Giving Reasons in the Personal Injury Commission, Including on Appeal

Keynote speech – PIC Members Conference

14 November 2025

Justice J K Kirk

Next year marks the centenary of the enactment of the *Workers Compensation Act 1926* (NSW), which represented a critical step in the development of workers compensation regimes in this country. It established the Workers Compensation Commission, the first specialist workers compensation tribunal in Australia.[1]

That body and its successors, down to the current Personal Injury Commission, have produced hundreds of thousands of decisions on important issues affecting individual workers and, more recently, those injured in motor vehicle accidents. Those decisions matter to those affected by them. And, not least because they matter, the decisions should be rational, reasonable and reasoned.

The theme of my remarks today will be giving reasons for decisions made in the Personal Injury Commission. I will address two topics.

First, I will seek to summarise key principles relating to the giving of adequate reasons for decisions of the kind in question.

Second, I will discuss the nature of appellate review in appeals by way of rehearing, and thus what has to be addressed in reasons of presidential members hearing internal appeals in the Commission, in light of the Court of Appeal's recent decision in *State of New South Wales v* ***Culhana***.[2]

Giving reasons

Turning to the first topic, the following issues arise:

1. Why give reasons?

2. How does the obligation to give reasons arise?

3. What should reasons contain?

---

[1] *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* (28th ed, 2021, Safe Work Australia), Ch 1: https://www.safeworkaustralia.gov.au/book/comparison-workers-compensation-arrangements-australia-and-new-zealand-2021-28th-edition/chapter-1-history-workers-compensation-schemes-australia-and-new-zealand.

[2] [2025] NSWCA 157; (2025) 342 IR 302.

Why give reasons?

In considering what standards should be met by a statement of reasons, it helps to understand why they are required when significant decisions are taken involving the exercise of governmental power, whether administrative or judicial. Various purposes have been enumerated. The following can be regarded as those at the core.[3]

First, the giving of reasons is a hallmark of non-arbitrary decision-making.[4] The rule of law in general, and administrative law in particular, requires that those trusted to apply the law to individuals do so based on reason and principle, not personal whim.

Second, giving reasons facilitates justice – including the correct and impartial application of the law – being seen to be done.[5] Doing so involves grappling with the substance of the evidence and arguments presented. This notion is most apt when applied to courts. But it has some relevance to administrative decision-makers, insofar as reason-giving demonstrates to the affected parties the careful application of law to their individual circumstances. Thus Robert French said in a paper in 1999 that "the citizen is entitled to expect and would ordinarily expect administrative decisions to be based on reasons which are explicable even if the outcome is thought to be wrong".[6] Section 33(2) of the South African Constitution goes so far as to provide that "[e]veryone whose rights have been adversely affected by administrative action has the right to be given written reasons".

Third, a statement of reasons allows the parties and any subsequent decision-maker to scrutinise the decision-making process for appellable or reviewable error.[7]

Fourth, the process of articulating reasons – of setting out thoughts in a logical and coherent statement – imposes discipline which requires the decision-maker to grapple with and resolve correctly the matters in dispute. As the Court of Appeal has recently said, "most judges will have experienced cases where they have reached a particular view on a point of fact or law after a hearing but then changed their minds upon further reflection when writing their judgment".[8]

Of course, broad principles must give way to the content of any particular requirement to give reasons. As the High Court said in ***Wingfoot*** *v Kocak*, "[g]eneral observations, drawn from cases decided in other statutory contexts and from academic writing, about functions served by the provision of reasons for making administrative decisions are here of limited utility".[9]

---

[3] See eg ***Ming*** *v Director of Public Prosecutions (NSW)* (2022) 109 NSWLR 604; [2022] NSWCA 209 at [26]-[29].
[4] See (albeit in the judicial context) *Wainohu v New South Wales* (2011) 243 CLR 181; [2011] HCA 24 at [92].
[5] ***Soulemezis*** *v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 278-279.
[6] "Administrative Justice in Australian Administrative Law" in Robin Creyke & John McMillan (eds), *Administrative Justice— the Core and the Fringe* (2000, Australian Institute of Administrative Law) 9 at 14; see similarly *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 at 507.
[7] ***DL*** *v The Queen* (2018) 266 CLR 1; [2018] HCA 26 at [32]; *Douglass v The Queen* (2012) 86 ALJR 1086; [2012] HCA 34 at [14].
[8] *Rock v Henderson; Rock v Henderson (No 2)* [2025] NSWCA 47 at [62].
[9] (2013) 252 CLR 480; [2013] HCA 43 at [45].

That leads to the second question.

How does the obligation to give reasons arise?

There is no general common law obligation to give reasons for an administrative decision.[10] A duty to give reasons commonly arises either expressly or impliedly from the relevant statutory scheme.

In the case of the Commission, the following requirements apply under the *Motor Accident Injuries Act 2017* (NSW) (**MAI Act**) in relation to motor accident claims:

1. s 7.13(4) provides that merit reviewers are "to attach a brief statement to the certificate setting out the reviewer's reasons for the determination";

2. s 7.23(7) requires medical assessors to "set out the reasons for any finding … as to any matter" certified in a medical certificate;[11]

3. s 7.36(5) mandates the Commission "to attach a brief statement to the certificate, setting out the Commission's reasons" when assessing claims for damages.

In relation to workers compensation claims:

1. where a dispute is determined by the Commission, s 294 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (**1998 Act**) requires "a brief statement … setting out the Commission's reasons for the determination" to be attached to the certificate of determination;

2. where a medical dispute is assessed by a medical assessor, s 325(2)(c) of the 1998 Act requires the medical assessment certificate to "set out the medical assessor's reasons for that assessment";

3. where an appeal against a medical assessment is made to a medical appeal panel, although there is no express requirement for the panel to give reasons it has been held that there is nevertheless an implied requirement to do so.[12]

More generally, in proceedings before the Commission and proceedings before a merit reviewer, r 78 of the Personal Injury Commission Rules 2021 (NSW) (**PIC Rules**) requires a determination to be accompanied by "a brief statement of the appropriate decision-maker's reasons for the determination".

Most generally, under r 59.9 of the Uniform Civil Procedure Rules (**UCPR**) a plaintiff bringing proceedings in the Supreme Court for judicial review can seek a statement of

[10] *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 662; [1986] HCA 7. Cf courts: note *Ming* at [25].
[11] See further *Khanna v Insurance Australia Ltd* [2025] NSWSC 33 at [44].
[12] *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372; [2006] NSWCA 284 at [31], [33], [117].

reasons for a decision by a public authority. The Court may order the provision of such if the public authority does not comply with the request.

What should reasons contain?

Where reasons must be given, the next question is what those reasons should address and the standard they must meet.

Beginning at a high level of generality, I have long admired Kitto J's succinct description of the judicial process in *Ex parte Tasmanian Breweries* in 1970:[13]

> the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined.

Although that passage is to be found in a classical discussion of the nature of judicial power, it also captures the core process that any decision-maker must follow in considering how a legal regime is to apply to any particular set of facts. A similar formulation was identified by Glass JA in *Azzopardi v Tasman UEB Industries Ltd* in 1985 when referring to the Workers Compensation Commission.[14]

The basic steps identified are commonly echoed in legislative statements of what reasons must address. Relevantly, r 78(2) of the PIC Rules provides that the required brief statement of the appropriate decision-maker's reasons must include:

> (a) the … decision-maker's findings on material questions of fact, referring to the evidence or other material on which those findings were based,
>
> (b) the … decision-maker's understanding of the applicable law,
>
> (c) the reasoning processes that led the … decision-maker to the conclusions made.

Rule 59.9 of the UCPR makes similar provision.

The first requirement is finding the material facts. That may involve resolving any disputes about the facts to the extent necessary, doing so by reference to the evidence or other material properly before the decision-maker.

A requirement to set out findings on material questions of fact mandates the decision-maker to set out the factual findings actually made which affected the outcome of the decision. The decision-maker must "*set out* the findings which it *did* make", doing so "on

---

[13] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374; [1970] HCA 8.

[14] (1985) 4 NSWLR 139 at 156.

those questions of fact which it considered to be material to the decision which *it* made and to the reasons *it* had for reaching that decision".[15]

Insofar as there is some dispute about relevant facts, then reasons must be given for the decision-maker's resolution of the dispute.[16] Thus the Court of Appeal said in *Goodrich Aerospace Pty Ltd v Arsic* in 2006 that:[17]

> It is not appropriate for a trial judge merely to set out the evidence adduced by one side, then the evidence adduced by another, and then assert that having seen and heard the witnesses he or she prefers or believes the evidence of the one and not the other. If that were to be the law, many cases could be resolved at the end of the evidence simply by the judge saying: 'I believe Mr X but not Mr Y and judgment follows accordingly'. That is not the way in which our legal system operates.

It is true that there are some issues for decision which are of such a nature that, to quote Kitto J again, "it is not to be expected that [the judge] will be able, at any rate satisfactorily to the litigants or to one of the litigants, to indicate in detail the grounds which have led him to the conclusion".[18] His Honour was there considering a patent case involving comparison of drawings, and went on to add that the case before him was not an "exception to the rule that the eye, like the heart according to Pascal, has its reasons that reason does not know".

Some medical issues could be of that nature. But such a conclusion should not be reached too readily. As the Western Australian Court of Appeal said when overturning a decision of a medical assessment panel for inadequacy of reasons:[19]

> In concluding which medical reports to accept or reject, the panel may have regard to matters such as the sufficiency of the history given to the doctor providing each report by the worker; the extent to which, if at all, the doctor has examined the worker and what the doctor has ascertained from that examination; whether the examining doctor has overlooked some matter, which the panel has observed on its examination and which it considers to be relevant; and whether the views expressed by the doctor accord with a respected body of medical opinion. There may be other reasons for rejecting some medical reports. They should be stated.

The second requirement involves identifying the applicable law. Of course, some types of decision within the Commission may involve in substance just a determination of fact, such as when a medical assessor determines whether or not a claimant is suffering from a particular condition. However, even that type of determination occurs in a particular

---

[15] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30 at [68] (emphasis in original).
[16] See eg, recently, ***Della Bruna*** *v Health Care Complaints Commission* [2025] NSWCA 105 at [44]-[63].
[17] (2006) 66 NSWLR 186; [2006] NSWCA 187 at [28].
[18] *Re Wolanski's Registered Design* (1953) 88 CLR 278 at 281; [1953] HCA 72; see also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212; [2003] HCA 56 at [40].
[19] *Re Croser; Ex parte Rutherford* [2003] WASCA 8 at [46(f)].

legislative context. The decision-maker would need to identify the issue they are resolving, expressly or implicitly acknowledging the legal context in which they are acting.

At the other end of the spectrum, some matters will involve a significant dispute about the meaning and effect of the law. Rule 78(2)(b) of the PIC Rules appropriately refers to the decision-maker's "understanding of the applicable law". As Brennan J said nearly 50 years ago, sitting in the AAT, although an administrative body "cannot judicially pronounce upon the limits [of its authority], its duty not to exceed the authority conferred by law upon it implies a competence to consider the legal limits of that authority, in order that it may appropriately mould its conduct".[20]

A notable recent example was a tricky question of statutory construction as to whether an injury to skin, which was not also an injury to nerves, was a "soft tissue injury" as defined in s 1.6 of the MAI Act. The question had been grappled with by a number of review panels of the Commission, reasonably reaching different answers, and with even those panels which reached the same conclusion adopting different reasoning to each other.[21] That reasonable people could reach different views on the topic was further illustrated by the fact that my Court of Appeal colleague Justice John Griffiths, sitting at first instance, reached one conclusion,[22] whilst I and two others reached another when sitting on appeal.[23]

Sometimes the legal issues will be familiar to the decision-maker. Routine use of the same "verbal formula" to describe the law is not of itself a jurisdictional error.[24] But, self-evidently, it is always necessary to pay close attention to the particular issue in dispute. And it is incumbent upon decision-makers to keep themselves up to date with respect to legal developments in the areas in which they are working.

It would be unwise always to assume that the parties have provided a complete and accurate account of the law. In *Culhana*, for instance, the dispute involved a question about whether an increase in risk sufficed of itself to establish factual causation in the workers compensation context. That very issue had been determined in a recent Court of Appeal decision,[25] yet neither decision in the Commission referred to the judgment, presumably because the parties had not drawn it to the decision-makers' attention.

The third requirement identified in r 78(2) of the PIC Rules is that the reasons statement include the reasoning process that led the decision-maker to the conclusions reached. Rule 78(3) goes on to state that "[w]ithout 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". The significance of the reference to the opinion of the decision-maker is not

---

[20] *Re Adams & Tax Agents' Board* (1976) 12 ALR 239 at 242 (AAT); approved eg *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216; [2022] HCA 16 at [24].
[21] *Al-Khafaji v Insurance Australia Ltd t/as NRMA Insurance* [2022] NSWPICMP 519 at [98]; *Nazari v AAI Ltd t/as GIO (No 2)* [2023] NSWPICMP 62 at [70]–[79]; *Eftikhari v AAI Ltd t/as AAMI* [2023] NSWPICMP 93 at [116]–[127]; *Dhupar v AAI Ltd t/as GIO* [2023] NSWPICMP 99 at [77]–[129].
[22] *Allianz Australia Insurance Limited v The Estate of the Late Summer Abawi* [2024] NSWSC 1245.
[23] *Allianz Australia Insurance Limited v Estate of the Late Summer Abawi* [2025] NSWCA 85.
[24] *Minister for Immigration and Ethnic Affairs v* ***Wu Shan Liang*** (1996) 185 CLR 259 at 266; [1996] HCA 6.
[25] ***Fisher*** *v Nonconformist Pty Ltd* (2024) 114 NSWLR 1; [2024] NSWCA 32.

apparent, but it is doubtful that it means that failure to comply with the requirements of subrule (2) would not constitute legal error.

Both rules affirm the need to grapple with the key arguments made and evidence relied upon. Failing to do so can result in a decision-maker erring in law, or manifesting jurisdictional error, or both.[26] While the distinction between the two in this context is rather fine, the standard for finding an error of law is generally lower than what is required to establish a jurisdictional error. An error of law will arise if the decision-maker fails to comply with the required legal standards with respect to the reasons in question,[27] focusing attention in the current context on the requirements I have addressed. As to jurisdictional error, constructive failure to exercise jurisdiction may be made out where the decision-maker has failed to address a "substantial, clearly articulated argument relying on established facts".[28]

As is implicit in these statements of principle, it is not necessary to refer to every piece of evidence, nor every argument made.[29] To address every scrap of material would be tiresome, burdensome and wasteful. Efficiency and promptness are also important administrative aims. Relatedly, the objects of the Act or instrument under which the decision is made may also be relevant. For example, one of the objects of the PIC Act is enabling the Commission "to resolve the real issues in proceedings justly, quickly, cost effectively and with as little formality as possible" (s 3(c)).

The phrase "a brief statement of reasons", which is used throughout the PIC statutory matrix,[30] has been held to reduce the detail required of a decision-maker's reasons; the obligation is "a lesser one than that imposed on courts".[31] As Leeming JA has observed, "[p]lainly enough, there may be a tension between the obligation to explain and the obligation to be concise".[32] That tension is reflected in a further aim in the PIC Act, namely "to ensure that the decisions of the Commission are timely, fair, consistent and of a high quality" (s 3(d)).

Whilst recognising that the nature of the particular duty to give reasons is important, it it still useful to quote the helpful discussion of three members of the High Court in *DL v The Queen* of the detail required of a judge in giving reasons:[33]

> At one extreme, reasons for decision will not be inadequate merely because they fail to address an irrelevant dispute or one which is peripheral to the real issues. Nor will they be inadequate merely because they fail to undertake "a minute explanation of every step in the reasoning process that leads to the judge's

---

[26] *Ming* at [30]-[46]; *Allianz Australia Insurance Limited v* ***Yangzom*** [2025] NSWCA 104; (2025) 109 MVR 214 at [11]-[13].
[27] See eg *Wingfoot* at [55].
[28] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088; [2003] HCA 26 at [24]; see also eg *Ming* at [12]-[18].
[29] See eg *Soulemezis* at 259, 280 and 282; *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [58]-[66].
[30] See eg 1998 Act s 294; PIC Rules s 78
[31] *Allianz Australia Insurance Ltd v* ***Kerr*** (2012) 83 NSWLR 302; [2012] NSWCA 13 at [53]; *Pham v NRMA Insurance Ltd* [2014] NSWCA 22; (2014) 66 MVR 152 at [29]. Both refer to an earlier iteration of the statutory scheme, but the point can be taken still to be applicable.
[32] *Zahed v IAG Ltd t/as NRMA Insurance* [2016] NSWCA 55; (2016) 75 MVR 1 at [4].
[33] At [33], citations omitted.

> conclusion". At the other extreme, reasons will often be inadequate if the trial judge fails to explain his or her conclusion on a significant factual or evidential dispute that is a necessary step to the final conclusion. In between these extremes, the adequacy of reasons will depend upon an assessment of the issues in the case, including the extent to which they were relied upon by counsel, their bearing upon the elements of the offence, and their significance to the course of the trial.

In other words, unsurprisingly, it all depends. In considering how much detail is required it can be useful to consider the purposes being served by providing reasons,[34] as outlined above. Do the reasons establish that a reasoned approach has been taken, exposing the decision-making pathway in a manner that allows scrutiny of whether legal error has occurred, and showing that the substance of the evidence relied upon and arguments put by either side have been taken into account?

Where a decision-maker is "bound to state the reasons for arriving at the decision reached, the reasons actually stated are to be understood as recording the steps that were in fact taken in arriving at that result".[35] Thus if a material point that was raised has not been addressed in the decision-maker's reasons, a reviewing court is liable to conclude that it has been overlooked.

I have already noted that it is not sufficient to summarise competing evidence and then opt for one version without explanation. The same point applies with respect to reciting the arguments of either side then saying, without further explanation, one side's submissions are preferred.[36] By way of example, a Magistrate was held both to have failed to comply with the curial duty to give reasons and to have manifested jurisdictional error because it "was not sufficient to summarise the evidence of either side, refer to the law, and then state a conclusion".[37]

A decision-maker is also liable to stray into error by uncritically replicating a party's submissions. In a case where the reasons given for a decision of the AAT included very substantial and unattributed copying of a party's submissions, jurisdictional error was established because those submissions – and thus the impugned decision – did not deal with material which formed an important part of the other party's case.[38]

As a practical tip, before finalising reasons it is useful for a decision-maker to check that they have addressed all of the material points raised by the party which is going to *lose* on the point in dispute. Doing so helps to ensure that the decision-maker both has done, and is seen to have done, justice to the case of the unsuccessful party. Ironically enough, the arguments of the winner are generally less important.

---

[34] See eg *Soulemezis* at 259 and 280; note also *Wingfoot* at [53]-[55].
[35] *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816; [2005] HCA 57 at [130] (Hayne J). This principle has been applied to administrative decision-makers who are obliged to give reasons: *Kerr* at [54]-[55]; *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187; (2013) 303 ALR 242 at [101]–[105]; *Della Bruna* at [54].
[36] See eg *Jones v Bradley* [2003] NSWCA 81 at [127]-[131]; *Keith v Gal* [2013] NSWCA 339 at [125]-[131].
[37] *Lazicic v Rossi* [2024] NSWSC 777 at [55].
[38] *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166; [2012] FCAFC 90; note also *Li v Attorney General (NSW)* (2018) 99 NSWLR 630; [2019] NSWCA 95.

If and when it comes to judicial review proceedings and appeals on questions of law, administrative decision-makers' reasons will not be construed with an eye keenly attuned to the perception of error.[39] That does not require that any ambiguity be resolved in favour of the decision-maker; rather, decisions are approached in a sensible and balanced way and read as a whole.[40]

Scrutiny is informed by the characteristics of the decision-maker and the nature of their task. Due allowance is made for infelicities of expression, misuse of legal terms, and other immaterial errors which may affect reasons given by a decision-maker whose area of expertise is not the law.[41] In the recent case of *Yangzom*, for example, the Court of Appeal made due allowance for a medical assessor's lack of legal training in finding that his reasoning was "tolerably clear" despite the "somewhat bald terms" in which his conclusion was stated.[42]

Inadequacy of reasons has different significance in an appeal by way of rehearing. That point leads to the second of my topics: the nature and consequences of the decision in *Culhana*.

Appellate reasoning following *Culhana*

The core issue on appeal in *Culhana* was the standard of appellate review applicable in an appeal to a Presidential member under s 352 of the 1998 Act. It is useful to give a quick overview of different types of appeal before addressing the implications of the decision.

Types of appeal

Appeals, for courts and tribunals below the High Court, are creatures of statute. They take their character from the provisions in question. That being said, it can be useful to delineate some broad categories of appeal rights.[43] They vary in particular with respect to the law that is applied; the facts to which that law is applied; and the criterion of review, which affects the "extent to which the appellate court may interfere with the result below".[44]

The first category, at the more intense end of the reviewing spectrum, is appeals de novo. As their name suggests, they are new hearings in which the law is applied as it is at the time of the appeal and evidence is adduced afresh. The applicant is not required to

---

[39] *Wu Shan Liang* at 272; *New South Wales Land and Housing Corporation v Orr* (2019) 100 NSWLR 578; [2019] NSWCA 231 at [76]–[77]; *Della Bruna* at [9]-[10].
[40] See eg *Della Bruna* at [15]-[16].
[41] Ibid at [10].
[42] *Yangzom* at [76].
[43] In ***Turnbull** v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297-8, Glass JA catalogued six forms of process called "appeals"; this list was referred to in eg ***Lacey** v Attorney-General (Qld)* (2011) 242 CLR 573; [2011] HCA 10 at [57].
[44] *Turnbull* at 297.

demonstrate any error or establish a particular criterion of review.[45] Appeals de novo are a relatively uncommon species of appeal.[46]

Second, "the most familiar appeal in the legal system" is an appeal by way of rehearing.[47] For such appeals "the court conducts a rehearing on the materials before the primary judge in which it is authorised to determine whether the order that is the subject of the appeal is the result of some legal, factual or discretionary error".[48] The type of review generally applied to errors of fact or law has come to be labelled the "correctness standard". The need for error distinguishes these appeals from appeal de novo – although, as explained below, that requirement has limited significance. It is not uncommon for the court or tribunal to have an express or implied power to admit new evidence by leave.[49] Such appeals are decided based on the law as it stands at the time the appeal is heard.[50] Appeals to the Court of Appeal from the Supreme or District Courts are appeals by way of rehearing, pursuant to s 75A of the *Supreme Court Act 1970* (NSW).[51]

The third broad category is appeals in the strict sense. It is similar to appeals by way of rehearing in that error must be shown and the correctness standard of review applies to errors of fact or law.[52] However, the law to be applied is the law as it was at the time of the decision subject to appeal.[53] The same is true of facts. Thus the appellate body "can only give the decision which should have been given at first instance whereas, on an appeal by way of rehearing, an appellate court can substitute its own decision based on the facts and the law as they then stand".[54] The most notable example of such an appeal is an appeal to the High Court under s 73 of the Constitution.[55] A key distinguishing feature of those appeals is that the High Court is not empowered to receive further evidence.[56]

A fourth, very broad category is appeals on, or by reference to, questions or errors or points of law.[57] For example, s 353(1) of the 1998 Act provides that if a party to any proceedings under the workers compensation legislation before the Commission "is aggrieved by a decision of [a] presidential member in point of law, the party may appeal to the Court of Appeal". Such proceedings have been described as being "in the nature of

---

[45] See eg ***Coal and Allied Operations*** *Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; [2000] HCA 47 at [13]-[14].
[46] Note T Prince, 'Recurring Issues in Civil Appeals – Part 1' (2022) 96 *Australian Law Journal* 203 at 213.
[47] *Culhana* at [45].
[48] *Lacey* at [57(3)].
[49] Ibid; MJ Beazley, PT Vout and SE Fitzgerald, *Appeals and Appellate Courts in Australia and New Zealand* (LexisNexis, 3rd ed, 2014) at 14.
[50] While the significance of this notion – in contradistinction to appeals in the strict sense – is somewhat obscure, changes to procedure and the orders that may be made in a proceeding may be applied in an appeal by way of rehearing but not an appeal in the strict sense: see, eg, *Attorney-General v Birmingham, Tame and Rea District Drainage Board* [1912] AC 788 at 802; *Dowling v Hamlin* [2006] ACTSC 117; (2006) 205 FLR 87 at [33].
[51] As regards the District Court, see eg *Dayeian v Davidson* (2010) 76 NSWLR 512; [2010] NSWCA 42 at [11].
[52] Note ***Allesch*** *v Maunz* (2000) 203 CLR 172; [2000] HCA 40 at [23].
[53] This may include retrospective legislation which is expressed to operate prior to the primary decision: see, eg, *Gold Coast City Council v Sunland Group Ltd* (2019) 1 QR 304; [2019] QCA 118.
[54] *Allesch* at [23].
[55] Note *Minister for Immigration and Border Protection v* ***SZVFW*** (2018) 264 CLR 541; [2018] HCA 30 at [30].
[56] *Eastman v The Queen* (2000) 203 CLR 1; [2000] HCA 29.
[57] See further the discussion in *Fisher* at [32]-[51].

judicial review".[58] They tend to be similar to administrative law challenges at common law, with a constrained focus on legal rather than factual error.

Construction of s 352 of the 1998 Act

Turning then to the issue addressed in *Culhana*, s 352(1) of the 1998 Act provides for appeals from decisions by a non-presidential member of the Commission to a presidential member. Section 352(5) provides for the nature of such appeals:

An appeal under this section 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 appeal is not a review or new hearing.

The current drafting of s 352(5) was introduced by amendments to the 1998 Act in 2011,[59] which were stated in the amending Act's second reading speech to be intended to reverse the Court of Appeal's decision in ***Sapina** v Coles Myer Limited*.[60] In that case the Court considered that s 352(5) – which at the time provided that "[a]n appeal under this section is to be by way of review of the decision appealed against" – required something more than only the "correction of error".[61] The approach affirmed in *Sapina* was closer to a fresh hearing than an appeal by way of rehearing.[62]

The newly amended s 352(5) was considered by a Deputy President of the Workers Compensation Commission in 2011 in ***Raulston** v Toll Pty Ltd*.[63] The Commission's approach to interpreting the standard of appellate review required was informed primarily by the judgment of Barwick CJ in ***Whiteley Muir** & Zwanenberg Ltd v Kerr*.[64] In that case, the Chief Justice advanced an approach to appeals which required substantial deference to findings made by the primary decision-maker. The Commission in *Raulston* held that *Whiteley Muir* applied to the construction of s 352(5) and required a deferential approach to appeals from a first-instance decision of the Commission. In particular it was said that "[i]t is not enough that the Presidential member would have drawn a different inference", rather, "[i]t must be shown that the Arbitrator was wrong".[65] This standard came to be expressed in terms of whether particular findings of fact were open to the decision-maker.

However, *Whiteley Muir* had been expressly disapproved of in the seminal case of *Warren v Coombes*, decided in 1979.[66] In *Warren v Coombes*, a majority of the High Court expressly rejected the deferential approach advanced by Barwick CJ in favour of what is now labelled the "correctness" standard.[67] That formulation has been consistently endorsed and applied since, notably including in the further important High Court decision

---

[58] *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72; [2001] HCA 49 at [15].
[59] The amending Act – the *Workers Compensation Legislation Amendment Act 2010* (NSW) – commenced via proclamation in the Government Gazette on 14 January 2011.
[60] [2009] NSWCA 71; 7 DDCR 54.
[61] Ibid at [57].
[62] See *Tan v National Australia Bank Ltd* [2008] NSWCA 198 at [12].
[63] [2011] NSWWCCPD 25; 10 DDCR 156.
[64] (1966) 39 ALJR 505.
[65] *Raulston* at [19].
[66] (1979) 142 CLR 531; [1979] HCA 9.
[67] At 542-552.

in *Fox v Percy* in 2003.[68] Why the Commission in *Raulston* applied *Whiteley Muir* rather than *Warren v Coombes* and *Fox v Percy* is, to be frank, a mystery (especially as *Fox v Percy* was referred to in the decision). In any event, the decision in *Raulston* proceeded on the basis that the standard of appellate review to be applied to appeals under s 352(1) involved substantial deference to the original decision-maker.

In *Culhana*, the Court held that the statement in s 352(5) that an appeal "is not…a new hearing" makes clear that the appeal is not heard de novo.[69] Instead, the use of the phrase "legal, factual or discretionary error" was held to "invoke[e] the incidents" of the appeal by way of rehearing, and that was the type of appeal which was provided for.[70]

The Court held that the deferential approach outlined in *Raulston* "cannot be reconciled" with the proper standard – the correctness standard – which was established in *Warren v Coombes* and which "has subsequently been reiterated time and again by the High Court".[71] The statutory wording, preponderance of authority, and legislative history all indicated that the deferential approach in *Raulston* was misguided.[72] The factors in favour of maintaining that approach were not sufficient to outweigh correcting the wrong step that had been taken 14 years before. The new position was set out concisely in *Culhana* at [91]:

> Future appeals under s 352 should apply the approach in *Warren v Coombes* and *Fox v Percy*. Appropriate deference is to be given to members where their findings are based on evidence in respect of which they have an advantage (such as the kind identified in *Lee v Lee* at [55]) over the Presidential member hearing an appeal. But it is not sufficient for an appeal to be dismissed on the basis that an inference was "open" to the member, as if the member were a jury and there was some evidence supporting it. If the Presidential member, after making appropriate allowance for the advantages enjoyed by the member, would reach a different conclusion on a question of fact, he or she should not shrink from giving effect to it. Otherwise, the Presidential member will be dismissing an appeal but without fully addressing whether there is an error of fact, law or discretion.

Implications for appeals to Presidential members of the Commission

The decision requires a significant change in approach when presidential members of the Commission hear appeals under s 352.

The correctness standard of appellate review recognises that the appellate body must conduct "a real review" with respect to any claimed error, doing so within "the constraints marked out by the nature of the appellate process".[73] Importantly, to reach a different

---

[68] See eg ***Fox v Percy*** (2003) 214 CLR 118; [2003] HCA 22 at [25]; ***Lee*** *v Lee* (2019) 266 CLR 129; [2019] HCA 28 at [55]-[56]; ***Moore*** *(a pseudonym) v The King* (2024) 98 ALJR 1119; [2024] HCA 30 at [14]; ***KMD*** *v CEO (Department of Health NT)* (2025) 99 ALJR 474; [2025] HCA 4 at [21].
[69] At [46], [75], [99].
[70] At [45].
[71] At [69].
[72] At [80]-[84].
[73] *Fox v Percy* at [25].

conclusion on an issue of fact or law *is* to find error.[74] That point may be obvious with respect to issues of law. But it also applies to findings of fact, after making due allowances for any advantages of the primary decision-maker. I will return to the former point shortly.

As to the latter point, what are the relevant advantages? In *Fox v Percy* the High Court reiterated the principle that restraint on the part of the appellate decision-maker is appropriate where factual findings are likely to have been affected by the primary decision-maker having observed the demeanour of witnesses as they gave evidence.[75] More recently, in *Lee v Lee*, four members of the High Court said that appellate restraint is to be applied "as to factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence".[76] The appellate restraint is not to findings of credit and reliability per se, as it is possible that such findings do not depend on a decision-maker having observed the witness's demeanour.[77]

Restraint is also appropriate in respect of other decisions where the primary decision-maker enjoyed an advantage not possessed by the appellate decision-maker.[78] One example is where the primary decision-maker had the benefit of a view or in-court demonstration.[79]

Where such deference or restraint is required, the relevant findings can only be overturned where they are "glaringly improbable" or "contrary to compelling inferences".[80] The Court of Appeal has summarised the approach by saying "a compelling basis is needed to overturn such a finding".[81]

It is important to note that the restraint applies only to the finding of fact itself in relation to which the primary decision-maker had an advantage. It does not apply to any inferences drawn from that finding, nor does it operate when it comes to applying the law to the facts.[82] The appellate decision-maker is in just as good a position to draw inferences or reach conclusions from established facts. And the primary decision-maker must have in fact exercised the relevant advantage – for example, making a credit finding based on observation of a witness's demeanour rather than, say, because of inconsistencies in their evidence. No requirement of deference flows from the mere fact that the primary decision-maker was first in time.

If the primary decision-maker did not receive oral evidence, and there was no view or demonstration or such like, then it is likely that they will have no inherent advantage in

---

[74] See eg *Costa and Another v The Public Trustee of NSW* [2008] NSWCA 223 at [49]-[51] and [83]-[97]; *Frigger v Trenfield (No 3)* [2023] FCAFC 49 at [139].
[75] See *Fox v Percy* at [29]; *Lee* at [55]. As to the provenance of this principle, see T Prince, "Recurring Issues in Civil Appeals – Part 2" (2022) 96 *Australian Law Journal* 273 at 274.
[76] *Lee v Lee* at [55].
[77] ***Prouten** v Chapman* [2021] NSWCA 207 at [10]-[16], [107]-[108].
[78] *Fox v Percy* at [23].
[79] See eg *Pledge v Roads & Traffic Authority* (2004) 78 ALJR 572; [2004] HCA 13 at [49]; ***FitzGerald** v Foxes Lane (NSW) Pty Ltd* [2025] NSWCA 212 at [114].
[80] *Fox v Percy* at [29].
[81] *Riechelmann v McCabe* [2024] NSWCA 37 at [53].
[82] *Lee* at [56]; *FitzGerald* at [114].

determining the facts over the appellate body. Appellate restraint or deference in such cases is neither required nor appropriate.

I noted earlier that reaching a different *conclusion* on an issue of fact or law is of itself sufficient error for the purposes of an appeal by way of rehearing. That consequence is implicit in the statement by the majority in *Warren v Coombes* that "[t]he duty of the appellate court is to decide the case – the facts as well as the law – for itself".[83] Similarly, it is implicit in what was restated in *Fox v Percy*, namely that the appellate court must "give the judgment which in its opinion ought to have been given in the first instance",[84] doing so "weighing conflicting evidence and drawing [its] own inferences and conclusions".[85] It is also implicit in the recent statement by four members of the High Court that the appellate decision-maker "determines for itself the correct outcome on the relevant issue".[86] That must be done even if there is not a clearly defined point at which the primary decision-maker's reasoning went awry, or if the decision is one on which reasonable minds may differ.[87]

The apparent breadth of this notion of error might be thought to give it little work to do. But the requirement for establishing error serves two key roles.

First, it supports the distinction between an appeal by way of rehearing and a fresh trial, preventing the first instance decision from being "relegated to the status of a 'practice run'".[88] The appellate body does not start afresh. Instead, the appellant must point to those aspects of the primary decision which it says are infected by error. Those grounds of appeal form – and delimit the boundaries of – the appeal's subject-matter. If other conclusions are not challenged, and do not depend upon conclusions which are challenged, then they are not redetermined in the appeal.

Second, the requirement to establish error has particular significance for decisions properly characterised as discretionary.[89] For such decisions the correctness standard of review does not apply, even in appeals by way of rehearing. The type of error which must be established for discretionary decisions was classically stated in *House v The King*, relating to an appeal from criminal sentencing.[90] The relevant types of error are that the primary decision-maker:[91]

1. mistook the facts;

---

[83] At 552.
[84] At [23], quoting ***Dearman*** *v Dearman* (1908) 7 CLR 549 at 561; [1908] HCA 84.
[85] At [25], quoting *Dearman* at 564.
[86] *KMD* at [21].
[87] *R v* ***Bauer*** (2018) 266 CLR 56; [2018] HCA 40 at [61]; see also *SZVFW* at [29]-[34], [46], [49], [153]; T Prince, "Recurring Issues in Civil Appeals – Part 1" at 216.
[88] *Roads and Traffic Authority (NSW) v Chandler* [2008] NSWCA 64; (2008) Aust Torts Reports 81-945 at [10].
[89] As illustrated by the High Court's decision in *Lacey*.
[90] (1936) 55 CLR 499 at 505; [1936] HCA 40.
[91] Ibid. See also *Moore* at [14]. As to unreasonableness, note *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; [2008] HCA 42 at [138].

2. acted upon a wrong principle;

3. allowed extraneous or irrelevant matters to affect the decision;

4. failed to take into account some material consideration; or

5. made a decision that was unreasonable or plainly unjust.

The nature of these standards is relatively well-developed. The more difficult question tends to be whether the decision should be characterised as a discretionary one. The High Court has recently explained the distinction in this way:[92]

> While what constitutes a "discretionary decision" in this context can be ambiguous, in essence it refers to the circumstance where the decision maker is allowed "some latitude as to the choice of the decision to be made". A determination of which standard of review is applicable does not depend on whether the reasoning to be applied is evaluative or in respect of which reasonable minds may differ. Instead, the determination turns on whether the legal criterion to be applied "demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the *House v The King* standard applies".

The notion of there being one correct outcome is to some extent a label of conclusion. But it can help to guide analysis. Where statutory schemes are at issue, as they are in the Commission, the question can be understood as one of statutory construction as to the nature of the legal criterion:[93] should the lawmaker be understood to have intended that there could be a permissible range of outcomes on the issue, such that restraint should be shown on appeal, or only one correct outcome? Tom Prince SC has outlined some factors relevant to the characterisation exercise in one of a pair of useful articles in the Australian Law Journal.[94]

By way of illustration, the High Court has held in recent times that review of exercise of the following powers is on the correctness standard: deciding whether tendency evidence is of significant probative value;[95] whether to refuse to admit prosecution evidence if its probative value is outweighed by the danger of unfair prejudice to the accused;[96] and whether proceedings should be stayed as an abuse of process.[97] Conversely, criminal sentencing is a clear example of a discretionary decision. The High Court has also held that the exercise by the Family Court of a power to "make such order as it thinks fit altering the interests of the parties" in relation to matrimonial property is discretionary;[98] so, too, a power to assess whether "inadequate" provision has been made for the "proper maintenance, education and advancement in life" of a family provision claimant.[99] The latter holding illustrates, incidentally, that in rare instances some substantially factual

---

[92] *Moore* at [15], citations omitted.
[93] *SZFVW* at [151]-[153]; see eg *Smith v Blanch* [2025] NSWCA 188 at [70]-[87].
[94] Prince, "Recurring Issues in Civil Appeals – Part 1" at 215.
[95] *Bauer* at [61].
[96] *Moore*.
[97] *GLJ v Trustees of Roman Catholic Church for Diocese of Lismore* (2023) 280 CLR 442; [2023] HCA 32.
[98] *Norbis v Norbis* (1986) 161 CLR 513; [1986] HCA 17.
[99] *Singer v Berghouse (No 2)* (1994) 181 CLR 201; [1994] HCA 40.

evaluative assessments may be treated as discretionary in the relevant sense. So, too, does the fact that restrained appellate review is applied with respect to valuation questions.[100]

One final point, to link my first and second topics together. A ground complaining of inadequate reasons is generally of limited utility in an appeal by way of rehearing, as opposed to an appeal on a point or question of law. In appeals by rehearing it leads to the query, “yes, and?”. If the case turns on issues of credit and reliability, and the primary decision-maker saw the key witnesses, then it may be necessary to remit the matter if the reasons are inadequate.[101] Otherwise, however, the appeal body itself can determine the issue. Remitter should be avoided if possible.[102] Thus complaining about inadequate reasons in an appeal by rehearing is only the start of the argument, not the end of it.

---

[100] *Valuer-General v Fenton Nominees Pty Ltd* (1982) 150 CLR 160 at 164-165; [1982] HCA 46.
[101] Eg *Saltalamacchia v Zamagias* [2024] NSWCA 184.
[102] Note ibid at [3].