



ADMINISTRATIVE REVIEW COUNCIL

REPORT TO THE ATTORNEY-GENERAL

COMPENSATION (COMMONWEALTH GOVERNMENT EMPLOYEES) ACT 1971 - AMENDMENTS

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ADMINISTRATIVE REVIEW COUNCIL

G.P.O. Box 9955
Canberra, A.C.T. 2601

27 June 1983

Dear Attorney-General,

I have pleasure in submitting to you herewith a Report by the Administrative Review Council titled the *Compensation (Commonwealth Government Employees) Act 1971-Amendments*.

The Council recommends that this Report be published.

Yours sincerely,

E. J. L. Tucker
Chairman

Senator the Hon. Gareth Evans
Attorney-General
Parliament House
Canberra, A.C.T. 2600

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PART 1: INTRODUCTION

1. The functions of the Administrative Review Council are set out in section 51 of the *Administrative Appeals Tribunal Act 1975*. They include the power to make recommendations to the Attorney-General on:

- (i) the procedures of administrative review tribunals; and
- (ii) ways and means of improving procedures in exercising administrative discretions to ensure the just and equitable exercise of such discretions.

2. The Council's attention has been drawn to a number of problems relating to the operation of both primary and review decision making under the *Compensation (Commonwealth Government Employees) Act 1971*. These problems concern the presentation of medical evidence to the Commissioner's Office and his delegates, delays in primary decision making, and the increasing number of appeals being taken to the Administrative Appeals Tribunal ('the AAT').

3. As these matters fall at least partly within the Council's statutory functions, it was decided to commence a project aimed at determining whether the Council should recommend any amendments to the *Compensation (Commonwealth Government Employees) Act 1971* or changes to existing administrative procedures. In developing this project, the Council's Director of Research has consulted with a number of people, including the Minister for Social Security (Senator the Hon. D. J. Grimes); the Commissioner for Employees' Compensation (Mr D. Corrigan); the Chairman of the Victorian Workers' Compensation Board (his Honour Judge C. W. Harris); his Honour Judge M. W. Campbell, D.C., of the Workers' Compensation Commission of N.S.W.; Messrs D. Cameron and G. Curran of the Sydney firm, Geoffrey Edwards & Co.; Mr Peter Redlich of the Melbourne firm, Holding & Redlich; and Mr J. O. Ballard, Senior Member of the AAT. The Council's project was also discussed with officials from the Australian Council of Trade Unions and the Administrative and Clerical Officers' Association.

PART 2: BACKGROUND

4. In 1981 the Council reported to the Attorney-General on the Commonwealth Employees' Compensation Tribunal. That Report formed part of the Council's general project on Commonwealth administrative tribunals and focused on five principal matters:

- (i) the question of incorporation of the Commonwealth Employees' Compensation Tribunal ('the CECT') into the AAT;
- (ii) the role of the Commissioner for Employees' Compensation in proceedings under the *Compensation (Commonwealth Government Employees) Act 1971*;
- (iii) the award of costs in such proceedings;
- (iv) the question of abolishing the existing alternative right of appeal to prescribed courts; and
- (v) the role of the Federal Court in the Commonwealth employees' compensation jurisdiction.

5. Most of the Council's recommendations were subsequently implemented in Part VI of the *Commonwealth Functions (Statutes Review) Act 1981*, including the primary recommendation that the jurisdiction of the CECT be conferred upon the AAT. The Council's recommendation that there should be a legislative provision requiring the Commissioner for Employees' Compensation to determine a matter as soon as practicable, but in any case within sixty days of lodgment of a claim, was not implemented.

6. This Report relates to a number of problems that have arisen concerning primary and review decision making. Those problems are now outlined in brief.

IDENTIFIED PROBLEMS

Delays

7. Mr J. O. Ballard has stated that the 'great defect over Commonwealth compensation must be delay' (in D. C. Pearce (ad.), *Administrative Law Service*, p. 5090). The problem of delay is especially acute in two areas: primary decision making and the preparation of section 37 statements for the purposes of AAT review.

PRIMARY DECISION MAKING

8. The problem of delay in determining claims for compensation was discussed by the Council in its earlier *Report on the Commonwealth Employees' Compensation Tribunal* (see paras 15-23). The problem was also highlighted in the Commissioner's Annual Report for 1980-81 (see pp. 7-9).

9. Some cases of delay stem from difficulties in gathering evidence - particularly medical evidence before a claim can be finalised. Several months may lapse before a claimant can be examined by a medical specialist. Other factors contributing to delay

may also be beyond the Commissioner's control such as his dependence upon the co-operation of employing departments; an acute staffing shortage in the face of a growing number of claims (see his Annual Report for 1980-81, pp. 3-6); and the Commissioner has claimed that some of his staff have been diverted from ordinary duties to undertake work relating to both AAT proceedings and applications for judicial review in the Federal Court.

10. Long delays may occur in cases where a claimant is required to submit himself or herself for examination by a medical referee. The following table demonstrates that more than half of the claims involving medical referees' examinations took longer than twenty weeks to determine.

TABLE 1: DELAYS ASSOCIATED WITH MEDICAL REFEREES' EXAMINATIONS 1981-82

Time elapsed in weeks between date of request and date of decision	Percentage of claims	Cumulative percentage of claims
0-4	1.08	1.08
5-8	4.50	5.58
9-12	12.43	18.01
13-16	14.96	32.97
17-20	15.32	48.29
21-24	12.97	61.26
25-28	11.53	72.79
29-32	6.67	79.46
33-36	5.23	84.69
37-40	4.32	89.01
41-44	3.60	92.61
45 and over	7.39	100.00

Source: Office of the Commissioner for Employees' Compensation

11. The Commissioner's Office advised that during 1981-82 it required medical referees' examinations in 1971 cases. Individual departments and authorities also arranged examinations in an unidentified number of cases. The Office was unable to provide separate information relating to the time taken to process claims that do not involve medical referees' examinations; however, the Council was advised that information received from agencies as to the average time they took to finalise all claims (including those involving medical referees' examinations) suggested that overall an average time of approximately eight and a half weeks occurred in 1981-82. Detailed information was not available to indicate the distribution of processing times around that average; however, the Commissioner's Office informed the Council that a sample of cases surveyed in Telecom in 1979-80 revealed that about 73% of claims were processed within four weeks and less than 10% took more than twelve weeks.

PROVISION OF SECTION 37 STATEMENTS

12. Where a decision is appealed to the AAT, the person who made the decision is required by section 37 of the AAT Act to lodge with the Tribunal within twenty-eight days of receipt of notification of the application, copies of a statement of reasons for the decision and other documents relevant to the Tribunal's review. The Council has noted that considerable delays are occurring in the Commonwealth employees' compensation jurisdiction in providing material for AAT proceedings; delays of up to six months have been experienced. The failure to comply with the twenty-eight day time limit has the effect of delaying the Tribunal's hearing of an appeal and adds to the overall time taken to dispose of a case.

Appeals to the Administrative Appeals Tribunal

13. Several problems have been identified in relation to the AAT's jurisdiction to review decisions of the Commissioner for Employees' Compensation.

VOLUME OF APPEALS

14. While the number of claims for compensation has continued to show a steady increase, there has been a more rapid rise in the number of requests for review by the final review tribunal, as the following tables demonstrate.

TABLE 2: NUMBER OF CLAIMS MADE 1972-82

Year Ending 30 June	Number of Claims
1973	23 606
1974	26 321
1975	27 545
1976	30 507
1977	26 885
1978	28 195
1979	29 828
1980	31350
1981	32 763
1982	35 146

Source: Annual Reports of the Commissioner for Employees' Compensation

TABLE 3: REQUESTS FOR REVIEW 1972-82

Year Ending 30 June	Tribunal	Prescribed Court	Total
1973	39	123	162
1974	49	93	142
1975	39	62	101
1976	42	70	112
1977	86	89	175
1978	107	71	178
1979	87	53	140
1980	138	70	208
1981	214	81	295
1982	363	-	363

Source: Annual Reports of the Commissioner for Employees' Compensation

A total of 166 requests for review were lodged with the AAT during the last six months of 1982 and an additional 77 were lodged in the first quarter of 1983.

15. Looked at in the context of the total number of claims for compensation, the number of appeals may appear relatively small. In 1981-82, for example, 35 146 new claims were received and, of the 48 910 cases processed during that year, 1893 were disallowed in whole or in part. The 363 appeals lodged with the AAT in that year represent 0.8% of total claims for compensation or 20% of disallowed claims. From the AAT's viewpoint, however, the number of appeals is significant and it is also a source of particular concern that the number has increased so sharply since 1978.

LOW RATE OF SETTLEMENT

16. The volume of appeals to the AAT assumes even greater significance in view of the fact that comparatively few cases in this jurisdiction are settled or conceded during preliminary stages and the great majority proceed to a full hearing. The effect is to add to the strain on the Tribunal's existing resources. Of the cases finalised by the Tribunal in this jurisdiction during 1981-82, 21 % were settled by consent. By comparison, in the Tribunal's social security jurisdiction, 37% of cases were conceded by the Department in 1981-82, and 31 % of appeals lodged were withdrawn by the applicant.

17. The relatively low rate of settlement of compensation cases may be attributable to a number of reasons including the complexity of many of the issues that arise and problems relating to access to medical evidence. In some cases the Department does not have full access to all the claimant's medical evidence and even where exchange of documents occurs after a Tribunal order, the Department may not have sufficient time to consider fully the implications of the material prior to hearing.

HIGH RATE OF SUCCESSFUL APPEALS

18. The Council has noted that not only do a large number of compensation appeals require a full hearing by the Tribunal before they are finalised, but a comparatively high percentage of these cases result in decisions favourable to claimants. In 1981-82, 59% of the cases finalised by the AAT in this jurisdiction resulted in the Commissioner's determinations being set aside. It remains to be seen whether the compensation jurisdiction will follow the pattern of other AAT jurisdictions and show a decline in the success rate as primary decision makers respond to the Tribunal's decisions. Their response will depend in part on action taken by the Commissioner to amend policy instructions issued to delegates in the light of review decisions. The Council has noted that some steps have been taken in this general direction with the recent publication by the Commissioner's Office of a Register of Decisions of the AAT, Federal Court and High Court.

Presentation of evidence

19. In his Annual Report for 1981 (see pp. 11-14), the Commissioner for Employees' Compensation described and criticised the practice adopted by some solicitors of denying the Commissioner and his delegates access to medical evidence

which was relevant to their client's claim. It was stated that the solicitors concerned preferred to present that evidence on review by the AAT after a claim for compensation had been disallowed for want of favourable medical opinion. This practice was criticised on the ground that it distorted the proper function of the AAT by effectively converting it from a review body into a primary decision maker.

20. A similar concern has been expressed in some AAT decisions. In *Pengelly v. The Commonwealth* (1982) (V81/287), for example, Mr Allan N. Hall, Senior Member (as he then was), commented on the fact that, despite a request by the Commissioner's delegate for medical evidence in respect of the applicant's claim, the only evidence supplied was a copy of the post-mortem report. Mr Hall stated:

What does concern me is that unless the Commissioner is given the opportunity properly to discharge his statutory function as the primary decision-maker in determining all matters and questions arising under the Compensation Act . . . the primary administration of that Act may in some cases be effectively cast upon this Tribunal . . . It is important, therefore, that where relevant medical evidence is available copies of the reports or summaries of the medical evidence relied on should be made available to the Commissioner to enable him to discharge his statutory function properly (pp. 15-16).

21. The Council shares the concern that there is a risk that the AAT will become the primary decision maker in this area. It considers, however, that the practice of some solicitors withholding their clients' medical evidence from the Commissioner must be judged not only in the light of their legitimate concern that their clients' legal costs be recovered, but also in the context of the inherent procedures of an adversary situation. The Council has also noted that the problem of withholding medical evidence is not caused by some claimant's solicitors alone. The problem of the Commonwealth itself withholding medical evidence may not occur to a similar extent but in at least one reported decision, *Strange v. The Commonwealth* (V81/344), a claimant's service medical records were withheld from the Commissioner's medical referee.

SOME RELEVANT CONSIDERATIONS

22. In examining the problems which have arisen in the Commonwealth compensation system and in considering whether to recommend any amendments to the legislation, the Council has been particularly conscious of the need to consider two important factors. Firstly, the need for claims for compensation to be processed promptly in order to minimise financial hardship on the part of claimants and their dependants. Secondly, any proposed amendments to the Act must take account of several features of the Commonwealth compensation scheme, including the role of the Commissioner, existing arrangements for reconsideration and review of primary decisions, and provisions concerning recovery of costs. These matters will now be discussed in greater detail.

The importance of expeditious decision making

23. A Commonwealth employee is entitled to receive compensation benefits under the Act in relation to:

- a personal injury arising out of or in the course of his employment;

- loss of or damage to an artificial aid or appliance (where personal injury is not caused) resulting from an accident arising out of or in the course of his employment; or
- the contraction, aggravation, acceleration or recurrence of a disease to which the employment is a contributing factor.

24. The financial importance of compensation benefits to claimants is considerable. On an average monthly basis, over half a million people are covered by the Commonwealth scheme and in 1981-82 the total amount of compensation paid under the Act was \$75 610 105. While some employees who are incapacitated for work may be able to obtain financial relief by recourse to sick leave benefits or social security payments, many employees and their dependants will depend heavily on compensation benefits for their income. In view of this urgent need, it is especially important that claims for compensation be processed as expeditiously as possible.

Some features of the Commonwealth scheme

THE COMMISSIONER'S ADMINISTRATIVE ROLE

25. The Commonwealth employees' compensation scheme differs fundamentally from other workers' compensation schemes operating in Australia under either State or Territory law. The Commonwealth system establishes the Commissioner as an independent statutory authority appointed by the Governor-General for the purpose of impartially determining claims for compensation made under the Act. Previously, the Secretary to the Department of the Treasury was, *ex officio*, the Commissioner. The Commissioner's current role as a central impartial determining authority is unique since under State or Territory schemes an independent authority becomes involved only where a dispute arises. The uniqueness of the Commissioner's role was recently emphasised by the High Court of Australia in *Heath v. The Commonwealth* (1983) 43 ALR 673. Brennan J, for example, stated:

The Commissioner is not simply an arbiter between the Commonwealth and the employee: his function is not to decide a contest between adversaries as to the Commonwealth's liability to the employee, but to inquire into the circumstances in order to determine whether the employee is entitled to any and what amounts of compensation under the Act (at pp. 687-8).

26. It was intended that the Commissioner's role be primarily an administrative one in the sense that he is to determine a claim for compensation on the basis of his own inquiries and investigation rather than simply adjudicate upon a dispute between adversaries. His function is defined in section 20(1) as 'to determine all matters and questions arising under this Act and [he] is empowered to do all things necessary for the carrying out of that function'. In discharging his function, the Act requires the Commissioner to be 'guided by equity, good conscience and the substantial merits of the case without regard to technicalities' (s.20(2)(a)). The Commissioner is not obliged to hold a formal or oral hearing, nor is he bound by the rules of evidence; but he is required to give any person who will be directly affected by the determination a fair opportunity of presenting his case (s.20(2)(b)). It is the Commissioner's practice not to conduct an oral hearing.

27. The Commissioner's determinative function is underlined by the fact that, although the Act requires that notice in writing be served on the Commonwealth of injury, disease, and loss of or damage to property, a claim for compensation has to be served on the Commissioner. The claim is normally processed by one of the Commissioner's delegates, of whom there are 840 in approximately 300 locations throughout Australia.

28. This system of delegation enables on-the-spot determination of straightforward claims and provides a readily accessible information service to claimants. But its practical effect is to weaken the perceived independence of the Commissioner's role since his delegates are invariably employees of Commonwealth departments and authorities. The Commissioner has also highlighted the administrative difficulties of supervising such a decentralised system and he is currently taking steps to centralise his functions so that they are carried out to a greater extent in offices to be established in State capitals and in some regional centres (see the Commissioners' Annual Reports for 1980-81 (pp. 2-5) and 1981-82 (pp. 3-6)).

29. Another feature of the Commonwealth compensation system is that, following a determination by the Commissioner or his delegate that there is an entitlement to receive compensation, payment does not come from a central fund. The employing department or statutory authority is required to meet the liability from its own budget. This feature is relevant to the question whether the Commissioner should be a party in review proceedings involving his determinations.

RECONSIDERATION BY THE COMMISSIONER

30. Provision is made in the Act for the Commissioner to reconsider a determination as part of the primary decision making process. As long as the AAT's review jurisdiction has not been invoked, either the claimant or the Commonwealth may seek a reconsideration by the Commissioner (s.20(4)(b)). Moreover, the Commissioner is empowered to reconsider a determination of his own motion regardless of whether AAT proceedings have been instituted (s.20(4)(a)). It is understood, however, that staffing constraints have inhibited the use of this power and in practice the Commissioner rarely reconsiders a determination of his own motion.

31. The following table provides details of requests made by either claimants or the Commonwealth for reconsideration by the Commissioner.

TABLE 4: REQUESTS FOR RECONSIDERATION, 1978-82

	1978-79	1979-80	1980-81	1981-82
Total requests received	229	252	308	338
Determinations varied	66	47	59	85
Determinations not varied	136	152	189	154
Requests withdrawn	6	9	14	21

Total requests finalised	208	208	262	260
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Sources: ARC Report on CECT, p. 5; and Commissioner's Annual Report for 1980-81, p. 23., and 1981-82, p. 29.

REVIEW PROCEDURES

32. The initial determination of a claim for compensation is made by the Commissioner or his delegate. This primary determination should not be seen as an adjudication between adversaries: no process of litigation exists at this point. Nor are the Commissioner's reconsideration processes properly seen as part of litigation. Although 'reconsideration' amounts to a form of 'review' of a primary determination, the Compensation Act provides that the reconsidered decision is the primary determination for the purposes of the Act (see s.20(4)(a) and (b)). The Act clearly establishes that a process of litigation begins only when a party who is dissatisfied with that primary determination institutes proceedings under Part V of the Act. At this point, under section 62, the Commonwealth or, if the claimant is employed by a statutory authority, the statutory authority becomes a party to that litigation in its capacity as employer. In accordance with Administrative Arrangements, the Department of Social Security has the responsibility of representing most government departments and authorities in AAT and Federal Court proceedings relating to compensation claims.

33. Since both the CECT and the right of review before prescribed courts under section 63 have now been abolished, the only relevant proceedings for the purpose of Part V are those before the AAT. It is not intended to suggest that the AAT provides the only review remedy for parties aggrieved by a primary determination. In an appropriate case an application for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* could be sought from the Federal Court. The Commissioner's Annual Report for 1980-81 reveals that four such applications were made during that year.

34. The Ombudsman is empowered to investigate complaints of defective administration and his Office has been involved in a number of cases involving Commonwealth employees' compensation, mostly relating to delays in the determination or finalisation of claims. During 1980-81, the Ombudsman investigated and finalised thirty-seven written complaints and an unspecified number of oral complaints relating to the administration of the compensation scheme. In 1981-82 he finalised seventeen written complaints and an unidentified number of oral complaints in this area.

COSTS

35. The Council has paid close attention to the relevant provisions concerning payment of costs, both in relation to the Commissioner's reconsideration processes and AAT hearings. It has been suggested to the Council that the recovery of larger costs may provide a possible explanation why some firms of solicitors apparently prefer to bring cases before the AAT rather than request and fully co-operate in a reconsideration by the Commissioner. The AAT is invested with a similar power to award costs as was possessed by the Commonwealth Employees' Compensation Tribunal. In general terms, the Tribunal may order the Commonwealth to pay the other party's costs where the Tribunal reaches a decision favourable to that party

(s.64 of Compensation (Commonwealth Government Employees) Act). In any other case, each party bears its own costs. The scale of costs used in AAT proceedings is based upon the scale which would have applied under the previous system if the claimant had sought judicial review in a prescribed court.

36. Provision is also made in the Act for the recovery of costs from the Commonwealth where the Commissioner reconsiders a determination but only certain costs are recoverable and different principles apply depending upon whether the reconsideration is carried out at the request of one of the parties or of the Commissioner's own motion. Where the reconsideration is conducted at the request of one of the parties, costs are recoverable from the Commonwealth where the Commissioner reaches a decision that is favourable to the claimant. These costs relate, however, only to expenses incurred by the claimant after the initial determination was made (s.20(6)). There is no provision enabling recovery of costs in connection with the preparation of the initial claim. Where review proceedings have commenced and the Commissioner reconsiders a determination of his own motion and substitutes a decision which has the effect of rendering the review proceedings abortive, the claimant is entitled to recover costs reasonably incurred by him in connection with those proceedings (s.20(5)). However, no provision is made for recovery of any costs where the Commissioner conducts a reconsideration of his own motion before review proceedings have commenced. In the Council's opinion, it is anomalous that costs cannot be recovered in circumstances where the reconsideration results in a decision favourable to the claimant even though costs will often be incurred where the claimant participates in that reconsideration.

PART 3: PROPOSED AMENDMENTS

37. The Council has given careful and detailed consideration to the problems described in Part 2 and recommends that certain amendments be made to the *Compensation (Commonwealth Government Employees) Act 1971*. They are:

Time limit for Commissioner's determinations

38. The Council is especially conscious of the hardship likely to be suffered by some claimants and their dependants where delays occur in the processing of claims for compensation. Not only may a claimant be without income, but the Council has also noted that compensation entitlements are calculated by reference to actual pre-injury earnings and no provision is made for inflation to be taken into account. It is important, therefore, that claims should be determined in the minimum possible time and the Council has concluded that a reasonable time limit is desirable within which the Commissioner or his delegates should determine matters and questions under the Act. Where no determination has been made when the time limit expires, the Commissioner should be deemed to have made an unfavourable determination which could be reviewed by the AAT.

39. It is noted that an employee covered by State Workers' Compensation legislation can commence legal proceedings at any time in respect of a claim, even before a determination of liability has been taken. Although delays may occur in obtaining a hearing date for such proceedings, the act of commencing proceedings itself brings pressure to bear by encouraging the making of a prompt decision on the issue of liability. The importance of speedy decision making in compensation cases is reflected in a directive issued by the Workers' Compensation Commission of New South Wales in February 1983 which requires all insurers and self-insurers either to commence weekly compensation payments or to deny liability within five working days of receiving documentation of a claim. That Commission has expressed its 'considered view that these arrangements are both reasonable from an administrative point of view and just in principle'.

40. The Council recognises that there are significant differences between State Workers' Compensation schemes and the Commonwealth scheme, but it considers that a Commonwealth employee should also be entitled to pursue his claim for compensation in another forum if the Commissioner does not reach a determination within a reasonable time.

41. Where there is an unreasonable delay in the exercise of a power, a claimant may at present complain to the Ombudsman (see s.10 of the *Ombudsman Act 1976*) or seek judicial review in the Federal Court (see s.7 of the *Administrative Decisions (Judicial Review) Act 1977*). The Council has considered whether these remedies provide an adequate solution to the problem of delay in the Commonwealth compensation system but has concluded that they do not. In the first place, the Council was informed by the Ombudsman's Office that there is some doubt whether

section 10 of the Ombudsman Act applies to overcome the problem of delay in the context of Commonwealth employees' compensation. The AAT's jurisdiction is to review a determination by the Commissioner and, on one construction of section 10, its effect would be to deem the Commissioner not to have made a determination. Secondly, unlike the AAT, neither the Ombudsman nor the Federal Court has the power to step into the shoes of the primary decision maker where there has been unreasonable delay and to determine the central issue of liability to pay compensation. It is the Council's view that a more effective remedy to the problem of delay in this context would be to create an automatic right of recourse to the AAT where no determination has been taken within a specified period.

42. The Council has also considered whether the problem of delay is overcome by the operation of sick leave credits but has concluded that it is not. Sick leave credits may provide a source of income for some claimants but may not provide sufficient protection against delays in other cases, such as a widow's claim on the death of her husband. Moreover, some employees may not have accumulated sufficient sick leave credits at the relevant time. Finally, it appears that an employee may have no legal right to have sick leave recredited upon determination of liability for his condition, even though it is understood that in practice this is done.

43. The Council's primary objective in recommending that a time limit be introduced within which matters should be determined by the Commissioner's Office is to facilitate recourse to the AAT where undue delays occur in circumstances where a claimant and his dependants may be suffering financial hardship. Hardship may, of course, occur well before the expiry of a time limit since there will usually be an interval between the date of injury and claim. The Council has taken this factor into account along with other factors in deciding upon the length of the proposed time limit. The Council has given careful consideration to the capacity of both the AAT and the Commissioner's Office to cope with the number of applications for review likely to be generated by a particular time limit. The requirement to provide section 37 documents once AAT proceedings have commenced is an important factor in deciding what is a reasonable time limit. After considering these factors, the Council has concluded that a time limit of sixty days should apply within which matters should be determined by the Commissioner's Office. In making this recommendation, the Council notes that the average time taken to finalise all claims at present appears to be approximately eight and a half weeks and that this figure should be reduced as a result of changes being made to existing administrative processes, including reforms currently being implemented with a view to achieving greater centralisation in the decision making. No information was available to the Council, however, to indicate how many cases at present took longer than average to determine. This figure is significant in assessing the likely impact on the AAT and the Commissioner's Office if a particular limit were introduced. It is the Council's view that the Commissioner's Office should consider how this figure could best be calculated and it is recognised that the recommended time limit of sixty days may need to be reconsidered when that figure is eventually determined. This information will be especially relevant in assessing the capacity of the Commissioner's Office to

cope with the requirement of providing section 37 statements within the prescribed period.

44. The Council recognises that in some cases the Commissioner will be unable, for good reasons, to make a determination within the prescribed period and consideration has been given to whether a provision enabling the time limit to be extended is warranted. Delays may occur as the result of factors beyond the Commissioner's immediate control, particularly where medical evidence has to be obtained. In some instances, the Commissioner's failure to comply with the time limit may be attributable to the claimant's failure to provide material relevant to the claim. The Council does not consider, however, that provision should be made for the time limit to be extended. In the Council's opinion, adequate provision already exists to deal with the situation, where the claimant is responsible for causing delay, in the form of the AAT's power to award costs under section 64 of the *Compensation (Commonwealth Government Employees) Act 1971*.

45. The Council would emphasise that its proposal that the claimant be entitled to seek review from the AAT after the prescribed period has expired does not prevent the Commissioner from further investigating a claim. Indeed, it is expected that his Office will continue to process a claim despite the fact that AAT proceedings have commenced, and it is anticipated that in some instances reconsideration will produce a decision favourable to the claimant thereby rendering the AAT proceedings unnecessary. Provision already exists in section 20(4) of the *Compensation (Commonwealth Government Employees) Act 1971* for the Commissioner to reconsider a determination notwithstanding that review proceedings have begun. In the event that a claim is conceded after AAT proceedings have commenced, the Council considers that section 20(5) of the *Compensation (Commonwealth Government Employees) Act* would also apply and the Commonwealth would be liable to reimburse the claimant for any costs reasonably incurred by him in connection with those proceedings. If, following further investigation, the Commissioner determines that no liability exists, proceedings in the AAT relating to the deemed determination should continue if the claimant so desires.

46. Provision exists in the *Administrative Appeals Tribunal Act 1975* for applications for review to be lodged where a decision is not made within a prescribed time. The effect of section 25(5) of that Act is to provide that a person may apply to the AAT for a review of a decision in circumstances where another person is required to do an act or thing within a prescribed period and has failed to do that act or thing. That failure is deemed to constitute the making of a decision by that person at the expiration of the prescribed period not to do that act or thing. The Council has considered whether this provision would apply to confer jurisdiction on the AAT where the prescribed period for determining a claim for Commonwealth employees' compensation has expired. There is some doubt whether section 25(5) would have the desired effect in the context of the Commonwealth employees' compensation scheme. Section 63(1) of the *Compensation (Commonwealth Government Employees) Act 1971* confers jurisdiction on the AAT 'where a determination by the Commissioner is

made under this Act'. On one construction, section 25(5) of the AAT Act would not operate to deem the Commissioner to have made an unfavourable determination but would merely deem him not to have made a determination. Such a construction would not, therefore, authorise AAT review since no 'determination' would exist. In view of this difficulty, the Council has concluded that it may not be sufficient to rely on section 25(5) to vest jurisdiction in the AAT in these circumstances and it recommends that the *Compensation (Commonwealth Government Employees) Act 1971* should be amended to provide that the Commissioner shall be deemed to have made an unfavourable determination if no determination has been made on expiration of the prescribed time limit.

47. The Council is aware that a similar recommendation to introduce a time limit made in its earlier *Report on the Commonwealth Employees' Compensation Tribunal* was not implemented. The Council considers, however, that a reasonable time limit is essential. It has considered the likely effectiveness of a time limit of sixty days in the light of the difficulties and delays in obtaining medical evidence. It notes, however, that the vast majority of claims are determined without additional medical evidence being sought and a sixty-day time limit appears feasible in these cases. In the minority of cases where additional medical evidence is sought and the Commissioner is unable to determine a claim within the time limit, he may continue to process a claim notwithstanding that proceedings in the AAT may have commenced. The Council considers that its recommendation strikes a proper balance between the need, on the one hand, to promote expeditious decision making in compensation cases with the need, on the other hand, to preserve the Commissioner's role as primary decision maker.

RECOMMENDATION 1

The *Compensation (Commonwealth Government Employees) Act 1971* should be amended:

- (a) to require the Commissioner for Employees' Compensation to determine a claim as soon as practicable, but in any case, within sixty days of lodgment of a claim with the Commissioner; and
- (b) to provide that the Commissioner is deemed to have made a determination adverse to the claimant if a claim has not been determined on expiration of the prescribed time limit.

Commissioner as the respondent in review proceedings

48. At present, the Commissioner is not a party to AAT proceedings. Consideration was given to this matter by the Council in its *Report on the Commonwealth Employees' Compensation Tribunal* (see pages 50-5). It was noted at that time that there were 'divergent considerations' as to the role of the Commissioner in review proceedings. On the one hand, it was recognised that the Commissioner's Office was a statutory authority independent of both claimants and the Commonwealth and it was suggested that it would be inappropriate for him to defend his determinations before a review body. It was further recognised that it was more appropriate for the Commonwealth to appear as a party since the costs of

compensation were borne by the employing department or authority rather than from a central fund administered by the Commissioner.

49. On the other hand, it was recognised that other considerations pointed to the Commissioner's being made a party to review proceedings. He is the primary decision maker in the compensation scheme and section 30(1)(b) of the *Administrative Appeals Tribunal Act 1975* establishes that the person who made a decision against which an appeal lies should be a party in proceedings before the AAT. It was also recognised that the Commissioner's direct involvement in AAT proceedings would be of mutual benefit to the Tribunal and his Office.

50. In balancing these conflicting considerations, the Council concluded in its earlier Report that the Commonwealth, rather than the Commissioner, should be a party to all review proceedings, whether initiated by the claimant or the Commonwealth. This recommendation was subsequently adopted.

51. The Council has reconsidered its earlier recommendation and has concluded that the Commissioner should be made a party to review proceedings. While still recognising that the conflicting considerations are finely balanced, the Council considers that insufficient reasons exist for maintaining an exception to the general principle that the person who made the decision that is the subject of AAT proceedings should be a party to those proceedings. Furthermore, it is the Council's view that, on the basis of experience gained since 1981, the benefits that are likely to arise from more direct involvement by the Commissioner in review proceedings outweigh any disadvantages. The review authority is likely to derive assistance from the active participation of the Commissioner since he will be familiar with the facts and circumstances of a claim and the reasons relied upon in arriving at the initial determination. Moreover, the Commissioner's Office is likely to benefit from direct participation to the extent that there would be a fuller appreciation of the reasons for the reviewing authority's decisions as well as the confidence of knowing that the Office's viewpoint had been fully argued before the review authority.

52. Other benefits are likely to flow from the Commissioner's involvement as a party. Experience in other AAT jurisdictions has shown that the holding of preliminary conferences facilitates the settlement of many disputes thereby obviating the need for those disputes to be resolved by a formal hearing. It is hoped that this would occur to a similar extent in the Commonwealth employees' compensation jurisdiction if the Commissioner were a party to review proceedings. It is expected that his direct involvement in the preparation of cases before the AAT will operate as a de facto reconsideration of his determination. The power of the AAT to order parties to exchange documents in advance of a hearing should enhance the effectiveness of the reconsideration process by providing the Commissioner with proper material.

53. In making its recommendations, the Council has attached considerable weight to the Commissioner's reconsideration power. In the Council's opinion some of the

problems identified in Part 2 should be overcome if the Commissioner were able to come to a reconsidered view on the basis of proper material. Although the Council has concluded that the Commissioner is more likely to gain access to such material if he were a party to AAT proceedings, consideration was given to other possible ways of strengthening the Commissioner's role. The Council considered whether to recommend that a provision be inserted into the Act requiring the Commissioner to reconsider a determination as a prerequisite to AAT review. This proposal was finally rejected for two reasons. Firstly, a mandatory reconsideration requirement would be unlikely to reduce the flow of cases to the AAT since it would not of itself overcome the problem of withholding evidence. Secondly, such a requirement would exacerbate the already acute problem of delay.

54. Consideration was also given to recommending that the Commissioner be empowered to compel production of existing documents. It was noted that a similar power is vested in the Director-General of Social Security under section 16 of the *Social Security Act 1947* and also in the Chairman of both the Repatriation Commission and a Repatriation Board under section 26 of the *Repatriation Act 1920*. Such a power would also be consistent with the Commissioner's statutory function (as described in the Heath case) of inquiring into a claim to ascertain whether an employee is entitled to compensation under the Act. It was ultimately decided, however, not to make such a recommendation for the following reasons. The power would in practical terms have little impact on the material available to the Commissioner's Office or his delegates. When a claim is initially determined the only relevant document likely to be in the claimant's possession is a medical certificate from his general practitioner which will be of limited value to the primary decision maker. It is most unlikely at this stage that the employee will have sought his own medical specialist's report. Such reports are usually obtained on legal advice and it is rare for a claimant to consult a solicitor before an unfavourable determination has been given. A power to compel production of documents would also have limited impact on a reconsideration. If the claimant has himself sought such a reconsideration he is likely to be co-operative and such a power would be unnecessary. If a reconsideration is commenced at the Commissioner's own motion, a claim of legal professional privilege would probably be available to deny him access to documents obtained for the purpose of submission to legal advisers for advice or for use in legal proceedings (see *Grant v. Downs* (1976) 11 ALR 577). Privilege could, of course, be overridden by statute but the Council considers that a more effective way of overcoming the problem of withholding evidence is to make the Commissioner a party to AAT proceedings and rely on the Tribunal's powers to obtain and exchange evidence.

55. Direct participation by the Commissioner in review proceedings will have resource implications for his Office, but the Council believes that its recommendation achieves a more rational allocation of resources than exists at present. Currently, the Commissioner's Office is responsible for preparing section 28 and 37 statements for the purpose of AAT proceedings, but the actual conduct of the case has usually

rested with the Office of Director-General of Social Security who represents most departments and authorities in these matters.

56. The Council considers that it is preferable that the Commissioner's Office should be responsible for the preparation and conduct of all aspects of a case to be presented to a review authority.

57. The Council has considered the role the Commonwealth should play in review proceedings if the Commissioner is to be the respondent in those proceedings in accordance with Recommendation 2. The Council recognises that in some circumstances the employing department or authority may wish to challenge the Commissioner's determination either in relation to the issue of liability or the amount of compensation to be paid. Since the employing department or authority is obliged to pay the cost of any liability determined by the Commissioner, there is no doubt that the Commonwealth has standing to challenge the Commissioner's determination in either the AAT or the Federal Court and the Commissioner would be the respondent in these proceedings. If the claimant wished to be joined as a party to such proceedings he could make an application under either section 30 of the *Administrative Appeals Tribunal Act 1975* or section 12 of the *Administrative Decisions (Judicial Review) Act 1977*. Similarly, the Commonwealth would be entitled to make an application to be joined as a party where the claimant challenges a determination of the Commissioner in either the AAT or the Federal Court.

RECOMMENDATION 2

The *Compensation (Commonwealth Government Employees) Act 1971* should be amended to provide for the Commissioner for Employees' Compensation to be the respondent in proceedings for review of his determinations.

58. Section 65 of the *Compensation (Commonwealth Government Employees) Act 1971* currently modifies some provisions of the AAT Act. Some of these modifications are occasioned by the fact that at present the Commissioner is not a party to AAT proceedings. Such modifications relate to the operation and implementation of a decision that is subject to review (s.65(6)); the power of the Tribunal to dismiss an application or strike out a party (s.65(7)); service of copies of the Tribunal's decisions (s.65(8)); and payment of fees for witnesses s.65(9)). If the Commissioner were made the respondent in review proceedings in accordance with Recommendation 2, these modifications would no longer be relevant and should be repealed. The Council has noted that repeal of section 65(7) would also rectify an apparent lacuna regarding the Tribunal's power to dismiss an application for review in its Commonwealth compensation jurisdiction. In modifying section 42A(2) of the *Administrative Appeals Tribunal Act 1975*, section 65(7) of the *Compensation Act* omits any reference to the Tribunal having a power of dismissal where a party fails to appear at the hearing of the matter before the Tribunal. The only power of dismissal conferred by the modified section relates to the failure of a party to appear at a preliminary conference. Repeal of this modification would restore the full power of dismissal

under section 42A(2) of the AAT Act where a party fails to appear at a preliminary conference or at the hearing.

RECOMMENDATION 3

If the Commissioner for Employees' Compensation is made the respondent in review proceedings in accordance with Recommendation 2, modifications of the *Administrative Appeals Tribunal Act 1975* effected by section 65(6), (7), (8), and (9) of the *Compensation (Commonwealth Government Employees) Act 1971* would be unnecessary and should be repealed.