - Operating Expenses and Income Related to Each Operational Fund*, which describes the basis of preparation.

The Statement has been prepared by the Principal Registrar of the Commission for the purpose of meeting the Commission’s reporting requirements of the Act. As a result, the Statement and this Auditor’s Report may not be suitable for another purpose.

Our report is intended solely for the Principal Registrar of the Commission and for incorporation into the Commission’s Annual Review 2022-23 Document and should not be used by or distributed to any other party. We disclaim any assumption of responsibility for any reliance on this Auditor’s Report, or on the Statement to which it relates to any other party or for any purpose other than that for which it was prepared. Our opinion is not modified in respect of this matter.

1
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Responsibilities of Management and Those Charged with Governance for the Statement

Management of the Commission are responsible for:

- the preparation and fair presentation of the Statement in accordance with the reporting requirements of the Act to the extent described in the attached Basis of Preparation - Operating Expenses and Income Related to Each Operational Fund.
- determining that the basis of preparation described in the attached Basis of Preparation - Operating Expenses and Income Related to Each Operational Fund is appropriate to meet the requirements of the Act.
- implementing necessary internal control to enable the preparation and presentation of the Statement that is free from material misstatement and non-compliance with the Act, whether due to fraud or error.
- assessing the Commission's ability to continue as a going concern and whether the use of the going concern basis of accounting is appropriate. This includes disclosing, as applicable, matters related to going concern and using the going concern basis of accounting unless they either intend to liquidate the Commission or to cease operations, or have no realistic alternative but to do so.

Those charged with governance being the Principal Registrar is responsible for overseeing the Commission's financial reporting process.

Auditor's responsibilities for the audit of the Statement

Our objective is:

- to obtain reasonable assurance about whether the Statement as a whole is free from material misstatement and non-compliance with the Act, whether due to fraud or error; and
- to issue an Auditor's Report that includes our opinion.

Reasonable assurance is a high level of assurance, but is not a guarantee that an audit conducted in accordance with *Australian Auditing Standards* will always detect a material misstatement and non-compliance when it exists.

Misstatements can arise from fraud or error. They are considered material if, individually or in the aggregate, they could reasonably be expected to influence the economic decisions of users taken on the basis of this Schedule.

A further description of our responsibilities for the Audit of the Statement is located at the *Auditing and Assurance Standards Board* website at: http://www.auasb.gov.au/auditors_responsibilities/ar4.pdf. This description forms part of our Auditor's Report.

KPMG

Leann Yuen

Partner

Sydney

3 October 2023



Appendix A

Operating expenses and income related to each operational fund

Personal Injury Commission	2023 \$'000	WCOF \$'000	MAOF Scheme 2017 \$'000	MAOF Scheme 1999 \$'000
Expense				
Personnel services				
Salaries and allowances (including annual leave) ⁵	26,015	10,908	11,859	3,248
Agency short term staff ⁶	2,760	1,216	1,212	332
Total personnel services	28,775	12,124	13,071	3,580
Other operating expenses				
Accommodation expenses ⁷	5,147	2,326	2,215	606
Payments to service partners ⁸	25,535	11,964	10,653	2,918
Software expenses ⁹	2,485	911	1,236	338
Other miscellaneous expenses ¹⁰	6,827	3,409	2,683	735
Total other operating expenses	39,994	18,610	16,787	4,597
Total expenditure	68,769	30,734	29,858	8,177
Income				
Contributions (WCOF)	30,734	30,734	-	-
Contributions (MAOF Scheme 2017)	29,858	-	29,858	-
Contributions (MAOF Scheme 1999)	8,177	-	-	8,177
Total income	68,769	30,734	29,858	8,177
Net result	-	-	-	-



Appendix B

Basis of Preparation – Operating Expenses and Income Related to Each Operational Fund

The Personal Injury Commission (Commission) resolves dispute applications. The Personal Injury Commission (PIC) Act 2020 (NSW) section 66(4)(d) requires the Annual Review to include the extent to which the operations of the Commission are funded by each operational fund. The operational funds are specifically defined in s66(5) as:

- a) The Motor Accidents Operational Fund (the SIRA Fund) under the Motor Accident Injuries Act 2017 (NSW) (MAOF Scheme 2017)
- b) The Motor Accidents Operational Fund under the Motor Accidents Compensation Act 1999 (NSW) (MAOF Scheme 1999)
- c) The Workers Compensation Operational Fund under the Workplace Injury Management and Workers Compensation Act 1998 (NSW) (WCOF).

The attached *Operating Expenses and Income Related to Each Operational Fund* statement is prepared on accruals basis. The basis of preparation associated with each financial caption including the basis used to allocate expenses and income to each of the three operational funds is described below:

Expense recognition

Expenses are expenses as incurred when recharged by the relevant bodies. As the Commission does not operate a bank account, SIRA settles payments on the Commission's behalf.

Personnel Services

Wages, salaries, superannuation, and annual leave

Operational staff are DCS employees, paid by the Department and subject to Department employee policies. The Commission's President and Members are not DCS employees, but are Statutory Appointees, who are paid through the Department's payroll functions.

Wages and salaries, including non-monetary benefits and annual leave expected to be settled within 12 months of the reporting date are recognised in respect of employee services up to the reporting date. Annual leave expense represents the movement in the annual leave provision as at the beginning of the year compared to the provision as at reporting date as provided by the DCS.

Superannuation expense is calculated in accordance with the Superannuation Guarantee Charge of 10.5% per annum as applied to the wages and salaries expense incurred and recharged throughout the year. Payroll tax is calculated based on the NSW State rate of 5.45% applied to the gross salary costs for each operational fund.

Other personnel expenses

Comprises of contractor expenses as recharged by Contractor Central. Contractor expenses are directly allocated to the operational fund which engaged the services of the individual contractors as identified by the Commission.

Other Operating Expenses

Accommodation Expenses

Accommodation expenses reflects the rental charge for the premises that the Commission inhabits. Rental expense is allocated to each operational fund based on the number of full-time equivalent employees assigned to each cost centre. For the 2023 year, this includes the costs associated with the refurbishment of premises occupied by the Commission and recharged from DCS.



Payments to Service Partners

Payments to service partners comprise those to Sessional Members, Medical Assessors, Mediators, and sessional Merit Reviewers. Sessional Members, Mediators, Merit Reviewers and Medical Assessors ('Service Partners') are appointed on a three (3) year basis and paid on an agreed fee schedule for work performed. The ATO issued a Private Tax Ruling in 2020 that requires Sessional Members and Medical Assessors' earnings to be subject to PAYG income tax and superannuation. The Department's payroll system is currently incapable of processing these calculations based on a fee schedule, so an external third-party provider (TRS) performs this function on the Commission's behalf.

Payments to Service Partners are processed in the Commission's Case Management Systems. Service Partners upload their payment claims in the respective case management system. The claims are reviewed by the relevant case managers and approved. Every two (2) weeks the Commission extracts the approved invoices from the systems and transfers this to TRS who calculate the income tax component and superannuation liability. TRS pay the Service Partners, ATO and super funds directly, and 'push' the summarised data into the Commission's company code in SAP, which triggers the reimbursement of TRS. SAP is managed and maintained by DCS.

Software Expenses

This reflects the incumbent case management systems and supporting software packages. Costs incurred are expensed upon receipt of invoice. Where software expenses are prepaid, the expense is recognised upon receipt of invoice. Prepaid expenses are not capitalised and deferred over the period of service but are expensed as incurred.

Other Miscellaneous Expenses

Other miscellaneous expenses represent other operating expenses incurred, including final one-off establishment costs and the planning and design of the single digital platform, and medical suites operations.

Expense allocation methodology

Expenses are allocated to each operational fund based on each individual employees' assigned cost centre, being Motor Accidents, Workers Compensation and Generic. Those in Generic are allocated based on the proportion of cases finalised. Case finalisation represents the actual cases finalised as of 31 May each year.

Income

As the Commission does not have a bank account, SIRA receipts all income on the Commission's behalf.

Contributions

Contributions are recognised upon the Personal Injury Commission's completion of the identified performance obligations. The performance obligation is satisfied over time as services are provided by the Commission.

Contributions are concentrated to SIRA which represents 99.9% of the income generated by the operational funds.

Income allocation methodology

Income is allocated to each fund based on the cases which generated the services.

Appendix L – Staff profile

This section provides data on the number of full-time members, senior executives and staff working in the Commission.

	Head Count
Full-time members	20
Senior executives	6
Staff (including administrative and legal officers)	158
Grand total	184

Notes:

The head count is the number of people in each group, shown in the Commission’s establishment report, as at 30 June 2023. The head count includes contractors.

The senior executives and staff of the Commission are provided by the Department of Customer Service pursuant to s 22 of the *Personal Injury Commission Act 2020*.

The full-time members are appointed by the Attorney General, pursuant to s 9 of the *Personal Injury Commission Act 2020*.

The remuneration of the President, members and senior executives is determined each year by the Statutory and Other Offices Remuneration Tribunal (SOORT):

- SOORT Judges and Magistrates Group Annual Determination
- SOORT Public Office Holders Group Annual Determination
- SOORT Public Service Senior Executives Determination.

The salaries of staff members are set under the Crown Employees (Administrative and Clerical Officers – Salaries) Award and the Legal Officers, Various Departments, Agreement No. 2375 of 1982.

Information about sessional members, medical assessors, merit reviewers and mediators can be found in other appendices.

Appendix M – Accessing the Commission’s information

Types of information held by the Commission

The Commission collects information to register applications and make decisions about personal injury disputes. This includes personal information, health information and other information provided by the parties and their legal representatives in Commission proceedings, including but not limited to:

- claim forms
- medical and investigative reports
- injury management plans, clinical notes and medical certificates
- witness statements
- notices issued under workers compensation or motor accidents legislation
- complying agreements
- receipts
- wage information and payslips.

The Commission also holds information relating to its decisions, proceedings, services and administration.

Protecting personal and health information

The Commission has obligations under the New South Wales *Privacy and Personal Information Protection Act 1998* (PPIPA) and the *Health Records and Information Privacy Act 2002* (HRIPA) to protect the privacy rights of customers, service providers, staff and members of the public. The Commission takes these responsibilities seriously.

The PPIPA and HRIPA contain principles about managing personal and health information which the Commission must comply with. These principles are legal obligations that describe what the Commission must do when it collects, stores, uses or discloses personal and health information. This is to ensure safeguards are in place to protect personal and health information from loss, unauthorised access, use, modification or disclosure, and against all other misuse. The Commission complies with these obligations.

While anyone can seek access, under the *Government Information (Public Access) Act 2009* (GIPA Act), to government information that is held by the Commission, there are certain considerations that are taken into account before any information is released. The Commission is unlikely to disclose the personal or health information of another person.

Information that is publicly available

The GIPA Act requires the Commission to make certain information, known as “open access information”, publicly available. The Commission holds the following types of open access information which is publicly available, free of charge, on the Commission’s website:

- an information guide
- policy documents.

The GIPA Act also authorises the proactive release of information unless there is an overriding public interest against disclosure of the information. Accordingly, the Commission has made the following information publicly available, free of charge, on the website:

- procedural directions and guidelines
- decisions
- guides and codes of conduct
- policies
- annual reviews
- papers and presentations
- bulletins and brochures.

How to access the Commission's information

If the information sought is not available on the Commission's website, there are, under the GIPA Act, two mechanisms for the release of government information that may be used: an informal request or a formal access application.

An informal request can be made to the Commission for the release of certain information. The Commission is not obliged to consider an informal request but may do so if possible.

Much of the information that is held by the Commission, other than the publicly available information referred to above, relates to the personal information of individuals and is likely to be exempt from disclosure under the GIPA Act. However, a formal access application may be made using the formal access application form.

Applications for internal review of the conduct of the Commission under section 53(1) of the PPIPA

During 2022-23, the Commission received one application under section 53 of the PPIPA and completed an internal review. The Commission notified the Privacy Commissioner about the application, kept it informed about the review's progress and informed the Privacy Commissioner about the review findings and the proposed action in response to the review. The Commission also invited the Privacy Commissioner to make submissions about the application. The applicant and the Privacy Commissioner were advised of the internal review outcome.

Government Information (Public Access) statistics

The GIPA Act requires agencies to report on their obligations under the GIPA Act. During 2022-23, the Commission received two access applications to release information under the GIPA Act. There were no invalid applications during this period.

Of the two applications received, one application was refused by the Commission because it could not be accessed as it was "excluded information" under section 43 of the GIPA Act. Information is excluded information of an agency, if it relates to any of the functions specified in Schedule 2 of the GIPA Act. In this case, the information requested was captured under clause 1 of Schedule 2, namely "judicial functions".



Welcome to the Personal Injury Commission

We resolve disputes between people injured in motor accidents and workplaces, employers and insurers in New South Wales.

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New South Wales

**Personal Injury
Commission**

Personal Injury Commission

Level 21, 1 Oxford Street, Darlinghurst NSW 2010

1800 PIC NSW (1800 742 679) within Australia

www.pi.nsw.gov.au