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The Conduct of Appeals in the Personal Injury Commission of NSW

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Contents

INTRODUCTION

1. The purpose of this paper is to identify a number of common issues which arise on appeal to a Presidential Member and to provide information to practitioners. It commences with a number of general observations about the jurisdiction.

2. The Personal Injury Commission (Commission) is a specialist tribunal constituted by the *Personal Injury Commission Act 2020* (the 2020 Act) and is charged with hearing, resolving, assessing or determining personal injury disputes in workers compensation and motor accidents cases. Different dispute models operate in the Commission's two divisions. This paper deals with the dispute model in the Workers Compensation Division.

3. The Commission has jurisdiction to hear matters arising under the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) and the *Workers Compensation Act 1987* (the 1987 Act),[1] including but not limited to, claims for weekly compensation, medical or related treatment expenses, and lump sum compensation for whole person impairment. In order to enliven the Commission's jurisdiction to hear an application, there must be a dispute between the worker and the employer and their insurer.[2] Once a dispute is filed, the dispute resolution pathway which follows depends on the matter in dispute, and can include a preliminary conference before a Member, a conciliation, followed by an arbitration or referral to a medical assessment.

4. The majority of disputes within the Workers Compensation Division initially proceed to a Member under this model. A Member has a statutory duty to use their best endeavours to bring the parties to a settlement acceptable to all of them.[3] Historically, the application of this model has seen on average up to 90% of disputes before Members resolving, having had the opportunity to independently bring the parties together to discuss the real issues in dispute. If the matter is unable to be resolved, the Member then proceeds to hear and determine the dispute. In so doing the Member must have regard to the objects of the 2020 Act[4] and the guiding principle.[5] The Commission is not bound by the rules of evidence and must act in accordance with equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.[6] A decision is, subject to the 2020 Act or the enabling legislation,[7] final and binding.

5. Section 352 of the 1998 Act provides for appeals from a non-presidential Member's decision to a Presidential Member.

THE JURISDICTION OF THE COMMISSION IS DEPENDENT UPON THERE BEING A "DISPUTE"

6. As a statutory tribunal, the Commission's jurisdiction to exercise its powers are expressly or by implication conferred upon it by statute. It does not possess inherent

[1] Section 105 of the 1998 Act.
[2] Sections 287 and 288 of the 1998 Act; *Skates v Hills Industries Ltd* [2021] NSWCA 142 (*Skates*).
[3] Schedule 3, Part 5, clause 6 of the 2020 Act.
[4] Section 3 of the 2020 Act.
[5] Section 42 of the 2020 Act.
[6] Section 43 of the 2020 Act.
[7] See section 5 of the 2020 Act for the definition of 'enabling legislation'.

jurisdiction.[8] Section 105 of the 1998 Act provides that the Commission has jurisdiction to determine all matters arising under the 1998 Act and the 1987 Act. However, the "exclusive" jurisdiction is subject to the express prohibitions and restrictions provided for in the 1998 Act.

7. Part 4 of the 1998 Act deals with the determination of compensation disputes. Division 1 of Part 4 sets out the disputes to which the Part applies, as follows:

> "**287 Disputes to which Part applies**
>
> (1) This Part applies to a dispute in connection with a claim for compensation between:
>
> (a) the person who makes the claim and a person on whom the claim is made, or
>
> (b) the employer on whom the claim is made and the insurer on whom the claim is made.
>
> (2) This Part extends to a dispute that concerns failure to commence provisional weekly payments of compensation as required by Division 1 of Part 3 …".

8. The "insurer" referred to in s 287 is not defined for the purposes of Division 1 of Part 4, however, it is consistently defined in the 1998 and 1987 Acts as meaning a "licensed" insurer, that is, an insurer who is licensed to provide a workers compensation insurance policy to employers.[9]

9. Division 3 of Part 4 provides for the determination of disputes by the Commission. Section 288 provides:

> "**288 Referral of disputes to Commission**
>
> (1) Any party to a dispute about a claim may refer the dispute to the President for determination by the Commission. However, if the dispute is about lump sum compensation, only the claimant can refer the dispute.
>
> ...
>
> (2) The President may not accept a dispute for referral for determination to the Commission if the dispute is a dispute that, under this Part, cannot be referred for determination by the Commission."

10. Section 289 of the 1998 Act imposes restrictions upon when a dispute can be referred to the Commission where the dispute is about:

> (a) a claim for weekly compensation (s 289(1));
>
> (b) a claim for medical expenses (s 289(2));

[8] *Raniere Nominees Pty Ltd v Daley* [2006] NSWCA 235, [66].
[9] Sections 37 and 70 of the 1998 Act; s 193 of the 1987 Act.

(c) a claim for lump sum compensation (s 289(3)), and

(d) a claim for compensation for property damage (s 289(4)).

11. Section 289(5) expressly provides that "[t]he Commission may not hear or otherwise deal with any dispute if this section provides that the dispute cannot be referred for determination by the Commission." Section 289A also provides that "[a] dispute cannot be referred for determination by the Commission unless it concerns only matters that were previously notified as disputed." In accordance with s 289A, the Commission may, however, "hear or otherwise deal with a matter subsequently arising out of such a dispute" or may also hear or deal with a dispute if the Commission is of the opinion that it is in the interests of justice to hear or deal with a dispute not previously notified.

12. As all of those sections in the 1998 Act are predicated by there being a "dispute" in relation to the claim, the Commission's jurisdiction to hear and determine a matter must be contingent upon there being a dispute in existence between the claimant and the person on whom the claim is made, or between the employer and the licensed insurer (s 287(1)) when the proceedings are instituted.

13. Once a matter is properly referred to the Commission in accordance with the above legislation, the Commission is seized of jurisdiction and may proceed to hear and determine a matter arising from the dispute, even if one party subsequently concedes that a matter previously notified is no longer in dispute.[10]

14. The Commission's jurisdiction to hear and determine disputes has been considered in various decisions, including on appeal to the Court of Appeal. In *Skates*, the worker made a claim for lump sum entitlements pursuant to s 66 of the 1987 Act in respect of an injury to his left wrist, right finger joint and associated scarring. The parties could not reach agreement as to the degree of impairment which constituted a medical dispute as defined by s 319 of the 1998 Act, so the worker commenced proceedings in the Commission. The medical dispute was referred to an Approved Medical Specialist (now referred to as a Medical Assessor) for assessment. The dispute followed a protracted path whereby the assessment by the Approved Medical Specialist was appealed, the Medical Appeal Panel decision was appealed to the Supreme Court and the decision of the Supreme Court was appealed to the Court of Appeal. Leeming JA made the following observations:

> "The starting point is a 'medical dispute'. That term is defined in s 319 of the [1998 Act], ... The term is defined by reference to the existence of a 'dispute between a claimant and the person on whom a claim is made' about any of seven related subject matters including the degree of permanent impairment as a result of an injury, whether the impairment is permanent, whether it is partly due to a previous injury or pre-existing condition and whether it is fully ascertainable. It may be expected that as a consequence of the ordinary operation of the regime at least in

[10] *Patrick Stevedores Holdings Pty Ltd v Fogarty* [2014] NSWWCCPD 76; *Dundullimal Holdings Pty Ltd t/as Western Parcel Express v CGU Workers Compensation (NSW) Ltd* [2008] NSWWCCPD 88.

most cases the *dispute* will have been identified by a written exchange of competing *claims*."[11] (emphasis in original)

And:

"The dispute between Mr Skates and the insurer was crystallised by the correspondence attached to Mr Skates' application; indeed, it was why the documents setting out both sides' claims were attached. That was the dispute which was referred to the Commission pursuant to s 288. It was a 'medical dispute' because the parties had made different claims about the degree of permanent impairment suffered by Mr Skates as a result of the injury. It was therefore apt to be referred for medical assessment. The point of doing so was to resolve the dispute.

Sections 321 and 321A concern referrals of a dispute for assessment. The language of the heading of each section commences 'Referral of medical dispute' and each provision confirms that it is the medical dispute which is referred for assessment. Section 293 authorises the referral of a medical dispute for medical assessment and the deferral of determination of the dispute. All these provisions proceed on the basis that the outcome of the assessment is the resolution of the medical dispute …".[12]

15. In conclusion, Leeming JA observed that the purpose of the statutory regime was to resolve a medical dispute and the *dispute* was "identified by the disputant's competing *claims*."[13]

16. In *Dickinson v Chapman*,[14] Mr Chapman commenced proceedings in the District Court in respect of injuries received on industrial premises. A significant issue arose in those proceedings raised by the public liability insurer as to whether Mr Chapman was a "deemed worker" within the meaning of the 1998 Act,[15] which he denied. If he was, then he would be precluded from proceeding with his claim for damages in the District Court because he had not taken the procedural steps required by the 1998 Act. After the District Court proceedings commenced but were yet to be finalised, Mr Chapman commenced proceedings in the Workers Compensation Commission where he, as well as the workers compensation insurer, asserted that Mr Chapman was not a deemed worker. The public liability insurer was subsequently joined to those proceedings. The public liability insurer objected to the Arbitrator proceeding to determine the matter, however, the Arbitrator did not allow the objection and proceeded to a determination, concluding that Mr Chapman was not a deemed worker. The public liability insurer appealed to a Deputy President of the Commission who found that the Commission had no jurisdiction to determine the issue because there was no dispute before it.[16]

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[11] *Skates*, [44].
[12] *Skates*, [46]–[47].
[13] *Skates*, [50].
[14] [2022] NSWCA 2 (*Chapman No 2*).
[15] Schedule 1 to the 1998 Act.
[16] *National Transport Insurance Limited v Chapman* [2019] NSWWCCPD 54 (*Chapman*).

17. The Deputy President observed as follows:

> "In the absence of a 'dispute' with either the [purported employer] or a dispute between the [purported employer] and its licensed insurer, [Mr Chapman] was not entitled to commence proceedings, and the Commission had no jurisdiction to hear and determine the matter. Despite the existence of a dispute between the [public liability insurer] and Mr Chapman, which on one view may have been 'in connection with a claim for compensation,' it was not a dispute between the requisite parties identified in s 287 of the 1998 Act.
>
> …
>
> The subsequent joinder of the [public liability insurer], who was not an insurer within the meaning of the Act, could not operate to create jurisdiction, thus enabling the Commission to hear and determine the matter. Firstly, the [public liability insurer] was not an 'insurer' within the meaning of the 1998 Act. Secondly, the first respondent did not make a claim for compensation (as defined by s 4 of the 1998 Act) against the [public liability insurer]. Subsection (5) of s 289 of the 1998 Act prohibits the Commission from hearing or otherwise dealing with a dispute if s 289 provides that a dispute cannot be referred to the Commission.
>
> The Commission does have the power to determine its jurisdiction, but that power must be exercised in accordance with the 1987 and 1998 Acts. The Arbitrator clearly erred in determining that he had jurisdiction to hear and determine the matter on the basis that there was a dispute between the first respondent and the [public liability insurer].
>
> The matter was not properly before the Commission as there was no dispute on foot between the parties [Mr Chapman and the workers compensation insurer] at the time the application was lodged with the Commission."[17]

18. Mr Chapman proceeded with his claim in the District Court and succeeded in achieving a judgment in his favour against the defendants on the basis that the parties had no intention to create a legal relationship and Mr Chapman was not a worker or a deemed worker. The public liability insurer appealed to the Court of Appeal. The Court of Appeal overturned the decision of the District Court.

19. In respect of the proceedings taken in the Commission, Basten JA (with Macfarlan and McCallum JJA agreeing) said:

> "… while it is important to avoid relitigating matters which have been raised or which should properly have been raised on an earlier occasion, it does not necessarily follow that consideration in a later proceeding constitutes an abuse of the process of that court. In the present case, it was the proceedings in the Commission which potentially constituted an abuse of process. [Mr Chapman] commenced proceedings in the Commission in order to present an argument that he was not a worker and that the Commission therefore had no jurisdiction grant him any relief. If the Commission were the only available tribunal in which his

[17] *Chapman*, [80], [84].

status as a worker could be determined, it would be necessary to consider whether declaratory relief to that effect might be available. As the premise was not established, it is not necessary to address that proposition. However, on the basis that the proceedings in the Commission brought by [Mr Chapman] were misconceived, the conduct of [the purported employer] in defending the proceedings can have no legal significance."[18]

20. Thus, the jurisdiction of the Commission is dependent upon a dispute (as provided for in Divisions 1 and 3 of Part 4 of the 1998 Act) between a worker and the person upon whom the claim is made or a dispute between the employer on whom the claim is made and the workers compensation insurer. In the absence of a "dispute" the Commission has no jurisdiction, and any such proceedings are misconceived and a nullity.

SECTION 352 OF THE 1998 ACT

21. Section 352 of the 1998 Act provides for appeals from a non-presidential Member's decision to a Presidential Member. The appeal must be filed within 28 days of the decision appealed against and the amount in issue must be at least $5,000 or at least 20% of the amount awarded in the original decision being appealed. Where there is no amount awarded, monetary threshold may in some circumstances be determined by reference to the claim as particularised by the applicant.[19]

22. An appeal is limited to a determination of whether the decision appealed against was affected by any error of law, fact or discretion and to the correction of any such error.[20] This applies to all decisions since 1 February 2011.

23. This provision has notably been commented upon in *Raulston v Toll Pty Ltd*,[21] which case has since been uniformly followed in Presidential decisions in both the Commission and its predecessor the Workers Compensation Commission. In *Raulston*, Deputy President Roche not only stated the requirement for there to be error before a Presidential Member can intervene on appeal, but also set out a number of other appeal principles which will be dealt with at greater length later in this paper:

> "17. There are a number of points to note about the new s 352:
>
> (a) an appeal from an Arbitrator to a Presidential member is no longer a 'review' and is not a hearing *de novo*. It is an appeal that is limited to the determination of whether the decision appealed against was or was not affected by any error of fact, law or discretion, and to the correction of any such error. It is the establishment of error and the correction of that error that now defines the process under s 352;
>
> (b) save for interlocutory decisions, it is no longer necessary to seek leave to appeal. For decisions that are not interlocutory, once the monetary threshold in s 352(3) is satisfied, the appeal proceeds as of right;

[18] *Chapman No 2*, [19].
[19] *Ausgrid v Parasiliti* [2020] NSWWCCPD 51.
[20] Section 352(5) of the 1998 Act.
[21] [2011] NSWWCCPD 25 (*Raulston*).

(c) the Commission is not to grant leave to appeal an interlocutory decision unless of the opinion that determining such an appeal is necessary or desirable for the proper and effective determination of the dispute;

(d) fresh evidence or additional evidence or evidence in substitution for the evidence received in relation to the decision appealed against may not be given on an appeal except with leave. The Commission is not to grant leave unless satisfied that the evidence concerned was not available to the party, and could not reasonably have been obtained by the party, before the proceedings concerned or that failure to grant leave would cause substantial injustice in the case;

(e) the lodging of an appeal does not operate as a stay or otherwise affect the operation of a decision as to weekly payments of compensation and those payments remain payable despite the filing of an appeal. In respect of other orders, the appeal stays the operation of the decision appealed against pending the determination of the appeal, and

(f) on appeal, the decision appealed against may be revoked and a new decision made in its place, or, in the alternative, the matter may be remitted to the Arbitrator or another Arbitrator for determination in accordance with any decision or directions of the Commission.

18. In applying the above provisions, the Commission will have regard to the following general principles and authorities.

19. First, as error now defines the appeal process under s 352, the following principles stated by Barwick CJ in *Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505 at 506 (cited with approval by Brennan CJ, Toohey, McHugh, Gummow and Kirby JJ in *Zuvela v Cosmarnan Concrete Pty Ltd* [1996] HCA 140; 140 ALR 227) are relevant (I have substituted 'Arbitrator' for 'trial judge' where appropriate):

(a) An Arbitrator, though not basing his or her findings on credit, may have preferred one view of the primary facts to another as being more probable. Such a finding may only be disturbed by a Presidential member if 'other probabilities so outweigh that chosen by the [Arbitrator] that it can be said that his [or her] conclusion was wrong'.

(b) Having found the primary facts, the Arbitrator may draw a particular inference from them. Even here the 'fact of the [Arbitrator's] decision must be displaced'. It is not enough that the Presidential member would have drawn a different inference. It must be shown that the Arbitrator was wrong.

(c) It may be shown that an Arbitrator was wrong 'by showing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn: or the available inference in the opposite sense to that chosen by the [Arbitrator] is so preponderant in

> the opinion of the appellate court that the [Arbitrator's] decision is wrong.'

20. The decision of Allsop J (as his Honour then was) in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833 (Drummond and Mansfield JJ agreeing) is also instructive in the context of the need to establish error. His Honour observed (at [28]):

> 'in that process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge.'

21. After observing that a degree of tolerance for any such divergence in any particular case will often be a product of the perceived advantage enjoyed by the trial judge, Allsop J concluded (at [29]):

> 'The appeal court must come to the view that the trial judge was wrong in order to interfere. Even if the question is one of impression or judgment, a sufficiently clear difference of opinion may necessitate that conclusion.'

22. Second, subject to a Presidential member granting one or both parties leave to tender fresh evidence or additional evidence on appeal, the appeal will be conducted on the transcript of the evidence presented at the arbitration.

23. Third, parties will usually be bound by the presentation of their case at the arbitration and neither party to an appeal will be permitted to raise new issues on appeal, where those issues could have affected the outcome or course of the arbitration and been met with additional evidence in response (*Coulton v Holcombe* [1986] HCA 33; 162 CLR 1 at 7; *University of Wollongong v Metwally (No 2*) [1985] HCA 28; 59 ALJR 481; *Water Board v Moustakas* [1988] HCA 12; 180 CLR 491; *Suttor v Gundowda* (1950) 81 CLR 418 at 438). This principle is subject to the Commission's power to allow (with leave) fresh evidence or additional evidence in the limited circumstances stated in s 352(6).

24. Fourth, given the discretionary power to allow fresh evidence or additional evidence on appeal, and the power to not only confirm or revoke a decision but to make a new decision in place of the Arbitrator's decision, an appeal under s 352 is properly characterised as a rehearing where the Presidential member's powers are exercisable 'only where the appellant can demonstrate that, having regard to all the evidence now before the [Presidential Member], the order that is the subject of the appeal is the result of some legal, factual or discretionary error' (*Allesch v Maunz* [2000] HCA 40; 203 CLR 172 per Gaudron ACJ, McHugh, Gummow and Hayne JJ at [23]; *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA

47; 203 CLR 194 at [14] (*Coal & Allied*)). The power to admit further evidence is of a remedial nature conferred 'to facilitate the avoidance of errors which cannot be otherwise remedied by the application of the conventional appellate procedures' (per McColl JA, Mason P and Giles JA agreeing, in *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116 at [66], quoting *CDJ v VAJ (No 1)* [1998] HCA 67; 197 CLR 172 at [109]).

25. Fifth, what constitutes an appealable error of fact, law or discretion will be determined on a case-by-case basis. However, the Commission will be guided by the principles stated in *Fox v Percy* [2003] HCA 22; 214 CLR 118 at [22] to [31]. Mistakes can occur in the 'comprehension, recollection and evaluation of evidence' (*Fox v Percy* at [24]). If, after making a proper allowance for the advantages of the Arbitrator in seeing and hearing the witnesses, the Presidential member concludes 'that an error has been shown' (*Fox v Percy* at [27]), he or she is obliged to correct that error.

26. Sixth, credibility based findings may be overturned if 'incontrovertible facts or uncontested' evidence (*Fox v Percy* at [28]) establish that they were wrong. In rare cases, although the facts fall short of being 'incontrovertible', such findings may be overturned if they are 'glaringly improbable' or 'contrary to compelling inferences' in the case (*Fox v Percy* at [29] citing *Brunskill v Sovereign Marine & General Insurance Co Ltd* [1985] HCA 61; 59 ALJR 842 at 844 and *Chambers v Jobling* (1986) 7 NSWLR 1 at 10).

27. Seventh, challenges to an Arbitrator's exercise of discretion will be in accordance with the principles in *House v The King* [1936] HCA 40; 55 CLR 499 at 504–5. Those principles were articulated by Heydon JA (as his Honour then was) (Sheller JA and Studdert AJA agreeing) in *Micallef v ICI Australia Operations Pty Ltd* [2001] NSWCA 274 (*Micallef*). To succeed with an appeal against an Arbitrator's exercise of discretion, the appellant must demonstrate that the Arbitrator:

    '(a) made an error of legal principle,

    (b) made a material error of fact,

    (c) took into account some irrelevant matter,

    (d) failed to take into account, or gave insufficient weight to, some relevant matter, or

    (e) arrived at a result so unreasonable or unjust as to suggest that one of the foregoing categories of error had occurred, even though the error in question did not explicitly appear on the face of the reasoning.' (*Micallef* at [45])

28. In an appeal against a discretionary decision, a Presidential member will not overturn the decision because he or she 'might have reached a different conclusion or because intuitive feelings suggest to them a different outcome in the particular case' (*The Queen v Taufahema* [2007] HCA 11; 234 ALR 1).

29. Eighth, the same general approach that applies to appeals against discretionary decisions also applies to appeals against compensation for pain and suffering under s 67 of the 1987 Act. The appellant must establish that the decision was 'outside the limits of a sound discretionary judgment' (*Alvorac General Engineering Pty Ltd v Arlotta* (1993) 9 NSWCCR 177 at 182B; *Moran v McMahon* (1985) 3 NSWLR 700 at 716-21). A Presidential member will not disturb an award of compensation for pain and suffering, or a decision analogous to a decision involving the exercise of a discretion as to be assimilated to a discretionary judgment, unless the Arbitrator has acted on a wrong principle of law or has misinterpreted the facts or made a wholly erroneous estimate of the damage suffered (*Moran v McMahon* at 702E, 722G, 726F; *Wilson v Peisley* (1975) 7 ALR 571 at 585, and *Costa v The Public Trustee of NSW* [2008] NSWCA 223 at [105]).

30. Ninth, in respect of an error involving a departure from the rules of natural justice or procedural fairness, the appellant needs to show that the departure deprived him of the possibility of a successful outcome. To negate that possibility, it is necessary for the Presidential member to find that a properly conducted arbitration could not possibly have produced a different result (*Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147).

31. In summary, the role of a Presidential member is to determine if the decision appealed against is affected by error and, if so, to correct that error. The error must be one that has affected the outcome (*Leichhardt Municipal Council v Seatainer Terminals Pty Ltd* (1981) 48 LGRA 409 at 419 cited in *Trazivuk v Motor Accidents Authority of New South Wales* [2010] NSWCA 287 at [110])."

PLEADING IN APPEALS

24. The starting point for any consideration of the drafting of an appeal or the defence of an appeal in the Commission is Procedural Direction WC3 – Presidential appeals and questions of law (PD WC3), to be read in conjunction with the enabling legislation, and the Personal Injury Commission Rules 2021 (the Rules) concerning appeals (Division 13.2). Compliance with Procedural Directions is mandatory, unless a party is excused.[22]

25. If the Commission is of the view that any appeal is non-compliant, it will be rejected. Any appeal that is non-compliant will be rejected and, given the 28-day appeal period, rejection could have a deleterious effect upon any compliant appeal subsequently filed outside the appeal period. If an appeal is filed outside the statutory appeal period, PD WC3 at paragraph [14] sets out what must be addressed in order for time to be extended and reads as follows:

> "14. In exceptional circumstances, the Presidential member may extend the time for making an appeal (s 352(4)(b) of the 1998 Act; r 123 and r 133A of the

[22] Section 21(4) of the 2020 Act.

PIC Rules). If the appeal application is lodged more than 28 days after the date of the decision appealed against, the appealing party must:

(a) as soon as practicable give notice to the other parties of the intention to seek the extension;

(b) make the extension application at the same time as the relevant application to which it relates;

(c) provide the reasons why the appeal has been lodged out of time;

(d) provide full details of the arguments in favour of granting an extension of time for the making of an appeal, and

(e) provide details of the demonstrable and substantial injustice that losing the right to appeal would allegedly cause".

26. As a consequence, parties to appeals ought be fully conversant with PD WC3. This includes being fully conversant with the timetable which is set for an appeal. Parties who defer from timetables or Directions of the Commission must apply for leave to do so, with submissions.

27. PD WC3 sets out the basic procedural requirements for the setting out of grounds in appeals in paragraphs [23]–[26], which are detailed below in full:

"23. An appeal is limited to the determination of whether the member's decision is affected by any error of fact, law or discretion, and to the correction of any such error. It is not a review or new hearing (s 352(5) of the 1998 Act).

24. The grounds of appeal must be clearly and succinctly stated. The grounds of appeal must identify:

(a) the respects in which error of law, fact or discretion is alleged to have occurred;

(b) any material findings it is said the member should or should not have made, and

(c) any material facts it is said the member should or should not have found.

25. It is not acceptable to merely allege that the member erred in law, fact or discretion, or that the decision is against the evidence or the weight of the evidence.

26. The appeal application must also record:

(a) whether the appeal is from the whole or only part, and which part, of the decision;

(b) the decision or order/s sought on appeal, and

(c) any costs order sought in respect of the appeal and proceedings before the member, if applicable".

28. In terms of submissions supporting an appeal, paragraphs [27]–[28] set out the requirements:

> "27. All submissions must clearly and succinctly address each ground of appeal separately. The submissions must:
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> (a) be divided into numbered paragraphs;
>
> (b) appear with appropriate subheadings, associated with each ground of appeal relied on;
>
> (c) include references to relevant legislation and case authorities, together with the relevant section, page or paragraph reference;
>
> (d) include the relevant page number to the evidence, in the appeal documents, Application to Resolve a Dispute, Reply and/or Application to Admit Late Documents, and
>
> (e) include the relevant page and line number to the Commission's official transcript of proceedings.
>
> 28. The submissions must be presented in a neat, legible manner. They must be signed by the person who prepared them and have the following recorded under the signature:
>
> (a) the name of the signatory;
>
> (b) the signatory's telephone number, and
>
> (c) the signatory's email address."

29. Paragraphs [29]–[31] specify what is required in terms of a chronology, and finally paragraph [32] requires a list of authorities.

30. There are procedural requirements in terms of opposing an appeal, provided for in paragraphs [37]–[39] of PD WC3. A Notice of Opposition must be lodged within 28 days or as directed, attaching submissions dealing with the threshold and preliminary matters, and responding clearly and succinctly to each of the appellant's grounds of appeal and submissions in support, also with headings, paragraph numbers and references to page numbers or paragraphs in documents or evidence. The failure to lodge a Notice of Opposition may result in the appeal being considered in the absence of any submission by the respondent/s. Notices of Opposition must still comply with procedural requirements, and be filed within time, otherwise the Commission may refuse to accept them.

31. If a document is rejected, or a delegate of the President issues a Direction requiring compliance of the parties, it is not appropriate that parties seek to then argue the point with the Commission's staff. The Commission expects practitioners to comply with its Directions and approach the Commission courteously, seeking leave to be heard in the

appropriate manner where they request the Commission's indulgence to dispense of requirements within Directions, Rules or PD WC3.

32. The Full Federal Court has, in a number of cases, set out the requirements for the drafting of appeals, which requirements are completely in simpatico with PD WC3.

33. In *Kowalski v Repatriation Commission*,[23] the Full Federal Court said as follows:

> "A ground of appeal must identify, in a meaningful way, what is alleged to be the error in the judgment of the court below rather than leave the reader to speculate by reference to a particular passage or, even worse, just judgment paragraph number what the error might be." (emphasis added)

34. More recently, the Full Federal Court said this in *Construction, Forestry, Maritime, Mining and Energy Union v Quirk*:[24]

> "In the end, in the course of oral submissions in the cross-appeal, it was accepted that the contention based upon implied freedom of political communication did not add much to the other arguments. There must be a limit upon how far this Court is required to go in dealing with every contention that is floated into the air. Manifesting ingenuity in marshalling as many arguments as possible is no proper aspiration for a barrister: *Giannarelli v Wraith* (1988) 165 CLR 543 at 556. Counsel have a duty to assist the court 'by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge would be capable of fashioning a winner': *Ashmore v Corporation of Lloyd's* [1992] 2 All ER 486 at 493. A considerable part of the barrister's task is to make the forensic assessments required in order to focus any case upon its essentials. Directions concerning the filing of written submissions with page limits are procedural attempts to impose this discipline which should be scrupulously observed. If it is considered that there would be unfairness if a party was confined to the page limit then application can be made but parties should not take matters into their own hands by ignoring such limits or pursuing stratagems to frustrate their purpose.
>
> When it comes to performing the barrister's forensic duty in the context of an appeal, there is a further responsibility to identify with precision the alleged error, understanding its significance in the overall scheme of the controversy between the parties. A point to be advanced in argument should either be considered to be of sufficient merit and significance after considering the nature of the subject matter of the appeal and the need to keep the dispute in proportion to what is ultimately at stake that it is clearly articulated and fully developed, or, if not, it should be put to one side. Where there is a failure to conform to these expectations the Court must, in the interests of efficiency, itself take on the responsibility of confining its consideration to those points which are considered to have sufficient merit or significance that they are appropriately addressed in reasons. Failure by a barrister to perform this responsibility cannot lead to the consequence that the appeal court must nevertheless consider every point. The

[23] [2011] FCAFC 43 (*Kowalski*), [21].
[24] [2023] FCAFC 163 (*Quirk*), [441]–[442].

resolution of appeals would collapse under the weight of a requirement of that character." (emphasis added)

35. As noted above, *Raulston* states that appellate intervention is dependent upon the proving of error, either of fact, law or discretion. To prove such error, axiomatically it must be meaningfully identified in the appeal papers.[25] Practitioners have a duty to assist the court "by simplification and concentration",[26] which is entirely consistent with compliance with PD WC3 and the guiding principle[27] which requires the parties to focus on the real issues in dispute.

INTERLOCUTORY APPEALS

36. Interlocutory appeals are governed by section 352(3A) of the 1998 Act, which provides:

> "There is no appeal under this section against an interlocutory decision except with the leave of the Commission. The Commission is not to grant leave unless of the opinion that determining the appeal is necessary or desirable for the proper and effective determination of the dispute."

37. Often the threshold question which is contested on an appeal relates to the nature of the appeal, namely, is the decision being appealed against interlocutory or final? The Commission has approached the consideration of this question in accordance with the High Court's test as stated in *Licul v Corney*:[28] "Does the judgment or order, as made, finally dispose of the rights of the parties?"

38. While in some cases the nature of a decision is clearly interlocutory, in others it is the subject of contention. This commonly arises where the decision on appeal involves the determination of liability for injury, but also a referral to a Medical Assessor for an assessment of the degree of permanent impairment. Such decisions have been considered interlocutory in nature in the recent Presidential authority of *DGL (Aust) Pty Ltd v Martino*,[29] thus, requiring leave to proceed on appeal. In *Martino*, leave was granted as it was the more efficient and effective way to determine the dispute. If the interlocutory appeal had not proceeded, a medical assessment would have taken place and a Medical Assessment Certificate issued, which may have required amendment if the appeal was lodged at that stage, adding to processes within the Commission. Deputy President Wood in *Martino* considered *Mosawi v Baron Forge (NSW) Pty Ltd*,[30] *Moore v Greater Taree City Council*[31] and *South Western Sydney Area Health Service v Edmonds*.[32]

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[25] PD WC3 [23]–[26]; *Kowalski.*
[26] *Quirk.*
[27] Section 42 of the 2020 Act.
[28] [1976] HCA 6; 180 CLR 213, [11].
[29] [2023] NSWPICPD 30 (*Martino*).
[30] [2022] NSWPICPD 48.
[31] [2009] NSWWCCPD 17.
[32] [2007] NSWCA 16 (*Edmonds*).

39. The principles associated with this question, and what is to be considered for leave are also found in *Collingridge v IAMA Agribusiness Pty Ltd*[33] where the following was stated:

> "16. The Arbitrator's decision was interlocutory because it did not finally dispose of the parties' rights but merely determined the deemed date of injury (*P & O Ports Ltd v Hawkins* [2007] NSWWCCPD 87, 6 DDCR 12; *Licul v Corney* [1976] HCA 6, 50 ALJR 439). As a result, the appellant must seek leave to appeal. …
>
> 17. Parties are reminded that, when leave to appeal is required because the decision appealed is interlocutory, the application for leave should be made in the documents filed when the appeal is lodged. The Commission is not to grant leave to appeal 'unless of the opinion that determining the appeal is necessary or desirable for the proper and effective determination of the dispute'. <u>This requires a consideration of the nature of the dispute and the orders sought on appeal.</u> (emphasis added)
>
> …
>
> 19. The issue in dispute is the determination of the correct deemed date of injury. If the appeal is successful, the Arbitrator's determination will be revoked and the matter remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for assessment of the claim for additional compensation under the Table of Disabilities. If the appeal is unsuccessful, and I determine that the correct deemed date of injury is 15 March 2010, Mr Perry conceded that I should dismiss the Application under s 354(7A)(b) of the 1998 Act as being 'misconceived' or 'lacking in substance' (*White v Sylvania Lighting Australasia Pty Ltd* [2011] NSWWCCPD 7 at [63]–[73] (*White*)). Either way, the issue in dispute will be resolved. It is therefore appropriate for the 'proper and effective determination of the dispute' that I grant leave to appeal."

40. If the true nature of an appeal is interlocutory, leave is required. It is the Commission's practice that if an appeal is solely interlocutory in nature, it can be dealt with swiftly and in accordance with the 2020 Act's mandate.[34] Parties are expected to be ready for a swift oral hearing or decision on the papers which will determine whether leave will be granted.

COMMON ISSUES ARISING IN APPEALS

Failure to deal with a clearly articulated argument based on established facts

41. A failure on the part of a decision-maker to deal with a material submission made in the proceedings constitutes an error. That does not mean that any failure by the decision-maker to refer to any argument will amount to error or that the decision-maker is required to separately address every submission advanced in the proceedings.

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[33] [2011] NSWWCCPD 31.
[34] Sections 3 and 42 of the 2020 Act.

In *Huntsman Chemical Company Australia Pty Limited v Narellan Pools Pty Limited*,[35] Flick J (with Moore J agreeing) said:

> "The duty of a Judge at first instance extends to a duty to refer to the evidence relevant to the submissions advanced and the findings relevant to the conclusions to be reached. But it is not a duty to refer to every submission and every piece of evidence".[36]

42. The submission must be a substantial submission supported by the proven facts in the case and must have been clearly articulated. As Kirby J observed in *Dranichnikov v Minister for Immigration & Multicultural Affairs*:[37]

> "... in a case where there has been a fundamental mistake at the threshold in expressing, and therefore considering, the legal claim propounded by an applicant, the error will be classified as an error of jurisdiction. It will be treated as a constructive failure of the decision-maker to exercise the jurisdiction and powers given to it.
>
> Obviously, it is not every mistake in understanding the facts, in applying the law or in reasoning to a conclusion that will amount to a constructive failure to exercise jurisdiction."[38]

43. In *Wang v State of New South Wales*,[39] McCallum JA (Macfarlan and Meagher JJA agreeing) confirmed that:

> "[*Dranichnikov*] is not authority for the proposition that any failure to refer to any argument put to a trial judge amounts to error. It is necessary to engage with the nature and materiality of the argument in the context of the issues in the proceedings."[40]

44. The Member's conclusion will constitute legal error if it amounts to a failure to deal with the appellant's case on the evidence. Thus s 352(5) of the 1998 Act, which requires that the decision of the Member is affected by error of fact, law or discretion, will be engaged. However, in *Whisprun Pty Ltd v Dixon*,[41] the High Court (Gleeson CJ, McHugh and Gummow JJ) warned that to "suggest that a trial judge has not properly considered a party's case is a serious charge. Such a suggestion should be accepted only when the record of the trial or other evidence persuasively suggests that the judge failed to discharge that paramount judicial duty."

45. Thus, in the context of an appeal from a Member of the Commission to a Presidential Member, in order to establish error on the basis of the Member's failure to deal with a material submission, the appellant will need to precisely identify where in the transcript and/or any written submissions the submission was put, the established evidence that

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[35] [2011] FCAFC 7 (*Huntsman Chemical Australia*).
[36] *Huntsman Chemical Australia,* [44].
[37] [2003] HCA 26 (*Dranichnikov*).
[38] *Dranichnikov*, [87]–[88].
[39] [2019] NSWCA 263 (*Wang*).
[40] *Wang*, [63].
[41] [2003] HCA 48, [63].

supports the submission, and how the failure to deal with the submission has affected the outcome of the proceedings.

Procedural fairness

46. Like all tribunals, the practice and procedure in the Commission is attended upon by great flexibility. The rules of evidence do not apply and the Commission may inform itself in a manner the Commission thinks appropriate.[42] Section 52 of the 2020 Act also provides great latitude in terms of how hearings may be conducted. Section 52 provides:

> "**52 Hearings and conferences**
>
> (1) Proceedings need not be conducted by formal hearing and may be conducted by way of a conference between the parties, including a conference at which the parties (or some of them) participate by telephone, closed-circuit television or other means.
>
> (2) Subject to any procedural directions, the Commission may hold a conference with all relevant parties in attendance and with relevant experts in attendance, or a separate conference in private with any of them.
>
> (3) If the Commission is satisfied that sufficient information has been supplied to it in connection with proceedings, the Commission may exercise functions under this Act and enabling legislation without holding any conference or formal hearing.
>
> (4) An assessment or determination is to be made by the Commission having regard to information that is conveniently available to the Commission, even if one or more of the parties to the assessment or determination proceedings do not co-operate or cease to co-operate."

47. Overriding all Commission proceedings is the obligation contained in the guiding principle for the Commission and all parties to "facilitate the just, quick and cost effective resolution of the real issues in the proceedings".[43]

48. In *South Western Sydney Area Health Service v Edmonds*,[44] McColl JA observed the following at [91]:

> "Having regard to the nature of the dispute the Arbitrator was assigned to determine and the fact his decision directly affected both parties' private rights he was, in my view, prima facie obliged to act in accordance with the obligations of procedural fairness and natural justice discussed by Deane J in *Australian Broadcasting Tribunal v Bond and Others* [1990] HCA 33; (1990) 170 CLR 321 at 365 ff; see also *Salemi v MacKellar (No 2)* [1977] HCA 26; (1977) 137 CLR 396 at 419 per Gibbs J (as his Honour then was). He was also, accordingly, obliged 'to observe the recognized standards of judicial fairness' (*Testro Bros Pty Ltd v Tait* [1963] HCA 29; (1963) 109 CLR 353 at 370 per Kitto J) and, in particular, that

[42] Section 43(2) of the 2020 Act.
[43] Section 42(1) of the 2020 Act.
[44] [2007] NSWCA 16 (*Edmonds*).

which required him to bring an impartial mind to the exercise of his decision-making function: see *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* [2001] HCA 23; (2001) 206 CLR 128 at [20] per Gleeson CJ, McHugh, Gummow and Hayne JJ; *Australian Broadcasting Tribunal v Bond and Others* (at 366–367) per Deane J."

49. There is no provision in the 2020 Act which specifically excludes the application of the common law principle of procedural fairness. Whilst *Edmonds* was decided in relation to the former Workers Compensation Commission, a legacy body of the Commission, there is no provision in the 2020 Act which in any way modifies or derogates from the principles enunciated in that decision.

50. Even though the Commission is not a court, procedural fairness therefore applies to Commission proceedings.

51. A denial of procedural fairness will generally be a basis to set aside a Member's decision. It is said generally because such a denial must be corrected unless it could not have affected the outcome.[45]

52. Procedural informality, such as practised in the Commission, cannot become a vehicle for procedural unfairness.[46]

The obligation to give reasons in the Commission

53. The adequacy of reasons delivered by a Member is frequently challenged on appeal.

54. There have been two recent cases in the Court of Appeal dealing with the obligation of a Member to give reasons: *Secretary, Department of Education v Dawking*[47] and *Fisher v Nonconformist Pty Ltd*.[48] Each of these referred to the statutory obligation under s 294 of the 1998 Act and r 78 of the Rules, which provide:

> "**294 Certificate of Commission's determination**
>
> (1) If a dispute is determined by the Commission, the Commission must as soon as practicable after the determination of the dispute issue the parties to the dispute with a certificate as to the determination.
>
> (2) A brief statement is to be attached to the certificate setting out the Commission's reasons for the determination."
>
> "**78 Statement of reasons for decision**
>
> (1) This rule applies only in relation to the following applicable proceedings—
>
> (a) Commission proceedings,
>
> (b) merit review proceedings.

[45] *Toll v Morrissey* [2008] NSWCA 197, [10].
[46] *Johnson v IPEC Transport Group* (1993) 9 NSWCCR 427 (Kirby P dissenting at 434C).
[47] [2024] NSWCA 4 (*Dawking*).
[48] [2024] NSWCA 32 (*Fisher*).

(2) A determination of the appropriate decision-maker in applicable proceedings to which this rule applies is to be accompanied by a brief statement of the appropriate decision-maker's reasons for the determination that includes the following—

(a) the appropriate decision-maker's findings on material questions of fact, referring to the evidence or other material on which those findings were based,

(b) the appropriate decision-maker's understanding of the applicable law,

(c) the reasoning processes that led the appropriate decision-maker to the conclusions made.

(3) Without limiting subrule (2), the reasons are to be stated sufficiently, in the opinion of the appropriate decision-maker, to make the parties to the proceedings aware of the appropriate decision-maker's view of the case made by each party."

55. In *Dawking*, Gleeson JA (Mitchelmore and Kirk JJA agreeing) said that the obligation to give a brief statement of reasons had to be considered in light of the issues raised for consideration by the parties (referring to *Brambles Industries Ltd v Bell*[49]). Thus, in that case it was not error that the Member did not address legal principles which had not been raised as issues before the Member.

56. In *Fisher*, Kirk JA (Meagher JA and Simpson AJA agreeing) said that "[t]here is no general common law duty on executive decision-makers to give reasons for their decisions", citing *Wingfoot Australia Partners Pty Ltd v Kocak*.[50] This was contrasted with judges, for whom "the requirement to give reasons is a normal, though not universal, incident of the judicial process". His Honour said "[w]hether or not the Member gave adequate reasons had to be assessed against the content of the legal duty which required the giving of reasons". His Honour noted that this duty, and the corresponding obligation of decision-makers, was addressed in s 294 and r 78 (quoted above). His Honour said that, if the standard required was the same standard expected of a judge (as was assumed by the parties' submissions in *Fisher*) the nature of that standard was summarised in the following passage from *Ming v Director of Public Prosecutions (NSW)*:[51]

> "What can be seen is that the judicial duty to give reasons does not extend to referring to every argument or piece of evidence. Relevantly for current purposes, what is required is that the judge expose the reasons for resolving a point critical to the contest between the parties, do justice to the issues posed by the parties' cases, refer to evidence that is important or critical to the proper determination of the matter, and generally explain any conclusion on a significant factual or evidential dispute that is a necessary step to the final decision."

[49] [2010] NSWCA 162 (*Brambles*).
[50] [2013] HCA 43, [43].
[51] [2022] NSWCA 209 (*Ming*).

57. From a practical point of view, it is likely that a statement of reasons that satisfied r 78 would also satisfy the requirements in *Ming*.

58. Prior to commencement of the 2020 Act, the position was governed by the s 294 of the 1998 Act and the former r 15.6 of the Workers Compensation Commission Rules 2006. That rule was in very similar terms to the current provision in r 78. Previously it was generally assumed that decisions, dealing with the common law duty of judges to give reasons, had application in the context of the former Workers Compensation Commission of New South Wales, and subsequently the Personal Injury Commission (see for example, *NSW Police Force v Newby*,[52] a decision of the President, Keating J). This is now open to doubt in light of the decision in *Fisher*, although the reasons of Kirk JA did not decide that issue.

59. There have been a number of cases that seek to anthologise the principles governing the adequacy of reasons (see for example *Pollard v RRR Corporation Pty Ltd*[53] per McColl JA at [56] to [67]). This paper shall not seek to summarise them here. There is a helpful statement by Meagher JA in *Beale v Government Insurance Office (NSW)*,[54] where his Honour said "… *the statement of reasons must be looked at as a whole* and the material inadequacies identified and considered" (emphasis added). Not infrequently, submissions on appeal will quote a small section from a Member's reasons, which in isolation appears inadequate, simplistic or wrong, although this is not so when the passage is viewed in context. It is unhelpful to focus solely on a problematic extract from the reasons if the reasons as a whole are adequate.

60. In *Minister for Immigration and Ethnic Affairs v Liang*[55] the plurality, dealing with the reasons of an administrative decision-maker, said "[t]he reasons for the decision under review are not to be construed minutely and with an eye keenly attuned to the perception of error". The plurality described the principles governing such reasons as "well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed". This passage has been regularly applied in both the former Workers Compensation Commission and in the Personal Injury Commission.

Factual error

61. Factual error is described in *Raulston,* a decision which applies the principles referred to by Barwick CJ in *Whiteley Muir & Zwanenberg Ltd v Kerr*.[56] *Raulston* was also cited with approval in in *Northern NSW Local Health Network v Heggie*.[57] As cited earlier in this paper, the Deputy President in *Raulston* said, of appeals governed by s 352(5):

> "(a) [A Member], though not basing his or her findings on credit, may have preferred one view of the primary facts to another as being more probable.

[52] [2009] NSWWCCPD 75, [142]–[144].
[53] [2009] NSWCA 110.
[54] (1997) 48 NSWLR 430, 444.
[55] [1996] HCA 6.
[56] (1966) 39 ALJR 505 (*Whiteley Muir*).
[57] [2013] NSWCA 255 (*Heggie*), [71].

Such a finding may only be disturbed by a Presidential member if 'other probabilities so outweigh that chosen by the [Member] that it can be said that his [or her] conclusion was wrong'.

(b) Having found the primary facts, the [Member] may draw a particular inference from them. Even here the 'fact of the [Member's] decision must be displaced'. It is not enough that the Presidential member would have drawn a different inference. It must be shown that the [Member] was wrong.

(c) It may be shown that [a Member] was wrong 'by showing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn: or the available inference in the opposite sense to that chosen by the [Member] is so preponderant in the opinion of the appellate court that the [Member's] decision is wrong'."

62. Basten JA, in *Workers Compensation Nominal Insurer v Hill*,[58] dealt with the scope of an appeal pursuant to s 352(5). His Honour said there was no error in a Presidential Member applying what was said by Barwick CJ in *Whiteley Muir*. Basten JA in *Hill* said:

> "With respect to errors of fact finding, the line between preferring a different result and identifying error is by no means easy to draw, but that is clearly what the Deputy President sought to do by adopting the language complained of. It was also what Barwick CJ sought to do in *Whiteley Muir* in using such language to identify the difference between an appeal based on a finding of error and a hearing de novo (and, one must now add, a rehearing). If, on an appeal by way of rehearing, the court asked whether the findings of fact were 'open' to the trial judge, that might demonstrate an unduly limited understanding of the court's function; however, that language is not out of place in determining an appeal from factual findings under s 352(5)."

63. In *Heggie* Sackville AJA, referring to *Norbis v Norbis*,[59] said:

> "*A fortiori*, if a statutory right of appeal requires a demonstration that the decision appealed against was affected by error, the appellate tribunal is not entitled to interfere with the decision on the ground that it thinks that a different outcome is preferable".

64. Sackville AJA in *Heggie* also said:

> "However, as Roche DP pointed out in [*Raulston*], at [20], the observations of Allsop J in *Branir Pty Ltd v Owston Nominees (No 2)* need to be borne in mind, particularly (I would add) where the challenge is to an evaluative judgment such as the reasonableness of actions by an employer with respect to discipline. Allsop J said, in relation to the application of the principle in *Warren v Coombes*, (at [28]) that:
>
> > 'in [the] process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between

[58] [2020] NSWCA 54 (*Hill*).
[59] [1986] HCA 17.

> conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge.'"

65. In *Australian Air Express Pty Ltd v Langford*[60] McColl JA referred to a finding of fact, on the issue of 'worker', as a "an exercise whose resolution is one of 'fact and degree' in respect of which views might legitimately differ". Her Honour said:

> "it is not enough that an appellate court might have come to a different conclusion – before an appellate court will intervene the appellant must show error on the part of the primary judge: *JA & BM Bowden & Sons Pty Limited v Chief Commissioner of State Revenue* (2001) NSWCA 125; (2001) 105 IR 66 at 68 [14] per Ipp JA."

66. *Heggie* is authority that a finding as to 'reasonableness' for the purposes of s 11A of the 1987 Act involves a broad evaluative judgment:

> "The finding made by the Arbitrator was one of fact. It involved 'elements of fact, degree, opinion or judgment': *Branir Pty Ltd v Owston Nominees*, at [24], per Allsop J. It was not put to the Deputy President that the Arbitrator had misunderstood the principles to be taken into account in determining whether disciplinary action is reasonable and the Deputy President did not so conclude.
>
> Thus, as the Deputy President recognised, he could conclude that the Arbitrator's finding was wrong only if the latter had committed an error in making the evaluative judgment as to reasonableness. The Deputy President accepted that it was necessary to identify a factual error of the kind described by Barwick CJ in *Whiteley Muir v Kerr*."[61]

Exercise of discretion pursuant to House v The King

67. One of the three grounds that a decision or part thereof can be set aside relates to an error of discretion. The principles applied are as follows.

68. The plurality in *House v The King*[62] stated the following principles regarding the exercise of discretion:

> "… the judgment complained of, namely, sentence to a term of imprisonment, depends upon the exercise of a judicial discretion by the court imposing it. The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration,

[60] [2005] NSWCA 96.
[61] *Heggie*, [170]–[171].
[62] [1936] HCA 40; 55 CLR 499.

then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."

69. Application of the principles in *House v The King*, in a matter of practice and procedure (a dismissal application in the District Court) was at issue in *Micallef v ICI Operations Pty Ltd*.[63] Heydon JA (Sheller JA and Studdert AJA agreeing) said an attack on a discretionary decision on a matter of practice and procedure "must fail unless it can be demonstrated that the decision-maker:

    (a) made an error of legal principle,

    (b) made a material error of fact,

    (c) took into account some irrelevant matter,

    (d) failed to take into account, or gave insufficient weight to, some relevant matter, or

    (e) arrived at a result so unreasonable or unjust as to suggest that one of the foregoing categories of error had occurred, even though the error in question did not explicitly appear on the face of the reasoning."

70. His Honour said it was "immaterial" that the court dealing with the appeal "would have exercised the discretion differently if the discretion had been conferred on it in the first instance". The exercise of discretion could only be interfered with in the circumstances described above. Heydon JA, in a detailed judgment, dealt in turn with the various "possible grounds of appellate interference with the primary judge's conclusion". His Honour concluded that none had application. The plaintiff's appeal against the strike out of his proceedings failed.

Appealable error and whether it affects the outcome

71. The general rule is that error, to be appealable, must have affected the outcome.

72. *Gerlach v Clifton Bricks Pty Ltd*[64] involved an appeal against an interlocutory order dispensing with a jury. The appeal was brought after the substantive proceedings were concluded. The Court of Appeal held the order dispensing with the jury should not have been made, set aside the judgment and ordered a new trial. These orders were appealed to the High Court. The plurality said:

    "6. The proposition that any interlocutory order can be challenged in an appeal against the final judgment in the matter is often stated in unqualified terms. The better view, however, is reflected in the formulation adopted in Spencer Bower, Turner and Handley where it is said that 'on an appeal from the final order an appellate court can correct any interlocutory order *which affected the final result'* (emphasis added in original).

    7. It is necessary to make the qualification, 'which affected the final result', at least to reflect the well-established principle that a new trial is not ordered

[63] [2001] NSWCA 274.
[64] [2002] HCA 22.

where an error of law, fact, misdirection or other wrong has not resulted in any miscarriage of justice."

73. *Walsh v Prest*[65] was a personal injury case, where calculations on appeal suggested there may have been an overcalculation by the trial judge of economic loss, representing about 20 per cent of the $100,000 allowed under this head. Basten JA (Giles JA and Campbell AJA agreeing) said:

> "The principle that the Court should not order a retrial, even where error has been demonstrated in the proceedings below, unless 'some substantial wrong or miscarriage has been thereby occasioned' is now to be found in Part 51, r 23 of the Supreme Court Rules. As noted in *Conway v The Queen* [2002] HCA 2; (2002) 209 CLR 203 at [27] and [28] the principle derives from the general law and is consistent with long-standing practice in civil cases at common law in New South Wales."

74. Basten JA said that "despite apparent error, the judgment below did not result in a substantial miscarriage of justice". The appeal was dismissed.

75. *Akora Holdings Pty Ltd v Ljubicic*[66] was a workers compensation appeal from a Presidential Member. Section 352 of the 1998 Act, in its form at that time, provided for the 'review' of a first instance decision, by a Presidential Member. The Presidential Member could intervene without identifying error (see [6] and [14] of *Ljubicic*). Basten JA (Hodgson and Campbell JJA agreeing) said:

> "To the extent that the Deputy President purported to identify legal error on the part of the arbitrator, that conclusion may itself be said to reveal legal error on the part of the Deputy President. However, read in context, it was not a material or operative error. If that conclusion were removed from the Deputy President's reasons, it is sufficiently clear that he would still have set aside the decision of the arbitrator for the reasons articulated at [34]–[35]."[67]

76. The situation is different if the established error is one going to procedural fairness. The leading case on this point is *Stead v State Government Insurance Commission*.[68] This was a claim for damages for personal injury in a motor accident. While the plaintiff's counsel was addressing on medical evidence, the trial judge told the counsel that the judge did not accept the particular doctor's evidence and "[y]ou needn't go on as to that". In a reserved decision the judge then accepted the evidence of the particular doctor, which was unfavourable to the plaintiff. The High Court upheld an appeal and remitted the matter for a new trial as to damages. The High Court said:

> "10. For this reason not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court,

[65] [2005] NSWCA 333.
[66] [2008] NSWCA 339 (*Ljubicic*).
[67] *Ljubicic*, [17].
[68] [1986] HCA 54.

the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial.

11. Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference.

…

16. Alternatively, if the Full Court is properly to be understood as saying no more than that a new trial would probably make no difference to the result, their Honours failed to apply the correct criterion. All that the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome. In order to negate that possibility, it was, as we have said, necessary for the Full Court to find that a properly conducted trial could not possibly have produced a different result."

77. The above was applied in the Court of Appeal, in the context of workers compensation proceedings, in *Toll Pty Ltd v Morrissey*.[69] The worker's business was run through a family company. Applications by the employer for the issuing of a direction for the production of financial material, and then a Notice to Produce, were both refused by the Arbitrator who heard the matter at first instance. On an appeal to a Presidential Member, it was held (correctly according to the Court of Appeal) that the Arbitrator erred in refusing these applications. However, the Presidential Member said he was not satisfied the error would have affected the outcome. Beazley JA (Handley AJA and McDougall J agreeing), applying *Stead*, said the Presidential Member "reversed the onus. The correct test was that he should allow the appeal from the arbitrator, unless the error of the arbitrator could not possibly have affected the result".

No error in not dealing with a submission not put to the Member below

78. A successful appeal is predicated upon the establishment of error on the part of the primary decision maker (the non-presidential Member).

79. The common law is clear that a party is bound by the conduct of his or her case. In *Metwally v University of Wollongong*,[70] the High Court said:

> "It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so."

80. The Court of Appeal considered this principle in the context of the Commission in *Brambles*, in which the appellant asserted an error of law on the part of a Deputy President of the Commission by failing to give adequate reasons for finding that a non-

[69] [2008] NSWCA 197.
[70] [1985] HCA 28.

related accident was not causative of the worker's disability. The appellant had made a submission to the (then) Arbitrator of the former Workers Compensation Commission but did not put the submission to the Deputy President on the appeal. Hodgson JA with (whom Tobias and McColl JJA agreed) said:

> "… the obligation to give reasons has to be considered in the light of the issues raised for consideration by the parties. … Having regard to the submissions that were put to the Presidential Member, in my opinion it cannot be said that his reasons were inadequate."[71]

81. Further, as Sackville AJA observed in *Boele v Rinbac Pty Ltd*,[72] it is important for the appellant to establish that the relevant argument was put to the primary decision-maker "with reasonable clarity."

Raising a new argument on appeal

82. A party is bound by the conduct of his or her case and it is only in exceptional circumstances that a party will be allowed to raise on appeal a new argument which he or she failed to put during the hearing.[73] In *Coulton,* the High Court observed that this principle involved notions of fairness and the public interest in the administration of justice. The plurality said:

> "The first respondents must be bound by the conduct of their case at the trial. It would not be fair to the appellants to subject them at this stage of the proceedings to what is virtually a new trial on an entirely different issue to that which has been litigated. In the pursuit of such a course, the interests of expedition, finality and justice are denied."[74]

83. The law with respect to raising an argument on appeal in those circumstances was summarised by McColl JA (Ward JA and Tobias AJA agreeing) in *Mamo v Surace*[75] as follows:

> "A party is bound by the conduct of his or her case. It has long been the law that, except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him or her, to raise on appeal (even one by way of rehearing) a new argument which, whether deliberately or by inadvertence, he or she failed to put during the hearing when there was an opportunity to do so."[76]

84. That general principle has been frequently applied in Presidential decisions in both the Commission and its predecessor, the Workers Compensation Commission. In *Scott v JR*

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[71] *Brambles*, [22].
[72] [2014] NSWCA 451, [100].
[73] *Coulton v Holcombe* [1986] HCA 33 (*Coulton*), [7]–[8], per Gibbs CJ, Wilson, Brennan and Dawson JJ; *Smits v Roach* [2006] HCA 36, [46].
[74] *Coulton*, [15].
[75] [2014] NSWCA 58 (*Mamo*).
[76] *Mamo*, [75].

Corney and SM Morrisey t/as Digquip,[77] Deputy President Roche referred to *Mamo* and made the following observations (citations omitted):

> "The Commission has consistently applied these principles in s 352 appeals, which are restricted to the identification and correction of error and are not rehearings.
>
> …
>
> As Emmett JA (Bergin CJ in Eq and Sackville AJA agreeing, though not in the result) explained in *Violi v Commonwealth Bank of Australia*, '[a] party does not have a right to insist that a new point be decided on appeal simply because all the facts have been established beyond controversy or the point is one of construction or of law'. His Honour added that it 'remains a question of whether the appellate court considers that it is expedient, and in the interests of justice, to entertain the new point'.
>
> ...
>
> Whether [the appellant] should be permitted to rely on matters not previously argued raises a difficult issue. The Commission has a statutory duty to act 'according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms' (s 354(3) of the 1998 Act). However, the authorities are clear that parties are bound by their conduct at the arbitration and that it is contrary to all principle to allow a party to run a new case on appeal."[78]

85. A further impediment arises in the context of appeals in the Commission. An appeal pursuant to s 352(5) of the 1998 Act can only be made against a Member's decision to a Presidential Member where there is an error of fact, law or discretion. As noted earlier, since 1 February 2011, an appeal is no longer a "review" and is not a hearing *de novo*. The appeal is limited to a determination of whether the decision appealed against was or was not affected by any error of fact, law or discretion, and *to the correction of any such error*. The process is defined by the establishment of error and the correction of that error. This raises a query as to whether, if leave is granted to raise a new issue on appeal, a Presidential Member can determine the new issue or whether the determination of that issue falls outside of the scope of the appeal.[79]

Fresh evidence on appeal

86. The use of fresh evidence on a Presidential appeal is governed by s 352(6) of the 1998 Act which provides:

> "Evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to the decision appealed against may not be given on

[77] [2016] NSWWCCPD 11 (*Scott*).
[78] *Scott*, [104]–[107]. Note that s 43 of the 2020 Act is identical in terms to the former s 354(3) of the 1998 Act.
[79] *Ballina Shire Council v Knapp* [2019] NSWCA 146 per Payne JA (Basten and Macfarlan JJA agreeing), [34].

an appeal to the Commission except with the leave of the Commission. The Commission is not to grant leave unless satisfied that the evidence concerned was not available to the party, and could not reasonably have been obtained by the party, before the proceedings concerned or that failure to grant leave would cause substantial injustice in the case."

87. In *CHEP Australia Ltd v Strickland*[80] Barrett JA (Macfarlan JA agreeing) dealt with the application of s 352(6) of the 1998 Act. His Honour at [27] and [30]–[31] said:

> "27. In the s 352(6) context, there are two threshold questions. They arise as alternatives and are set out in the second sentence of the provision. The first goes to the issue of availability in advance of the proceedings. The second entails an assessment of whether continued unavailability of the evidence 'would cause substantial injustice in the case'. The discretion to admit becomes available to be exercised only if the Commission is satisfied as to one of the threshold matters."
>
> "30. Counsel for the appellant submitted that the Commission misdirected itself in law in construing the 'substantial injustice' criterion in s 352(6). It was submitted that that criterion may be satisfied in circumstances where it is not possible to say that availability of new evidence would have produced a different result; and that the criterion will be satisfied if the evidence is compelling and might have influenced the outcome even though it cannot be said that it would certainly have done so.
>
> 31. ... The part of s 352(6) concerning 'substantial injustice' does not direct attention to possibilities or potential outcomes. The task is to decide whether absence of the evidence 'would cause' substantial injustice in the case. There must therefore be a decision as to the result that 'would' emerge if the evidence were taken into account and the result that 'would' emerge if it were not. If the result would be the same on each hypothesis, the ends of justice cannot be said to have been defeated by exclusion."

88. The discretion relates to an appeal pursuant to s 352 of the 1998 Act and is to be exercised in that context. Barrett JA at [34] said:

> "The power of the appellate tribunal upon such an appeal is a narrow power to correct operative error of fact, law or discretion. The power of the Presidential member to admit further evidence (subject to satisfaction of one of the statutory pre-conditions) was therefore concerned with evidence which, if accepted, would have been likely to demonstrate that the decision appealed against was affected by such error: [*Heggie*] at [66]."

89. In addition to the need to satisfy one of the threshold tests, admission of evidence pursuant to s 352(6) is discretionary. Basten JA, dealing with the second of the gateways (substantial injustice) at [4] said:

[80] [2013] NSWCA 351.

"Once through a gateway, the discretionary power was engaged: however, where it had been established that the failure to admit further evidence would cause substantial injustice, it is doubtful that any residual discretion would remain to exclude the further material, in most cases."

The Commission's ability to inform itself

90. The Commission is a specialist tribunal. Members sometimes use their expertise in workers compensation law to inform themselves. This is an issue sometimes raised on appeal, and the approach is set out below.

91. Section 43 of the 2020 Act provides:

> "**43 Procedure before Commission generally**
>
> (1) Proceedings in any matter before the Commission are to be conducted with as little formality and technicality as the proper consideration of the matter permits.
>
> (2) The Commission is not bound by the rules of evidence but may inform itself on any matter in the manner the Commission thinks appropriate and as the proper consideration of the matter before the Commission permits.
>
> (3) The Commission is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms."

92. Rule 73 of the Rules provides:

> "**73 Guiding principles for applicable proceedings**
>
> The appropriate decision-maker for applicable proceedings must, when informing itself or themselves on any matter in the proceedings, have regard to the following principles—
>
> (a) evidence should be logical and probative,
>
> (b) evidence should be relevant to the facts in issue and the issues in dispute,
>
> (c) evidence based on speculation or unsubstantiated assumptions is unacceptable,
>
> (d) unqualified opinions are unacceptable."

93. In *Edmonds* Giles JA, referring to the first instance decision-making, said:

> "… the Arbitrator came to his finding either by giving weight to the opinion of Dr Rivett, or by applying some unstated general knowledge of work activities and their relationship, predominant over non-work activities, to the diseases, all in the absence of evidence and without explanation. Whichever course he took, he was in error."

94. In *Onesteel Reinforcing Pty Ltd v Sutton*[81] Allsop P dealt with r 15.2 of the previous Workers Compensation Commission Rules 2010 (which was substantially identical to r 73). His Honour described the rule as requiring the Commission to "draw its conclusions from material that is satisfactory, in the probative sense, in order that it act lawfully and in order that conclusions reached by it are not seen to be capricious, arbitrary or without foundational material". His Honour observed that the rule "is not a reintroduction of the rules of evidence".[82]

95. Although the Commission may inform itself in any matter, in the manner it thinks appropriate and as the proper consideration of the matter permits, it is bound by "the application of substantive rules of law" and the rules of procedural fairness.[83] In *Paul Segaert Pty Ltd v Narayan*[84] Roche ADP (as he then was) at [73] said:

> "[Members], when seeking to inform themselves on matters, have a duty to comply with the rules of natural justice and procedural fairness as discussed above. That is, they must give all the parties in the case a reasonable opportunity to consider the material. This includes allowing a reasonable time to seek an opinion from their own specialist or do their own research on the particular topic. The power should be used sparingly and cautiously."

96. In *Strinic v Singh*[85] Beazley JA (Ipp and Basten JJA agreeing) said:

> "Procedural fairness does, however, take its colour and hue from the particular circumstances at hand. Thus, a specialist tribunal will have greater leeway in applying its specialist knowledge, either because the constituting statute so provides, or because the parties are taken to understand its practices. Such tribunals are often the sole and final determiners of fact. Likewise, a trial judge would be entitled to advise the parties that he understood certain medical evidence to have a particular meaning, even if that meaning was not stated in the evidence. If all parties agreed that the judge's understanding on that matter was correct, then, the matter being transparent and not in dispute, there would be no breach of procedural fairness in the trial judge's acting on that understanding."

97. Dealing with the previous Workers Compensation Commission of NSW (before that body became the Compensation Court of NSW) Barwick CJ in *J & H Timbers Pty Ltd v Nelson*[86] said:

> "However the value of described work in the labour market is a matter well within the general knowledge and experience of this Commission. Consequently in this case, the Commission would be able to assess what wages ought to be paid for the respondent's labour both before and after the injury."

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[81] [2012] NSWCA 282 (*Sutton*).
[82] *Sutton*, [2]–[3].
[83] See *Edmonds*, [90].
[84] [2006] NSWWCCPD 296.
[85] [2009] NSWCA 15.
[86] [1972] HCA 12.

98. There were similar statements of principle regarding the Compensation Court of NSW (see for example *Cowra Shire Council v Quinn*,[87] *Akawa Australia Pty Ltd v Cassells*[88]). In *Goktas v Goodyear Australia Pty Ltd*,[89] Roche ADP referred to these authorities and at [32] said of the former Workers Compensation Commission of NSW "as a specialist tribunal the Commission is entitled to draw on its knowledge of the labour market and wages."

99. If the Commission is to rely on its specialist knowledge regarding wages, it would be prudent that this be raised between the decision-maker and the parties so that there is an opportunity for the parties to address the issue. The preferable course is that such matters be established by evidence if the cannot be agreed.

WHAT IS AHEAD FOR THE COMMISSION IN 2024

Deployment of Pathway in the Workers Compensation Division

100. The final element of the Commission's digital transformation project, "Pathway", will be delivered in mid-2024 with the deployment of the Pathway platform in the Workers Compensation Division. This platform was commissioned in the Motor Accidents Division in June 2023 and represents the completion of the Commission's decision to transform its digital offering to a single platform across the whole Commission.

101. We will shortly be commencing education sessions with the profession and other users to instruct them in how to use the new platform. We will also provide assistance to users in the weeks after deployment.

500-page rule

102. Later in 2024, the Commission will be introducing a new rule which, in shorthand, can be described as the "500-page rule." This rule has been discussed by the Rule Committee, who passed a resolution to make the 500-page rule, after a process of consultation with the Commission's stakeholders and the legal profession. We are in the final stages of drafting the rule with the Parliamentary Counsel's Office. Pleasingly the introduction of this rule has widespread support, especially from the Bar Association and the Law Society.

103. At the outset the following proposition is clear – there will be no limitation on material or evidence that is required to justly and fairly determine the issues in dispute.

104. In short form, the rule will limit the number of pages filed by each party to no more than 500 pages of supporting material/evidence. If a party needs to file more pages than 500 in the support or defence of an application, leave will need to be sought.

105. It is proposed that such an application for leave will be made to an appropriate decision maker and it will be decided in a short online hearing or on the papers. If it is obvious that the extra material is necessary to fairly hear the case it will be waved through. A party making such an application must show how the document(s) sought to be relied on

[87] [1996] 13 NSWCCR 175 per Handley JA (Meagher and Cole JJA agreeing), 179D.
[88] (1995) 25 NSWCCR 385 Rolfe AJA (Kirby P and Priestley JA agreeing), [23].
[89] [2007] NSWWCCPD 1.

relate to the "real issues in the proceedings" as contemplated in the guiding principle, s 42 of the 2020 Act.

106. The rules of evidence do not apply to Commission proceedings (s 43(2) of the 2020 Act) and the 500-page rule does not attempt to re-introduce them. The test as to whether additional documents will be admitted into proceedings is whether the documents relate to the real issues in dispute as set out under s 42. That is, it is not based on the rules of evidence because they do not apply to the Commission.

107. In summary, there will be no limitation on material which is related to the "real issues in the proceedings." As each Commission decision maker has decision making independence, they will have the discretion to admit documents in excess of the 500-page limit.

108. There will however be a strict limitation on material that does not satisfy the requirement of relating to the real issues in the proceedings.

The necessity for the introduction of this rule includes the following considerations.

109. Firstly, by eliminating material which is not related to the real issues in the proceedings, the Commission and the parties are better able to achieve the statutory mandate under the Act of proceedings being conducted "justly, quickly and cost effectively" (ss 3(c) and 42 of the 2020 Act). Parties and the Commission decision maker need not be concerned with material which is not related to any of the real issues in dispute, thus enabling a more focused hearing. The Act directs parties to focus on the real issues in the proceedings and this rule change is in simpatico with that object and guiding principle.

110. Over time, Commission decision makers have observed instances of parties filing many hundreds or thousands of pages in applications, with very little of the material actually being referred to by the parties in argument. We have also noticed the circumstance where multiple copies of the same document are filed in applications and replies, thus complicating the hearing process. There has also been a practice where large volumes of clinical notes and pathology records are filed, often not referred to or if they are, it is only to ground a submission that the records do not contain relevant complaints of injury. The courts have long held that medical records must be approached with caution because they are not produced for the purposes of legal proceedings.[90]

111. Secondly, this limitation is an aspect of the Commission's approach to cyber security. It is a principle of cyber security for any entity holding data to hold only such material as it needs and no more. In 2023 there were high profile criminal "hacks" of a large law firm and the Victorian Court system. Cyber security is therefore a critical task for the Commission and all users.

112. Medical records more often than not contain highly confidential entries of a claimant's health and medical history which are unrelated to the matters at issue in the proceedings. Frequently, psychiatric treatment is described at length. The disclosure of such material, if not related to the issues in dispute, simply adds to the process trauma of the proceedings, particularly for vulnerable claimants/workers. There is also a risk of

[90] *Mason v Demasi* [2009] NSWCA 227, [2], per Basten JA.

harm should the material be unlawfully accessed and disseminated. In *HWL Ebsworth v Persons Unknown*,[91] Slattery J noted at [31] that in relation to law firms there is a "responsibility to protect client confidences". This duty will include not disclosing confidential matters which are unrelated to the issues in dispute as well as taking proper steps to guard against cyber theft.

113. Doubtless in almost every case, there will be confidential material which of necessity must be considered in Commission proceedings. This is the nature of the work. Given the statutory mandate to publish decisions (s 58 of the 2020 Act), these are matters which may end up being referenced in a decision but they will satisfy the requirement of constituting an aspect of being a real issue in the dispute. But such decisions can be subject to redaction or de-identification orders under Rule 132. Cyber theft can serve to thwart such orders, so the more we do to protect this information, the more we protect the integrity of proceedings and the wellbeing of vulnerable claimants.

114. The 500-page rule therefore seeks to enable proceedings to be efficiently conducted while protecting the confidentiality of material unrelated to the issues in contest.

[91] [2024] NSWSC 71.