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Legal briefing

Appealing to a higher authority

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Introduction

This briefing discusses the features of modern civil appellate practice in Australian courts including the principles and procedural elements governing various classes of appeal.

First, this briefing explores principles underpinning the inquiry ‘*what is an appeal?*’ by reference to its statutory basis and related curial procedures.

Second, this briefing investigates the nature of appeals, considering the different categories of appeal and their respective standards of review, evidence and law.

Third, the character of a decision under appeal is considered, including discussion on the differences between appeals from discretionary and non-discretionary decisions, and particular issues arising in the appellate environment such as receiving new evidence, findings of fact and raising new points of law.

Fourth, this briefing discusses the nature of appeals as distinct from the common law tradition of judicial review.

And lastly, matters unique to the High Court’s appellate jurisdiction are explored, including special leave to appeal and the power of the High Court to remit matters following an appeal.

Finality

Finality is a core value of the judicial system.¹ The process of litigation can be arduous, costly and is inherently riddled with uncertainty for the parties involved. The finality of a decision allows a party, whether or not successful, to ‘arrange their affairs knowing that chapter in their personal or business lives is concluded’.²

However, it is also a core value of the judicial system that there exists some provision for the correction of error.³ After all, ‘finality is a good thing, but justice is better’.⁴ The tension between finality and ultimate justice is borne out by the limited powers of a court to reopen judgments – an appeal, by its very nature, increases delay and uncertainty. Striking the balance requires that appeals ‘be safely circumscribed within a narrow compass’.⁵

What is an appeal?

An appeal is the action of an unsuccessful party applying to a superior court to redress an error made by a court or tribunal below.⁶ It is ‘axiomatic’ that an appeal lies from a judgment or order of a court, not from the reasons given.⁷ As Mildren explains:

A finding or other determination of a court which is not incorporated into an order or judgment is not appellable unless it can be shown that the court intended by that finding to dispose finally of the litigation or of some question in the litigation. Consequently, there is no appeal from the reasons for judgment; the appeal is from the judgment or order.⁸

¹ Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2nd ed, 2020) 270; Adrian Zuckerman et al, *Zuckerman on Australian Civil Procedure* (LexisNexis, 2018) 955.

² Graeme Blank and Hugh Selby, ‘What Is an Appeal?’ in Graeme Blank and Hugh Selby (eds), *Appellate Practice* (Federation Press, 2008) 4.

³ Virginia Bell, ‘Appellate Review of the Facts’ (Sir Maurice Byers Lecture, NSW Bar Association, 20 August 2014) 2.

⁴ *Ras Behari Lal v King-Emperor* (1933) 50 TLR 1, 2 (Lord Atkin).

⁵ Alexander Hamilton, ‘Federalist 81’ in Alexander Hamilton, John Jay and James Madison, *The Federalist (Gideon Edition)*, ed George Carey and James McClellan (Liberty Fund, 2001) 421.

⁶ *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 (‘*Dignan*’). See also MJ Beazley, PT Vout and SE Fitzgerald, *Appeals and Appellate Courts in Australia and New Zealand* (LexisNexis, 2014) 3; Blank and Selby (n 2) 4.

⁷ *BP v New South Wales* [2019] NSWCA 223, [11]. See also *Driclad Pty Ltd v Commissioner of Taxation* (1968) 121 CLR 45, 64 (Barwick CJ and Kitto J); *Jadwan Pty Ltd v Rae & Partners [No 2]* [2020] FCAFC 95, [8]; Beazley, Vout and Fitzgerald (n 6) 17.

⁸ Dean Mildren, *The Appellate Jurisdiction of the Courts in Australia* (Federation Press, 2nd ed, 2023) 1.

In *Driclad Pty Ltd v Commissioner of Taxation*, the High Court noted that it was erroneous to express notices of appeal as if they were against the reasons of the primary judge, 'because it is of the nature of appeals' that they lie against judgments, decrees, orders and sentences, 'not against reasons'.⁹ A court's reasons for judgment 'are not themselves judgments'.¹⁰ Nevertheless, it is permissible to refer to the reasons for judgment in order to ascertain error. The error identified must be *vitiating*, that is, it must be an error 'essential to or an essential step in the reasoning process which led to the order of judgment' being appealed.¹¹

Statute is the basis for an appeal

An appeal is 'not a procedure known to the common law; it is always a creature of statute'.¹² This means it is necessary to focus attention on the statutory language to identify whether a right to appeal exists and, if so, the character of the appeal process (including the nature of the appellant's burden and the function of the court).¹³

Leeming provides several examples of courts falling into error as a result of proceeding on 'a priori assumptions' about the character of an appeal:

In *Walsh v Law Society (NSW)* the matter was argued in the court below and in the High Court as an appeal de novo until it was pointed out that it was in fact a rehearing, with an obligation on the appellant to identify error. Conversely, in *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (NSW)* the error was in proceeding on the basis that it was necessary for the appellant taxpayer to demonstrate error; the legislation gave the taxpayer a right to seek 'review' by the court, which, although taken to be an 'appeal' for some purposes, authorised the re-exercise of discretions *without* first identifying error.¹⁴

It is important to look to the statute for precise identification of the character of an appeal.

Leave to appeal and interlocutory decisions

It is an accepted and long-standing curial procedure that leave or special leave may be required in order to appeal.¹⁵

The requirement to obtain leave has been described as a 'necessary control' and a 'filter of the work which comes before some appellate courts' to promote the availability and efficiency of justice.¹⁶ It also serves to protect respondents from the costs of a full appeal hearing which would 'obviously fail'.¹⁷

Whether leave to appeal is required will, necessarily, be determined by statute. For example, an appeal from a final judgment, decree, order or sentence of a single judge of the Federal Court lies

⁹ *Driclad Pty Ltd v Commissioner of Taxation* (1968) 121 CLR 45, 64 (Barwick CJ and Kitto J). See also Thomas Prince, 'Recurring Issues in Civil Appeals: Part 1' (2022) 96(3) *Australian Law Journal* 203, 212 ('Civil Appeals: Part 1').

¹⁰ *R v Ireland* (1970) 126 CLR 321, 330 (Barwick CJ).

¹¹ Mildren (n 8) 15, citing *Portland Properties Pty Ltd v Melbourne and Metropolitan Board of Works* (1971) 38 LGRA 6, 18; *Kentwell v The Queen* (2014) 252 CLR 601, 617-8 [42] (French CJ, Hayne, Bell and Keane JJ).

¹² *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 555 [29] (Gageler J) ('SZVFW') citing *Dwyer v Calco Timber Pty Ltd* (2008) 234 CLR 124, 128 [2]. See also Catherine Branson, 'Appeals in the Federal Court of Australia' (Government Law Group Presentation, 5 July 2005) [2]; Leeming (n 1) 273; Beazley, Vout and Fitzgerald (n 6) 3; Mildren (n 8) 1-2. But see Prince, 'Civil Appeals: Part 1' (n 9) 203, who considers this statement misleading. The position is different in equity, where it has been settled since 1675 that the House of Lords had inherent jurisdiction to hear appeals from the Chancery: at 206.

¹³ See *Perara-Cathcart v The Queen* (2017) 260 CLR 595, 613-4 [40] (Kiefel, Bell and Keane JJ); Mildren (n 8) 4. There will be circumstances in which no appeal lies and an aggrieved party may turn to the prerogative writs.

¹⁴ Leeming (n 1) 273, citing *Walsh v Law Society (NSW)* (1999) 198 CLR 73; *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2011) 245 CLR 446.

¹⁵ *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194, 218. See Leeming (n 1) 294.

¹⁶ *Coulter v The Queen* (1998) 164 CLR 350, 359 (Deane and Gaudron JJ).

¹⁷ *Ibid.*

'as of right' to the Full Court.¹⁸ However, leave is generally required to appeal from an interlocutory judgment or order.¹⁹

Mildren sets out a helpful overview of the main statutory provisions governing leave to appeal to an intermediate appellate court.²⁰

Advisory opinions, academic questions and moot points

The object of the judicial process is the final determination of rights and liabilities. Consistent with this object, appellate courts generally do not entertain moot points, give advisory opinions or pronounce on academic questions that are of no practical consequence to the parties.²¹

There is limited authority that suggests an appellate court has the discretion to continue to hear an appeal where intervening circumstances render the subject matter moot but there remains a live question as to costs. In *Bonan v Hadgkiss*, the Full Court of the Federal Court explained:

There is no limit on the considerations which may be taken into account in determining whether to exercise the discretion to continue to hear and determine the appeal where the only live issue between the parties is the costs order made below. However, the authorities show that the courts have had regard to the following factors in determining whether to exercise the discretion: whether the decision under appeal has ramifications which extend beyond the facts of the case in question and it is in the public interest that the issue be resolved; whether the decision under appeal reflects adversely upon the reputation of one of the parties and the determination of the appeal may serve to vindicate that party's reputation; whether a finding of bad faith by the decision-maker has been made; whether there is doubt over the correctness of the decision under appeal; the amount of judicial resources which would be taken in hearing and determining the appeal; and the costs issue.²²

However, the presence of one or more of these factors does not compel exercise of the discretion in favour of hearing the appeal. Each case must be considered on its facts.²³

Nature of an appeal

Given appeals are creatures of statute, it is not strictly possible to provide an exhaustive taxonomy of appeals.²⁴ For example, Gageler J in *Minister for Immigration and Border Protection v SZVFW* explained that although describing:

a particular appeal as an appeal by way of rehearing can accordingly be to fail to identify all of the statutory incidents of that appeal ... [m]ore than a century of case law expounding the ordinary incidents of an appeal by way of rehearing from a final judgment of a judge sitting without a jury nevertheless allows those ordinary incidents to be identified with relative precision.²⁵

The standard of appellate review in any appeal depends on the nature of the appeal and the decision under appeal.²⁶

¹⁸ *Federal Court of Australia Act 1976* (Cth) s 24(1)(a) ('FCA Act'). See *Luck v Chief Executive Officer of Centrelink* (2017) 251 FCR 295, 302 [29] ('Luck'); Beazley, Vout and Fitzgerald (n 6) 287.

¹⁹ *FCA Act* (n 18) s 24(1A). An exception exists where the judgment or order affects the liberty of an individual or is in proceedings relating to contempt of court: at s 24(1C).

²⁰ Mildren (n 8) 68–70. See also Beazley, Vout and Fitzgerald (n 6) 81, 141–59.

²¹ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 355–6 [47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); Zuckerman et al (n 1) 962; Mildren (n 8) 8.

²² *Bonan v Hadgkiss* (2007) 160 FCR 29, 32 [10] (citations omitted).

²³ *Ibid* 32 [11]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* (2020) 276 FCR 1, 6 [20].

²⁴ See generally Leeming (n 1) 284–5; Blank and Selby (n 2) 15; Mildren (n 8) 10. See also Beazley, Vout and Fitzgerald (n 6) 7–10.

²⁵ *SZVFW* (n 12), 555 [29] (Gageler J).

²⁶ Prince, 'Civil Appeals: Part 1' (n 9) 212.

Nature of the appeal

It is convenient to use the following categories of appeal which cover 'the vast bulk of civil appeals':²⁷

- appeals in the strict sense
- appeals by way of rehearing
- appeals de novo.²⁸

The following is a simplified outline of the ordinary incidents of each of these categories of appeal:

	Evidence	Law	Standard of review
Strict sense	Only evidence produced below	As it stood at the time of the impugned decision	Must demonstrate error in the impugned decision
Rehearing	Evidence produced below, plus additional evidence	As it stands at the time of the appeal	Must demonstrate error in the impugned decision
De novo	Any evidence	As it stands at the time of the appeal	No need to demonstrate error in the impugned decision

While these categories assist in understanding the nature and requirements of each kind of appeal, Lockhart J has cautioned:

The classification of appeals into three categories is sometimes helpful, but it is impermissible to treat each category as being necessarily distinct from the others or as having immutable characteristics or inflexible boundaries. Ultimately the true character of an appeal must depend on the interpretation of the particular legislation; the jurisdiction, powers, composition and functions of the tribunal from whose decision the appeal lies; and the nature of the rights and liabilities of the persons affected by the tribunal's decision.²⁹

Strict sense

An appeal in the strict sense is a procedure for the correction of error.³⁰ In deciding whether there is error, the appellate court looks to the materials which were before the court below and to nothing else.³¹

An appellate court in a strict sense appeal will only disturb the original decision if it was wrong or involved a serious irregularity. The judgment to be delivered by the appellate court in a strict sense appeal is that which 'ought to have been given at the original hearing'.³² The High Court has explained that an appellate court has jurisdiction to determine whether the impugned decision was

²⁷ Ibid.

²⁸ See *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 596–7 [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Lacey*').

²⁹ *Traut v Faustmann Bros Pty Ltd* (1983) 77 FLR 98, 108 (Lockhart J).

³⁰ *SZVFW* (n 12) 555 [30] (Gageler J); *Mickelberg v The Queen* (1989) 167 CLR 259, 267 (Mason CJ) ('*Mickelberg*'); *Eastman v The Queen* (2000) 203 CLR 1, 10–13 [5]–[19] (Gleeson CJ), 24–5 [68]–[70] (Gaudron J), 34–5 [107]–[112], 52–3 [160] (McHugh J), 58–9 [178]–[180] (Gummow J) ('*Eastman*').

³¹ *Mickelberg* (n 30) 267 (Mason CJ).

³² *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281, 296 (Glass JA) ('*Turnbull*'). See also *Dignan* (n 6) 107 (Dixon J).

or was not erroneous on the evidence and law as it stood at the time of that decision.³³ An appeal to the High Court, via s 73 of the Constitution, is the 'prime example' of an appeal in the strict sense.³⁴ However, not all appeals in the High Court are s 73 appeals and see below under 'Rehearings' in relation to appeals to the High Court on referral under s 40 of the *Judiciary Act 1903* (Cth). A further example of an appeal in the strict sense is an appeal to the Full Court from a decision of a single judge of the Federal Court reviewing orders made by a magistrate under s 34 of the *Extradition Act 1988* (Cth).³⁵ In this statutory context, the Full Court noted that while s 27 of the *Federal Court Act 1976* (Cth) (FCA Act) expressly permits the receipt of additional evidence on appeal, suggesting that an appeal to the Full Court will be by way of rehearing, '[t]he specific provisions of the statute which engages the Court's jurisdiction (in this case, the [*Extradition Act*]) should be accorded primacy over the more general provisions of the *Federal Court Act*'.³⁶

In *Eastman v The Queen* (2000) 203 CLR 1, Gleeson CJ made the following observation about the distinction between an appeal in the strict sense and a rehearing:

Appeals are creatures of statute. It is not uncommon for intermediate appellate courts in Australia, including Courts of Criminal Appeal, to have conferred upon them, by statute, power to receive and act upon evidence which was not before the court of first instance. When such a power is exercised, what is involved is an exercise of original rather than strictly appellate jurisdiction.³⁷

Rehearing

Most civil appeals are by way of rehearing.³⁸ Like an appeal in the strict sense, a rehearing is also a procedure for the correction of error.³⁹ The High Court has explained that in an appeal by way of rehearing:

The powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error ...⁴⁰

Justice Gageler has explained that 'the difference between correction of error on an appeal in the strict sense and correction of error on an appeal by way of rehearing lies in the temporal perspective that the appellate court is required to adopt in examining the correctness of the judgment under appeal'.⁴¹

That temporal difference is simply that if errors of law have occurred below, an appellate court in an appeal by way of rehearing is to deliver judgment 'according to the facts and the law as they stand at the time the court makes its order'.⁴² The court will be able to receive additional evidence

³³ *Lacey* (n 28) 596–7; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, 203 [12] (Gleeson CJ, Gaudron and Hayne JJ) ('*Coal and Allied Operations*').

³⁴ *SZVFW* (n 12) 555 [29] (Gageler J). See also *Dignan* (n 6) 109 (Dixon J); *Fox v Percy* (2003) 214 CLR 118, 125 (Gleeson CJ, Gummow and Kirby JJ) ('*Fox*'). But see Prince, 'Civil Appeals: Part 1' (n 9) 210–1.

³⁵ *Extradition Act 1988* (Cth) ss 34, 35(3), 35(6)(b), 35(6)(e).

³⁶ *New Zealand v Johnston* [2011] FCAFC 2, [25].

³⁷ *Eastman* (n 30) [14] (Gleeson CJ).

³⁸ Prince, 'Civil Appeals: Part 1' (n 9) 212.

³⁹ *SZVFW* (n 12) 555–6 [30] (Gageler J), citing *Fox v Percy* (2003) 214 CLR 118, 125 [23] (Gleeson CJ, Gummow and Kirby JJ), quoting *Dearman v Dearman* (1908) 7 CLR 549, 561 (Isaacs J); *Branson* (n 12) [11].

⁴⁰ *Allesch v Maunz* (2000) 203 CLR 172, 180 [23] (Gaudron, Gummow, McHugh and Hayne JJ) ('*Allesch*').

⁴¹ *SZVFW* (n 12) 556 [31] (Gageler J).

⁴² *Morgan v District Court of New South Wales* (2017) 94 NSWLR 463, 470 [29] (Meagher JA). See also *Turnbull* (n 32) 297 (Glass JA); *Leeming* (n 1) 287.

as it sees fit,⁴³ and have regard to jurisprudential developments.⁴⁴ The ability to receive new evidence has been deemed part of a court's original jurisdiction, leading courts to note that a court's jurisdiction in an appeal by way of rehearing is neither purely original nor purely appellate.⁴⁵

Key examples of appeals by way of rehearing are appeals to the Full Court of the Federal Court under s 24 of the FCA Act⁴⁶ and appeals to state and territory intermediate appellate courts.⁴⁷

Also, when the High Court is exercising jurisdiction by way of a removal to the Court under s 40 of the *Judiciary Act 1903* (Cth) of an appeal pending before another court, it will not be exercising jurisdiction under s 73 of the Constitution (which would involve an appeal in the strict sense) but rather jurisdiction under s 76(ii) of the Constitution (via the s 40 removal) and the nature of the appeal is by way of rehearing.⁴⁸

Appeal de novo

An appeal de novo involves an appellate court hearing the matter afresh.⁴⁹ The court hears the matter on whatever evidence is given at that new hearing and does not require the appellant to show error by the original decision-maker.⁵⁰ It has been judicially noted that in hearing an appeal de novo, a court will exercise original rather than true appellate jurisdiction.⁵¹

Prince observes that such appeals de novo are relatively uncommon and raise few issues.⁵² Put simply:

All the issues must be retried. The party succeeding below enjoys no advantage, and must, if [they] can, win the case a second time.⁵³

Notwithstanding the apparent lack of difficult issues, an appeal de novo is considered the most intrusive form of appellate interference.⁵⁴ Whereas the powers of an appellate court in an appeal by way of rehearing are limited to circumstances where the impugned order is the result of some error,

⁴³ See *Turnbull* (n 32) 297 (Glass JA); *SZVFW* (n 12) 556 [31] (Gageler J), citing *CDJ v VAJ* (1998) 197 CLR 172, 201–2 [111] (McHugh, Gummow and Callinan JJ) ('*CDJ*').

⁴⁴ *Turnbull* (n 32) 297 (Glass JA); *SZVFW* (n 12) 556 [31] (Gageler J), citing *Dignan* (n 6) 106–8 (Dixon J); *Attorney General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557, 567 [29] (Spigelman CJ). See also the unusual circumstances in *Aristocrat Technologies Australia Pty Ltd v Commissioner of Patents* (2025) 311 FCR 493, 532 [121], where the Court found that the law had changed 'as a result of the appeal itself, in that we have rejected the majority decision [of the full Federal Court] which bound the primary judge'.

⁴⁵ See, eg, *CDJ* (n 43) 201–2 [111] (McHugh, Gummow and Callinan JJ); *Australia Bay Seafoods Pty Ltd v Northern Territory of Australia* (2022) 295 FCR 443, 478 [120] ('*Australia Bay Seafoods*').

⁴⁶ *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 533 [75] (Gleeson CJ and Gummow J); *Branir Pty Ltd v Owston Nominees Pty Ltd* [No 2] (2001) 117 FCR 424, 434–5 [20] (Allsop J). See also Leeming (n 1) 286.

⁴⁷ All States, except for Victoria, have express provisions to this effect: see, e.g. *Supreme Court Act 1970* (NSW) s 75A; *Supreme Court Civil Procedure Act 1932* (Tas) s 46. For the Territories, see, e.g. *Supreme Court Act 1933* (ACT) s 37N; *Supreme Court Act 1979* (NT) s 54 which enable the Courts of Appeal to have regard to evidence given in the proceedings below and receive further evidence on appeal. See also *Warren v Coombes* (1979) 142 CLR 531, 537 (Gibbs ACJ, Jacobs and Murphy JJ), discussed in Leeming (n 1) 286; *Freeman v Rabinov* [1981] VR 539, 547–8 (Lush J), discussed in Leeming (n 1) 286.

⁴⁸ *TCXM v Minister for Immigration and Citizenship* [2026] HCA 13, [2] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ); *O'Toole v Charles David Pty Ltd* [No 2] (1991) 171 CLR 232, 247 (Mason CJ).

⁴⁹ *Lacey* (n 28) 596–7 [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Coal and Allied Operations* (n 33) 203 [13] (Gleeson CJ, Gaudron and Hayne JJ).

⁵⁰ *Allesch* (n 40) 180–1 [23] (Gaudron, McHugh, Gummow and Hayne JJ); Prince, 'Civil Appeals: Part 1' (n 9) 212; *Coal and Allied Operations* (n 33) 203–4 [13]–[14] (Gleeson CJ, Gaudron and Hayne JJ); Blank and Selby (n 2) 19.

⁵¹ *Freshfood Holdings Pte Limited v Pablo Enterprise Pte Limited* [No 2] [2021] FCA 1404, [6] (Thawley J) ('*Freshfood Holdings*'), citing *Hungry Spirit Pty Limited ATF The Hungry Spirit Trust v Fit n Fast Australia Pty Ltd* [2020] FCA 883, [13] (Burley J). See also *New England Biolabs Inc v F Hoffmann-La Roche AG* (2004) 141 FCR 1, 14 [44]; *Woolworths Ltd v BP plc* [No 2] (2006) 154 FCR 97, 129 [137].

⁵² Prince, 'Civil Appeals: Part 1' (n 9) 212.

⁵³ *Turnbull* (n 32) 297–8 (Glass JA), citing *Ex parte Sweeney* (1906) 4 CLR 716, 729 (Griffith CJ).

⁵⁴ Zuckerman et al (n 1) 959.

an appellate court in a hearing de novo may exercise its powers 'regardless of error'.⁵⁵ The law is applied as it is at the time of the appeal.⁵⁶

Although not absolute, there is a presumption that an appeal from an administrative decision-maker is to be conducted as a hearing de novo.⁵⁷ The statement in the governing statute that the appeal from an administrative authority is by way of rehearing generally means that the court will undertake a hearing de novo. This presumption was described by Mason J in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621 in the context of state legislation allowing an appeal to a state court which was authorised to exercise both executive and original jurisdiction.⁵⁸ And, although acknowledging that there were sound reasons for the general presumption, Mason J specifically excluded from this presumption 'the case of an appeal to a federal court exercising the judicial power of the Commonwealth under Ch. III of the Commonwealth Constitution'.⁵⁹

Notwithstanding the exclusion from this presumption of appeals to Ch. III courts from administrative decision makers, it is interesting to consider federal statutes that provide for appeals from administrative decision makers to the Federal Court, appeals which are often described as hearings 'de novo' despite not exhibiting all of the typical features of an appeal de novo as set out above. The question arises how an appeal from a decision of an administrative decision maker to a Ch III court can be 'de novo' without offending the separation of powers. The cases seem to address this tension by identifying the ways in which the appeals do not have all the indicia of a hearing de novo.

Examples include appeals against decisions:

- under Part IVC of the *Taxation Administration Act 1953* (Cth) (Tax appeals)
- of the Commissioner of Patents (Patent appeals)⁶⁰ and the Registrar of Trademarks (Trademark appeals)⁶¹
- of Registrars of the Federal Circuit Court.⁶²

Though Tax appeals have some of the characteristics of an appeal de novo such as the ability to lead evidence relevant to the issues for determination that was not before the Commissioner of Taxation, a taxpayer does not have an unqualified right to put before the court all the material it contends is relevant and the Federal Court has held that these are not hearings de novo.⁶³

In relation to Patent (and Trademark) appeals, although described as appeals de novo, it is recognised that, generally, a judge would not have the technical expertise of the Commissioner (or experienced delegate of the Registrar of Trademarks) and, in such an event, may be able to take into account conclusions of the Commissioner based on his or her expertise⁶⁴. In *Technological*

⁵⁵ *Allesch* (n 40) 180–1 [23] (Gaudron, Gummow, McHugh and Hayne JJ).

⁵⁶ *Mildren* (n 8) 12, citing *Re Coldham; Ex parte Brideson* [No 2] (1990) 170 CLR 267, 273.

⁵⁷ *United Petroleum Pty Ltd v Victorian Workcover Authority* [2011] VSC 570, [49]–[53] (Osborn J), referring to *Re Coldham; Ex parte Brideson* [No 2] (1990) 170 CLR 267, 270, citing *Ex parte Australian Sporting Club Ltd; Re Dash* (1947) 47 SR (NSW) 283; *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616, 621–2 (Mason J); *Clarke & Walker Pty Ltd v Secretary Department of Industrial Relations* (1985) 3 NSWLR 685, 692 (Kirby P).

⁵⁸ *Ex parte Australian Sporting Club Ltd; Re Dash* (1947) 47 SR (NSW) 283, 284 (Jordan CJ).

⁵⁹ *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616, 621 (Mason J).

⁶⁰ *Patents Act 1990* (Cth) s 60(4); see, eg, *Commissioner of Patents v Sherman* (2008) 172 FCR 394, 399 [18]–[34].

⁶¹ *Trade Marks Act 1995* (Cth) ss 56, 67, 84D, 104; see, e.g. *Freshfood Holdings* (n 51) [6] (Thawley J); *Donzenac Pty Ltd v MCV Enviroworks Pty Ltd* [2015] FCA 361, [12]–[15] which also recognises that while an appeal under these provisions does not focus on any error on the part of the decision maker, 'weight will be given to the Delegate's opinion having regard to the individual's experience and skill'.

⁶² *Federal Circuit Rules 2001* (Cth) r 20.03. See *Zdrilic v Hickie* (2016) 246 FCR 532 ('Zdrilic').

⁶³ See Drummond J's discussion of the nature of appeals under s 14ZZ(c) of the *Taxation Administration Act 1953* (Cth) in *Kajewski v Commissioner of Taxation* [2003] FCA 258, [3]–[8] which makes clear these are not hearings de novo.

⁶⁴ *Commissioner of Patents v Sherman* (2008) 172 FCR 394, 399–400 [21]. See also the Court's comments in *Donzenac Pty Ltd v MCV Enviroworks Pty Ltd* [2015] FCA 361, [12]–[15].

Resources Pty Limited v Tettman [2019] FCA 1889, Jagot J refers to such an appeal as an ‘appeal de novo’ but also recognises the expert role of the Commissioner (at [6]).

In relation to appeals from decisions of Registrars of Federal Circuit and Family Court of Australia exercising delegated judicial power, such as the power to make a sequestration order,⁶⁵ the availability of a de novo appeal to a judge of the Court is seen as essential to ensuring that the exercise of delegated judicial power is constitutional because it ensures that the original jurisdiction of the court is still ultimately exercised by judges appointed under s 72 of the Constitution.⁶⁶

Appeals limited to questions of law

Appeals limited to questions of law are types of appeals in the strict sense.⁶⁷ In the absence of such a statutory prescription, the right to appeal will almost always be construed as an appeal on questions of fact as well as law.⁶⁸

In the 2015 decision of *Haritos v Federal Commissioner of Taxation* the Full Court of the Federal Court (constituted by Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ) considered the vexed issue of what constitutes a question of law in the context of s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), now repealed, but which has been replaced by an equivalent provision.⁶⁹ A challenge to a decision of the Administrative Appeals Tribunal (AAT) under s 44 (now s 172 of the *Administrative Review Tribunal Act 2024* (Cth)) (ART Act) was a prime example of an appeal limited to a question of law. Contrary to previous authority,⁷⁰ the 5 Justices of the Full Court determined that a question of mixed fact and law may fall within the ambit of s 44 of the AAT Act:

the terms, the context ... the history, authority and the purpose of s 44 each indicates that the right of appeal in s 44 should not be read as meaning that “may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal” may never extend to a mixed question of fact and law or as requiring that the question of law be a “pure” question. Rather, it may more accurately be said that the right of appeal does not extend to mere questions of fact. As French CJ, Gummow and Bell JJ emphasised in *Osland*, at [19], the Court “should not usurp the fact-finding function of the AAT”, citing *Repatriation Commission v O’Brien* [1985] HCA 10; 155 CLR 422 at 430 per Gibbs CJ, Wilson and Dawson JJ. It follows that the right of appeal does not extend to mixed questions of fact and law where, in order to decide the question of law, the Court must positively determine a question of fact itself, rather than judicially review the Tribunal’s fact-finding.⁷¹

The effect of the decision in *Haritos* is that it is not necessary for an appellant to identify a ‘pure’ question of law on appeal from a decision of the AAT or, by extension, its replacement, the Administrative Review Tribunal (ART).⁷² In practical terms, *Haritos* directs the court to resolve any doubt regarding the questions raised by the appellant by closely considering the notice of appeal, the questions and grounds raised, the statutory context and the tribunal’s reasons for decision to determine whether there is in fact a question of law.⁷³ Justice Leeming observed that this approach

⁶⁵ *Zdrilic* (n 62).

⁶⁶ *Harris v Calladine* (1991) 172 CLR 84, 95 (Mason CJ and Deane J), 124–6 (Dawson J), 164 (McHugh J); *Groom v National Registrar Federal Court of Australia* [2026] FCA 720, [17].

⁶⁷ Mildren (n 8) 16. But note that appeals under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (‘AAT Act’) (now repealed) lie within the original jurisdiction of the Federal Court: *Drake v Minister for Immigration and Ethnic Affairs* [1979] 24 ALR 577, 581 (Bowen CJ and Deane J). Appeals under s 172 of the *Administrative Review Tribunal Act 2024* (Cth) would be of the same nature.

⁶⁸ Mildren (n 8) 16.

⁶⁹ *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315, 341–2 [62], 363 [135], 385 [202] (‘*Haritos*’). Section 44 of the AAT Act has now been repealed. However, s 172(1) of the *Administrative Review Tribunal Act 2024* (Cth) is not materially different from s 44(1) of the now repealed AAT Act.

⁷⁰ *Birdseye v Australian Securities and Investments Commission* [2003] FCAFC 232.

⁷¹ *Haritos* (n 69) 383 [192].

⁷² *Ibid* 346–7 [79].

⁷³ Justice Duncan Kerr, ‘What is a Question of Law Following *Haritos v Federal Commissioner of Taxation*?’ (Speech, Hot Topics Seminar: Commonwealth Compensation, 25 November 2016).

‘eschews technicality and elevates substance over form’ and reflects an ‘appreciation that a notice of appeal is not a pleading’.⁷⁴ The Full Court in *eSafety Commissioner v Baumgarten* [2026] FCAFC 12 has confirmed that ‘no different approach’ to the meaning of the phrase ‘on a question of law’ (as explained in *Haritos* and applied in *May v Military Rehabilitation and Compensation Commission* [2015] FCAFC 93; 233 FCR 397) should be taken under s 172 of the ART Act (than was required by its predecessor s 44 of the AAT Act).⁷⁵

In relation to appeals brought pursuant to s 172 of the ART Act,⁷⁶ these are an exercise of original jurisdiction (s 19 of the FCA Act).⁷⁷ In limited circumstances, the Federal Court may admit new evidence in appeals from the ART.⁷⁸ The law applied by the Federal Court on a s 172 appeal (or previously s 44 of the AAT Act) is the law at the time of the Tribunal decision.⁷⁹

To succeed on an appeal limited to a question of law, the appellant must demonstrate that the error made was an error of law. The question of what constitutes an error of law has been the subject of much judicial consideration. In *Customs v Agfa-Gevaert*, the High Court observed that ‘no satisfactory test of universal application’ has been formulated to determine the distinction between an error of law and an error of fact.⁸⁰ In doing so, the High Court referred to the decision in *Customs v Pozzolanic* where the Full Court of the Federal Court stated that ‘[d]istinctions between a question of fact and a question of law can be elusive’ and ‘[t]he proper interpretation, construction and application of a statute to a given case raise issues which may be or involve questions of fact or law or mixed fact and law’.⁸¹

Nevertheless, the Full Court went on to establish 5 general propositions in determining the distinction between questions of fact and questions of law in a statutory context:

1. The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law.⁸²
2. The ordinary meaning of a word or its non-legal technical meaning is a question of fact.⁸³
3. The meaning of a technical legal term is a question of law.⁸⁴
4. The effect or construction of a term whose meaning or interpretation is established is a question of law.⁸⁵
5. The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law.⁸⁶

Qualifying the fifth proposition, the Full Court stated that when a statute uses words according to their ordinary meaning and it is reasonably open to hold that the facts of the case fall within those words, then the question as to whether they do or not is one of fact.⁸⁷

At that time, the High Court recorded that while such expositions are ‘helpful in many circumstances’, they may lose a degree of their utility when ‘the phrase or term in issue is complex

⁷⁴ See Leeming (n 1) 292.

⁷⁵ *eSafety Commissioner v Baumgarten* (2026) 315 FCR 44, 46 [2] (Mortimer CJ and Beach J).

⁷⁶ Section 172(1) of the *Administrative Review Tribunal Act 2024* (Cth) is not materially different from its predecessor, s 44(1) of the now repealed AAT Act.

⁷⁷ *Committee of Direction of Fruit Marketing v Australian Postal Commission* (1979) 37 FLR 457.

⁷⁸ *Administrative Review Tribunal Act 2024* (Cth) s 177(3)(b).

⁷⁹ *National Disability Insurance Agency v Warwick* (2025) 311 FCR 18, 34 [84].

⁸⁰ *Collector of Customs v Agfa-Gevaert Limited* (1996) 186 CLR 389, 394 (*‘Agfa-Gevaert’*).

⁸¹ *Collector of Customs v Pozzolanic* (1993) 43 FCR 280, 287.

⁸² *Ibid*, citing *Jedko Game Co Pty Ltd v Collector of Customs* (1987) 12 ALD 491; *Brutus v Cozens* [1973] AC 854.

⁸³ *Ibid*, citing *Jedko Game Co Pty Ltd v Collector of Customs* (1987) 12 ALD 491; *NSW Associated Blue Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509, 512 (Kitto J); *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60, 78 (Isaacs J); *Neal v Secretary, Department of Transport* (1980) 29 ALR 350, 361–2 (Sheppard J).

⁸⁴ *Ibid*, citing *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126, 137–8 (Jordan CJ); *Lombardo v Federal Commissioner of Taxation* (1979) 40 FLR 208, 215 (Franki J).

⁸⁵ *Ibid*, citing *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60, 79 (Isaacs J).

⁸⁶ *Ibid*, citing *Hope v Bathurst City Council* (1980) 144 CLR 1, 7 (Mason J); *Australian National Railways Commission v Collector of Customs (SA)* (1985) 8 FCR 264, 379 (Sheppard and Burchett JJ).

⁸⁷ *Ibid* 288, citing *Hope v Bathurst City Council* (1980) 144 CLR 1, 8 (Mason J).

or the inquiry that the primary decision-maker embarked upon is not clear'.⁸⁸ In determining whether a phrase is a composite phrase or not, their Honours said that such an inquiry is always a question of law.⁸⁹

The decision under appeal

The character of the decision under appeal is an important factor when considering what an appellant must show to succeed in any appeal. The 2 primary categories of appeals are appeals from discretionary decisions and appeals from non-discretionary decisions.⁹⁰

Discretionary decisions

A discretionary decision is typically regarded as one in which there is no uniquely correct outcome – that is, there is no single consideration or combination of considerations that necessarily determine a result, and the primary judge is allowed some latitude as to the choice of decision.⁹¹ It is a decision involving 'value judgments in respect of which there is room for reasonable differences of opinion'.⁹²

On an appeal from discretionary decisions, it must be demonstrated that there was error in the decision-making process. The classic statement of what must be demonstrated in an appeal from a discretionary decision is from *House v The King*:

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**, 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. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.⁹³

The key to understanding a *House v The King* error is that it must go to the fundamental nature of the primary judge's decision-making process.⁹⁴ It is not sufficient that the appellate court would have exercised the discretion differently.⁹⁵

A decision to impose a civil penalty, even where the penalty is agreed between the parties, remains an exercise of judicial discretion. To disturb a decision determining the appropriate penalty, it is necessary to identify the kind of error described in *House v The King*.⁹⁶

⁸⁸ *Agfa-Gevaert* (n 80) 396.

⁸⁹ *Ibid* 395. See also *Mildren* (n 8) 18.

⁹⁰ Prince, 'Civil Appeals: Part 1' (n 9) 212.

⁹¹ See *SZVFW* (n 12) 588–9 [143]–[144] (Edelman J); *Coal and Allied Operations* (n 33) 204–5 [19]–[21] (Gleeson CJ, Gaudron and Hayne JJ). See generally *Blank and Selby* (n 2) 10–11; *Mildren* (n 8) 18–20; *Beazley, Vout and Fitzgerald* (n 6) 125–6.

⁹² *Norbis v Norbis* (1986) 161 CLR 513, 518 (Mason and Deane JJ). For a discussion about the term 'discretion', see *SZVFW* (n 12) 589–91 [146]–[149] (Edelman J).

⁹³ *House v The King* (1936) 55 CLR 499, 504–5 (Dixon, Evatt and McTiernan JJ).

⁹⁴ *Coal and Allied Operations* (n 33) 205 [21] (Gleeson CJ, Gaudron and Hayne JJ).

⁹⁵ See *SZVFW* (n 12) 574–5 [86]–[87] (Nettle and Gordon JJ), 582–3 [128] (Edelman J). The *House v The King* (n 93) test of appellate review is analogous to the usual grounds of judicial review, which justify interference for the correction of error made by a primary decision-maker. Despite such similarity, an error of fact is not a ground of judicial review. In order to succeed on an application for judicial review, an applicant would also need to proceed on the basis of another recognised error, such as an error on the basis of no evidence, unreasonableness or failing to accord procedural fairness.

⁹⁶ *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* (2021) 284 FCR 24, 46 [132].

The High Court in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* considered the application of *House v The King* principles in the context of a 'balancing exercise' in making a discretionary decision.⁹⁷

The question is what the particular statute or rule of law conferring the discretion contemplates as relevant or irrelevant factors. If it mandates that particular weight be given to one factor, that mandate must be obeyed. But, in the absence of any such mandate, the question of what weight the relevant factors should be given or what balance should be struck among them is for the person on whom the discretion is conferred, provided no error of law is made, no error of fact is made, all material considerations are taken into account and no irrelevant considerations are taken into account, subject to the possibility of appellate intervention if there is a plain injustice suggesting the existence of one of the four errors just described even though its nature may not be discoverable, or if there is present what has come to be known as "Wednesbury unreasonableness".

This decision has been taken to clarify certain aspects of *House v The King* principles.⁹⁸ In the absence of a *House v The King* error, an appellate court may still intervene on *Wednesbury* unreasonableness grounds.⁹⁹ Unless there is some statutory direction as to how relevant considerations are to be balanced, the primary judge is at liberty to weigh considerations as they see fit.

Non-discretionary decisions

In an appeal from a non-discretionary decision (such as a decision involving some binary choice), the appellant must show that the primary judge came to a wrong conclusion about a relevant matter of fact or law. Justice Gageler in *SZVFW* referred to this relatively simple standard of review as the 'more general correctness standard of appellate review'.¹⁰⁰

When assessing whether the primary judge came to a wrong conclusion, the appellate court must 'recognise the advantages enjoyed by the judge who conducted the trial'.¹⁰¹ It is unnecessary to show some specific error or that it was 'not open' to the primary judge to make the impugned finding.¹⁰²

Recently, in *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore*, the High Court considered the distinction between discretionary and non-discretionary decisions in the context of s 67 of the *Civil Procedure Act 2005* (NSW) (Civil Procedure Act). It held that an exercise of power under s 67 of the Civil Procedure Act to stay proceedings permanently on the ground that they are an abuse of process as any trial will be necessarily unfair or "so unfairly and unjustifiably oppressive" as to constitute an abuse of process' is an evaluative, but not a discretionary, decision.¹⁰³ That is because 'the law tolerates but one correct answer', even if that answer involves a value judgment.¹⁰⁴ In such circumstances, the applicable standard for an appellate review of such an order is the 'correctness standard' described above.¹⁰⁵

⁹⁷ *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, 112 [138].

⁹⁸ Prince, 'Civil Appeals: Part 1' (n 9) 213.

⁹⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

¹⁰⁰ *SZVFW* (n 12) 560–1 [43] (Gageler J).

¹⁰¹ *Warren v Coombes* (1979) 142 CLR 531, 552 (Gibbs ACJ, Jacobs and Murphy JJ).

¹⁰² Prince, 'Civil Appeals: Part 1' (n 9) 216.

¹⁰³ *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 280 CLR 442, 455–6 [15] (Kiefel CJ, Gageler and Jagot JJ), 483–4 [95] (Steward J), 502 [161] (Gleeson J).

¹⁰⁴ *Ibid* 455 [16]–[17], 459 [23] (Kiefel CJ, Gageler and Jagot JJ).

¹⁰⁵ *Ibid* 449 [1], 459 [23] (Kiefel CJ, Gageler and Jagot JJ).

Particular issues

Receiving new evidence

The ability of an appellate court to receive new evidence has been taken to 'point irresistibly' to the conclusion that it is to decide an appeal by way of rehearing on the facts and law which exist at the time of *its* decision.¹⁰⁶

Although there exists the power to receive new evidence, the High Court in *Fox v Percy* has noted that:

The 'rehearing' does not involve a completely fresh hearing by the appellate court of all the evidence. That court proceeds on the basis of the record and any fresh evidence that, **exceptionally**, it admits.¹⁰⁷

Similarly, s 27 of the FCA Act confirms that while the evidence before the appellate court is not limited to that which was available at the time of the original decision, that power is discretionary. It provides:

In an appeal, the Court shall have regard to the evidence given in the proceedings out of which the appeal arose, and has power to draw inferences of fact and, in its discretion, to receive further evidence ...¹⁰⁸

This limitation on receiving new evidence is an indication that a court in an appeal by way of rehearing is exercising its appellate jurisdiction to correct an error. An appeal by way of rehearing is not simply a 'second go' at trial.

As is the case with most incidents of appeals, the 'power to receive fresh evidence on appeal may depend on the provisions of a statute'.¹⁰⁹ Taking the FCA Act as an example, the proper limits of the Federal Court's discretion are to be determined as a matter of construction:

As the Federal Court Act is silent as to the factors which govern its exercise, the discretion is confined only by the subject matter with which the Act is concerned. It should not be understood to be subject to implications or limitations not found in the words used by the legislature. It is a discretion to be exercised in the context of an appeal by way of rehearing.

...

A critical factor will be the subject matter of the proceeding with which the appeal is concerned. As the High Court observed in [*CDJ v VAJ* (1998) 197 CLR 172] the court will more readily admit further evidence where the rights of third parties, such as children are at stake.¹¹⁰

The guiding principles for the Federal Court's exercise of discretion have recently been summarised by the Full Court as follows:

- (1) The discretion conferred by s 27 is unfettered, save that it must be exercised judicially and according to principle.
- (2) The power to receive further evidence is remedial and its primary purpose is to empower the Court to receive further evidence to ensure that proceedings do not miscarry.

¹⁰⁶ *Re Coldham; Ex parte Brideson* [No 2] (1990) 170 CLR 267, 274. See also *Allesch* (n 40) 180 [22] (Gaudron, Gummow, McHugh and Hayne JJ).

¹⁰⁷ *Fox* (n 34) 125 [22] (Gleeson CJ, Gummow and Kirby JJ) (emphasis added). See generally Blank and Selby (n 2) 18–19; Mildren (n 8) 178–82, 231–2.

¹⁰⁸ *FCA Act* (n 18) s 27.

¹⁰⁹ Mildren (n 8) 180.

¹¹⁰ *Sobey v Nicol and Davies* [2007] FCAFC 136, [69]–[70].

- (3) The power is not constrained by common law rules that govern the grant of new trials on the ground of discovery of “fresh evidence”.
- (4) The following two considerations will normally be relevant to the exercise of the discretion:
 - (i) the further evidence is such that, had it been adduced at trial, the result would very probably have been different; and
 - (ii) the party seeking to adduce the evidence demonstrates that it was unaware of the evidence and could not have been, with reasonable diligence, made aware of the evidence.
- (5) The interests of third parties and the public at large may outweigh a party’s interest in the finality of litigation. For example, a greater willingness to receive further evidence on appeal has been apparent in bankruptcy matters which affect the interests of creditors generally.¹¹¹

Findings of fact

Appellate courts are bound to conduct a ‘real review’ of the evidence presented in the lower court and the judge’s reasons, to determine whether there has been an error of fact or law.¹¹² However, appellate courts are reluctant to interfere with decisions of lower courts based on factual findings affected by impressions about credibility and reliability of witnesses seen and heard by the primary judge.¹¹³ The great defender of the rule of law, Sir Thomas Bingham, posited that ‘every litigant should be entitled to a full contest on the facts at one level only and that the facts should be open to review thereafter only if some glaring and manifest error could be demonstrated’.¹¹⁴

This is embodied in the ‘classic statement’, from the 19th century English case of *Coghlan v Cumberland*:

Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that **its duty is to rehear the case**, and the **Court must reconsider the materials before the judge with such other materials as it may have decided to admit**. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. **When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them.** It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen.¹¹⁵

¹¹¹ *Northern Land Council v Quall* [No 3] [2021] FCAFC 2, [16] (Griffiths and White JJ), cited with approval in *District Council of Streaky Bay v Wilson* (2021) 287 FCR 538, 568 [149]. See generally *CDJ* (n 43) 184–6 (Gaudron J); *Cottrell v Wilcox* [2002] FCA 1115; *Gao v The Official Trustee in Bankruptcy* [2003] FCAFC 84, [23]; *Li Pei Ye v Crown Ltd* [2004] FCAFC 8, [158].

¹¹² *Fox* (n 34) 126–7 [25] (Gleeson CJ, Gummow and Kirby JJ).

¹¹³ *Lee v Lee* (2019) 266 CLR 129, 148–9 [55] (Bell, Gageler, Nettle and Edelman JJ). See Thomas Prince, ‘Recurring Issues in Civil Appeals: Part 2’ (2022) 96(4) *Australian Law Journal* 273, 273–5 (‘Civil Appeals: Part 2’). See generally Zuckerman et al (n 1) 957–8.

¹¹⁴ Sir Thomas Bingham, ‘The Judge as Juror: The Judicial Determination of Factual Issues’ (1985) 38(1) *Current Legal Problems* 1, 11, cited in Bell (n 3) 4.

¹¹⁵ *Coghlan v Cumberland* (1898) 1 Ch 704, 705 (Lindley MR).

This principle, reflected in High Court authority, recognises the significant advantage of the trial judge in having heard and seen witnesses.¹¹⁶ Importantly, they have heard and seen the evidence in full, whereas an appellate court is usually taken to select passages.¹¹⁷ Prince thinks that this advantage is reduced in modern practice, where most evidence is either documentary, or by affidavit.¹¹⁸

Deference to the primary judge is not unlimited. Although interfering with a prior finding of fact conflicts with the desirable goal of finality, the High Court has reminded appellate courts that giving effect to the appellate court's own conclusion:

is not forbidden ... by ritual incantation about witness credibility, nor by judicial reference to the desirability of finality in litigation or reminders of the general advantages of the trial over the appellate process.¹¹⁹

An appellate court is 'entitled, indeed obliged'¹²⁰ to intervene where the primary judge's finding of fact is 'glaringly improbable'¹²¹ or 'contrary to compelling inferences'.¹²²

New points of law raised on appeal

The High Court in *Coulton v Holcombe* explained that:

It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than preliminary skirmish.¹²³

An appellate court cannot entertain a point raised for the first time on appeal where the point is one which might possibly have been met by evidence at trial.¹²⁴ This is for reasons of procedural fairness, as '[n]othing is more likely to give rise to a sense of injustice in a litigant than to have a verdict taken away on a point that was not taken at the trial and could or might possibly have been met by rebutting evidence or cross-examination'.¹²⁵ A party resisting the raising of a new point is not compelled to set out what evidence would have been led, or the precise manner in which the new point would have altered the trial.¹²⁶

There are limited circumstances in which an appellant may raise a point of law not argued at first instance. No party is entitled as of right to raise a new point on appeal – but the appellate court has a general discretion which it may exercise if satisfied that it is expedient and in the interests of justice to grant leave to argue the new point.¹²⁷

¹¹⁶ Prince, 'Civil Appeals: Part 2' (n 113) 273, citing *McLaughlin v Daily Telegraph Newspaper Co Ltd [No 2]* (1904) 1 CLR 243, 277 (Griffith CJ); *Dearman v Dearman* (1908) 7 CLR 549, 553 (Griffith CJ), 557–8 (Barton J), 559 (Isaacs J). In circumstances where the primary judge does not enjoy any advantage, an appellate court must reach its own view as to the correct finding of fact.

¹¹⁷ See *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306, 330 [90] (Kirby J), quoted in *Fox* (n 34) 125–6 [23] (Gleeson CJ, Gummow and Kirby JJ).

¹¹⁸ Prince, 'Civil Appeals: Part 2' (n 113) 274–5.

¹¹⁹ *Fox* (n 34) 128 [29] (Gleeson CJ, Gummow and Kirby JJ).

¹²⁰ Beazley, Vout and Fitzgerald (n 6) 124.

¹²¹ *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842, 844, cited in *Fox* (n 34) 128 [29] (Gleeson CJ, Gummow and Kirby JJ).

¹²² *Chambers v Jobling* (1986) 7 NSWLR 1, 10 (Kirby P), cited in *Fox* (n 34) 128 [29] (Gleeson CJ, Gummow and Kirby JJ).

¹²³ *Coulton v Holcombe* (1986) 162 CLR 1, 7 (Gibbs CJ, Wilson, Brennan and Dawson JJ).

¹²⁴ Prince, 'Civil Appeals: Part 2' (n 113) 278. See *Suttor v Fundowda* (1950) 81 CLR 418, 438; *Water Board v Moustakas* (1988) 180 CLR 491, 497–8 (Mason CJ, Wilson, Brennan and Dawson JJ).

¹²⁵ *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598, 1608 [51] (Gleeson CJ, McHugh and Gummow JJ). See also *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413, 426 (Isaacs J); Prince, 'Civil Appeals: Part 2' (n 113) 278.

¹²⁶ *Cummings v Lewis* (1993) 41 FCR 559, 567 (Sheppard and Neaves JJ).

¹²⁷ See, e.g. *Multicon Engineering Pty Ltd v Federal Airports Corp* (1997) 47 NSWLR 631, 645 (Mason P); *Auimtagi v Australian Building and Construction Commissioner* (2018) 267 FCR 268, 281 [68]; *Branir Pty Ltd v Owston Nominees Pty Ltd [No 2]* (2001) 117 FCR 424, 439–40 [38] (Allsop J). See also Prince, 'Civil Appeals: Part 2' (n 113) 278.

Interlocutory decisions

Leave is generally required to appeal from an interlocutory judgment or order.¹²⁸ This reflects a policy decision to prevent the fragmentation of the trial process and the undermining of the trial judge's authority.¹²⁹

The Full Court of the Federal Court recently considered that the test for determining whether a judgment or order appealed from is final or interlocutory is whether the judgment or order, as made, finally determines the rights of the parties.¹³⁰

This depends on whether the legal, not the practical, effect of the judgment is final. If the legal effect of a judgment would allow a party to bring a second application (notwithstanding the merits), that judgment is not final.¹³¹ As may be expected, this test will turn on the particular circumstances of the case at hand – 'no golden thread of logic runs through the cases'.¹³² It has been said that although the test is readily stated, its application in some contexts can be difficult.¹³³ To provide just one example of the difficulties which can attend the application of this test, a line of Federal Court authority suggests that in the case of a proceeding dismissed for want of jurisdiction on the basis that the claims were not justiciable, that dismissal is a final judgment.¹³⁴ On the other hand, in *SZAJB v Minister for Immigration and Citizenship*, French J (as his Honour then was) explained that if a proceeding is dismissed as incompetent (for example, because it has been brought in the wrong court), that will dispose of the proceedings in that court, but not finally dispose of the rights of the parties (as the matter may be re-commenced in the right court) and so will be interlocutory. However, where the finding of want of jurisdiction flows from a finding on the merits (for example, a finding of jurisdictional fact which is fatal to the merits of the claim), that will be a final judgment.¹³⁵

Section 24(1A) of the FCA Act provides the Court with an unfettered discretion to grant leave to appeal from an interlocutory judgment.¹³⁶ In exercising that discretion, the Court will usually consider the following:

- whether the decision is attended with sufficient doubt to warrant reconsideration by the Full Court
- whether substantial injustice would result if leave were refused (supposing it was wrong).¹³⁷

Nature of appeals as distinct from judicial review

There are a number of key differences between the nature of appeals and the procedure for judicial review that exemplify the distinct features of the appellate process.

First, unlike the statutory basis for the right of appeal, access to the courts for the purpose of judicial review is anchored in the common law tradition. While the standard and character of an appeal process is prescribed by statutory language, the availability and scope of judicial review is

¹²⁸ FCA Act (n 18) s 24(1A). An exception exists where the judgment or order affects the liberty of an individual or is in proceedings relating to contempt of court: at s 24(1C). See generally Zuckerman et al (n 1) 962; Blank and Selby (n 2) 12; Mildren (n 8) 74–6; Beazley, Vout and Fitzgerald (n 6) 89–95.

¹²⁹ See, e.g. *Bomanite Pty Ltd v Slatex Corp Aust Pty Ltd* (1991) 32 FCR 379, 391 (French J). See also *Latitude Finance Australia v Australian Securities and Investments Commission* [2025] FCAFC 124, [18], where the Full Court observed that '[t]he fragmentation of proceedings through the filing of applications for leave to appeal following declaratory orders is regrettable, as it frequently causes delay to the finalisation of proceedings'.

¹³⁰ *Australia Bay Seafoods* (n 45) 464 [70], citing *Cubillo v Commonwealth* (2001) 112 FCR 455, 503 [182]; *Carr v Finance Corporation of Australia Ltd [No 1]* (1981) 147 CLR 246, 248 (Gibbs CJ), 253–4 (Mason J) ('Carr').

¹³¹ *Australia Bay Seafoods* (n 45) 464 [67], citing *Carr* (n 131) 248 (Gibbs CJ), 256 (Mason J).

¹³² *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd [No 2]* (1990) 21 NSWLR 200, 207 (Kirby P).

¹³³ *Australia Bay Seafoods* (n 45), 464 [71].

¹³⁴ See *Luck* (n 18) 302 [29]; *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union* (2018) 264 FCR 342, 354–5 [46]–[48] (Rares and Barker JJ).

¹³⁵ *SZAJB v Minister for Immigration and Citizenship* (2008) 168 FCR 410 [23].

¹³⁶ *Johnston v Cameron* (2002) 124 FCR 160, 163 [7] (Branson J); Branson (n 12) [17].

¹³⁷ *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397; *Brilliant Digital Entertainment Pty Ltd v Universal Music Australia Pty Ltd* [2004] FCAFC 270, [3] (Black CJ and Stone J); Branson (n 12) [17]; Blank and Selby (n 2) 12.

a consequence of the judicial remedy sought: the prerogative writs (habeas corpus, quo warranto, mandamus, certiorari and prohibition) and the equitable remedies of injunction and declaration.¹³⁸

Second, a hallmark feature of judicial review is its focus on executive rather than judicial action. In *Church of Scientology v Woodward*, Brennan J said that judicial review is:

neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.¹³⁹

However, it is clear that a Federal judge may be an officer of the Commonwealth for the purposes of s 75(v) of the Constitution,¹⁴⁰ although a High Court judge is not.¹⁴¹

Third, and most interestingly, is the role of an error of fact on appeal and in the context of judicial review. On an appeal by way of rehearing (like an appeal in the strict sense) the appellate court is permitted to 'give the judgment which in its opinion ought to have been given in the first instance'.¹⁴² Appeals of this kind are procedures for the correction of error where 'the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal'.¹⁴³

To the extent necessary to address the grounds of appeal, the appellate court is 'obliged to conduct a real review of the trial and ... of [the] judge's reasons'.¹⁴⁴ While performing this obligation, the appellate court 'cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions'.¹⁴⁵

In contrast, judicial review is available only to test the legality of a decision and not its merits. Courts are not permitted to ask whether a decision was a 'good' decision, rather they are confined to the question of whether the decision-maker acted fairly and according to law.¹⁴⁶

In *SZVFW*, the High Court heard a challenge to a conclusion of a primary judge that an administrative decision-maker exceeded its decision-making authority by making an unreasonable decision. Justice Gageler considered the standard of appellate review applicable to the appeal by way of rehearing in circumstances where the underlying proceeding was conducted by way of judicial review. His Honour determined that:

The answer is that the appellate court must reach its own conclusion as to whether the administrative decision was unreasonable. That is to say, the appellate court must determine not whether the conclusion of the primary judge was open but whether the conclusion of the primary judge was, in the opinion of the appellate court, the right conclusion.¹⁴⁷

Justice Gageler's reasoning highlights the distinct role of an appeal compared to the exercise of judicial review. A court exercising appellate jurisdiction is required to conduct a 'real review' of the

¹³⁸ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report No 129, March 2019) 415 [15.11].

¹³⁹ *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (Brennan J).

¹⁴⁰ *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1, 22, 33, 41–42 (Barton J), recently cited with approval by Gordon J in *State of Queensland v Mr Stafford* [2025] HCA 3, [181].

¹⁴¹ *Re Carmody; Ex parte Glennan* (2003) 77 ALJR 1202, 1203 [6].

¹⁴² *SZVFW* (n 12) 555–6 [30] (Gageler J), citing *Fox* (n 34) 125 [23] (Gleeson CJ, Gummow and Kirby JJ), quoting *Dearman v Dearman* (1908) 7 CLR 549, 561 (Isaacs J).

¹⁴³ *Ibid*, citing *Norbis v Norbis* (1986) 161 CLR 513, 519 (Mason and Deane JJ).

¹⁴⁴ *Ibid* 556 [32] (Gageler J), citing *Fox* (n 34) 126–7 [25] (Gleeson CJ, Gummow and Kirby JJ).

¹⁴⁵ *Ibid*, citing *Dearman v Dearman* (1908) 7 CLR 549, 564 (Isaacs J), partly quoted in *Fox* (n 34) 126–7 [25] (Gleeson CJ, Gummow and Kirby JJ).

¹⁴⁶ Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) [103].

¹⁴⁷ *SZVFW* (n 12) 553 [20] (Gageler J).

trial and judicial reasons.¹⁴⁸ It has a duty to decide the case for itself, on the facts as well as the law.¹⁴⁹ By contrast, a proceeding for judicial review does not involve evaluative judgment or the substitution of a court's view as to how a decision-maker's discretion should have been exercised.¹⁵⁰ Instead, a judge undertaking judicial review is confined to identifying legal error. In this sense, judicial review is comparable to an appeal on an error of law where the appellate court, tasked with identifying legal error, would impermissibly exercise judicial power by concerning itself with identifying errors of fact or questions as to whether a preferable decision could be made.¹⁵¹

High Court

Special leave to appeal

The appellate jurisdiction of the High Court is granted by s 73 of the Constitution. Given the source, it is worth setting out in full:

73. Appellate jurisdiction of High Court

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences—

- i. Of any Justice or Justices exercising the original jurisdiction of the High Court:
- ii. Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:
- iii. Of the Inter-State Commission, but as to questions of law only:

and judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

Access to this jurisdiction is provided by Part V of the *Judiciary Act 1903* (Cth). In particular, ss 35 and 35AA provide that the jurisdiction to hear and determine appeals from State and Territory Supreme Courts, and the Federal Court, is subject to the High Court granting 'special leave to appeal'.¹⁵² Part 41 of the High Court Rules 2004 (Cth) provides for procedural matters relating to applications for special leave.

¹⁴⁸ Ibid 556–7 [32]–[33] (Gageler J), citing *Fox v Percy* (n 34) 126–7 [25] (Gleeson CJ, Gummow and Kirby JJ).

¹⁴⁹ Ibid 559–60 [41] (Gageler J), citing *Warren v Coombes* (1979) 142 CLR 531, 552 (Gibbs ACJ, Jacobs and Murphy JJ).

¹⁵⁰ Ibid 566–7 [58] (Gageler J), citing *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 363 [66] (Hayne, Kiefel and Bell JJ).

¹⁵¹ See also *Augusta Pool 1 UK Ltd v Williamson* (2023) 111 NSWLR 378, 392–3 [69]–[73] where Ward P, Bell CJ agreeing at 381 [10] and Adamson JA agreeing at 412 [168], applies Gageler J's reasoning in *SZVFW* (n 12) in circumstances 'where there is a discretionary decision to be made as to the approval of the settlement in question (having regard to whether it is fair and reasonable in the interests of group members) but the orders made in approving that judgment are required to be "just"'.

¹⁵² See *Judiciary Act 1903* (Cth) ss 35(2), 35AA(2). Special leave is not required to hear and determine an appeal from a final judgment of the High Court exercising original jurisdiction: see at s 34. For an overview of the 'rise and demise' of the defunct Inter-State Commission, see Stephen Gageler, 'Chapter IV: The Inter-State Commission and the Regulation of Trade and Commerce under the Australian Constitution' (2017) 28(3) *Public Law Review* 205.

Nature of special leave

Special leave to appeal differs in nature from leave to appeal. O'Brien explains that 'to obtain leave an applicant needs only to establish a prima facie case of error, whereas to obtain special leave it is necessary in addition for there to be "some special feature of the case which warrants the attention of [the] court"'.¹⁵³ In *Packett v The King*,¹⁵⁴ Evatt J emphasised this distinction when he said: '[t]he fact that, if special leave were granted, the appeal would be allowed does not necessarily mean that special leave should be granted'.¹⁵⁵

The High Court has itself described the character of an application for special leave as 'unusual'.¹⁵⁶ The jurisdiction exercised in determining an application for special leave is not a proceeding in the ordinary course of litigation.¹⁵⁷ In determining an application for special leave, the High Court is exercising a function in its original jurisdiction conferred by s 76(ii) of the Constitution.¹⁵⁸ The grant of special leave is a condition of an appeal – characterised by Leeming as a jurisdictional fact.¹⁵⁹

As to the nature of special leave, Leeming has made the following comments:

It follows that, until leave or special leave be granted, there are no proceedings inter partes before the court, and the grant of leave is interlocutory and may be rescinded, and a refusal does not of itself prevent a further application being made based (*sic*) following a material change of circumstances.¹⁶⁰

The High Court has also confirmed that an application for special leave is 'merely an application to commence proceedings', so reasons for determination have no precedential value.¹⁶¹ Similarly, it is doubtful that an appeal can be brought from a refusal of special leave – such a determination does not relevantly fall into the category of 'judgments, decrees, orders, and sentences'.¹⁶²

Criteria for granting special leave

A purpose of the requirement for special leave is to 'ensure that the workload of the Court is of a character worthy of the Court's attention'.¹⁶³

Section 35A of the Judiciary Act sets out that the High Court *may* have regard to any matters it considers relevant, but *shall* have regard to the following, when determining an application for special leave:

- (a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:
 - (i) that is of public importance, whether because of its general application or otherwise; or
 - (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and
- (b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.

¹⁵³ David O'Brien, *Special Leave to Appeal* (Supreme Court of Queensland Library, 3rd ed, 2007) 47, citing *Radenkovic v The Queen* (1990) 170 CLR 623, 640 (Dawson J); *Morris v The Queen* (1987) 163 CLR 454, 475 (Dawson J).

¹⁵⁴ *Packett v The King* (1937) 58 CLR 190, 218 (Evatt J).

¹⁵⁵ O'Brien (n 153) 47.

¹⁵⁶ *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194, 217–8.

¹⁵⁷ See *Coulter v The Queen* (n 16) 356 (Mason CJ, Wilson and Brennan JJ).

¹⁵⁸ See Leeming (n 1) 296; O'Brien (n 153) 46.

¹⁵⁹ Leeming (n 1) 294.

¹⁶⁰ *Ibid* 296.

¹⁶¹ *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 133 [112] (Kiefel and Keane JJ).

¹⁶² *Constitution* s 73. It is ultimately a question of interpretation: see Leeming (n 1) 296.

¹⁶³ Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24(3) *Melbourne University Law Review* 784, 785.

Given the (seemingly unlimited) breadth of matters the High Court may consider when determining an application for special leave, it is difficult to set out any bright line rules for how a determination will be made. However, it can be said at a level of generality that in order to be granted special leave to appeal to the High Court a matter will usually need to:

- raise a new question of law of public importance
- involve questions of law that have been decided in inconsistent ways by lower courts, or
- involve the interests of the administration of justice, such that they require consideration by the High Court.¹⁶⁴

The High Court will generally refuse an application for special leave if:

- the decision below is not attended with sufficient doubt¹⁶⁵
- the case does not raise a question of principle or sufficient public importance or is otherwise not a suitable vehicle for the determination of a question of principle¹⁶⁶
- the proceedings are interlocutory, notwithstanding that the matter itself may be of general public importance,¹⁶⁷ or
- the grant of leave would be futile or moot due to intervening circumstances.¹⁶⁸

The High Court has also said that it will be an exceptional case in which special leave is granted in taxation matters, on the basis that the Full Court of the Federal Court is to be treated as the ultimate court of appeal in such matters.¹⁶⁹ Of course, the Court will still grant leave in appropriate cases which involve questions of fundamental principle.¹⁷⁰

Although these reasons may be considered to have common application, looking at previous determinations of applications for special leave 'is of limited assistance. The Court does not give reasons why special leave is granted [and] reasons for refusal of special leave are usually quite perfunctory and tell one very little'.¹⁷¹

Power of High Court to remit matters following an appeal

There is established jurisprudence on the nature and scope of the High Court's power to remit matters in its original jurisdiction arising under s 44 of the Judiciary Act.¹⁷² However, principles regarding the High Court's power to remit matters in the exercise of its appellate jurisdiction have had less judicial consideration.

The recent High Court decision in *ZG Operations Australia Pty Ltd v Jamsek* provides some insight into the basis upon which the High Court might remit a matter following an appeal. In *Jamsek*, the

¹⁶⁴ Sir Anthony Mason, 'The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal' (1996) 15(1) *University of Tasmania Law Review* 1 ('The Jurisdiction to Grant Special Leave'). See also Mildren (n 8) 207.

¹⁶⁵ Sir Anthony Mason, 'The Jurisdiction to Grant Special Leave' (n 164) 16.

¹⁶⁶ Ibid 17, citing *Wenpac Pty Ltd v Allied Westralian Finance Ltd* (1992) 67 ALJR 165.

¹⁶⁷ Ibid 18, citing *Wenpac Pty Ltd v Allied Westralian Finance Ltd* (1992) 67 ALJR 165; *Trade Practices Commission v Santos Ltd* (1992) 67 ALJR 166.

¹⁶⁸ Mildren (n 8) 208. See also Transcript of Proceedings, *Facebook Inc v Australian Information Commissioner & Anor* [2023] HCATrans 22, line 851 where special leave was unanimously revoked by the High Court on the basis that amendments to the Federal Court Rules relating to the requirements of service meant the grounds of appeal were no longer of public importance.

¹⁶⁹ *Commissioner of Taxation v Westfield* (1991) 22 ATR 400, 402 (a decision refusing special leave to appeal); *Commissioner of Taxation v Rowe* (1996-97) 187 CLR 266, 275.

¹⁷⁰ For some recent examples of where special leave was granted, see: *Commissioner of Taxation v Pepsico, Inc* [2024] HCASL 301; *Commissioner of Taxation of the Commonwealth of Australia v Bendel & Anor* [2025] HCADisp 124.

¹⁷¹ Tim Game, 'Making a Special Leave Application in the High Court' in Graeme Blank and Hugh Selby (eds), *Appellate Practice* (Federation Press, 2008) 190, 191.

¹⁷² See *Mokhlis v Minister for Home Affairs* (2020) 94 ALJR 843, 847 [18]; *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2007) 157 FCR 260, 279 [62]; *S61 v Refugee Review Tribunal* (2004) 136 FCR 122.

appellant appealed against findings of the Full Court of the Federal Court and made submissions to the High Court that the respondents were independent contractors, rather than employees of its company.¹⁷³ The respondents cross-appealed, claiming that the Full Court should have held that they were employees within the extended meaning of s 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth).¹⁷⁴ The High Court allowed the appeal, holding that the respondents were independent contractors and not employees, but otherwise declined to deal with the matters raised in the cross-appeal, with Kiefel CJ, Keane and Edelman JJ saying:

The Full Court, having concluded that the respondents were employees according to the ordinary meaning of that term, considered that it was unnecessary to deal with s 12(3) in order to dispose of the appeal. **As a consequence, this Court does not have the benefit of the Full Court's reasoned resolution of the issue sought to be raised by the proposed cross-appeal.** Ordinarily, that circumstance would warrant the refusal of special leave to bring the cross-appeal. That would be unfair in this case, given that the Full Court did not consider the respondents' submissions in relation to s 12(3) because their claim could be sustained on another basis.

...

The arguments advanced by the respondents are not insubstantial. They cannot be dismissed out of hand. **Acceptance of these arguments would have substantial consequences for the revenue. It would be inappropriate for [the High Court] to determine these issues in circumstances where the Commissioner of Taxation was not a party to the proceedings, and where the Full Court did not address these questions.**¹⁷⁵

On that basis, the majority of the High Court determined that 'the justice of the case' would be met by an order remitting the matter to the Full Court to enable the issues raised in the cross-appeal to be heard following the joinder of the Commissioner.¹⁷⁶

The decision in *Jamsek* provides some insight into matters considered relevant by the High Court in exercising its power to remit matters in its appellate jurisdiction. In circumstances where the issue raised by the respondents: (1) was 'not insubstantial', (2) was not considered by the court below, and (3) would have substantial consequences for a Commonwealth agency not party to the proceeding, the majority determined that it would be inappropriate to determine the issue on appeal.

Conclusion

The nature and scope of modern civil appellate practice has been said to produce 'more difficult areas of legal argument than any other subject in the development of Australian jurisprudence'.¹⁷⁷ Among other reasons, the ambiguity of the word 'appeal' necessitates careful consideration of legal principles in order to determine the avenues available for appellate review. For legal practitioners, the distinction between types of appeal is crucial in determining the principles applicable in any given proceeding. Such principles govern the nature of the appeal, the power conferred on the appellate court and the relief available.¹⁷⁸

The existence of appellate jurisdiction reflects the reality that 'errors can be made and fall to be corrected in the exercise of judicial authority'.¹⁷⁹ Prince observes that while 'many other aspects of civil procedure have changed substantially since the enactment of the *Judicature Acts*, the procedure of appeal has not'.¹⁸⁰ This is a reflection of the continuing efficacy and importance of the appeal and its vital role in the administration of justice.

¹⁷³ *ZG Operations Australia Pty Ltd v Jamsek* (2022) 275 CLR 254, 275 [60] (Kiefel CJ, Keane and Edelman JJ).

¹⁷⁴ *Ibid* 278 [71] (Kiefel CJ, Keane and Edelman JJ).

¹⁷⁵ *Ibid* 279 [75] (Kiefel CJ, Keane and Edelman JJ).

¹⁷⁶ *Ibid* 279 [76] (Kiefel CJ, Keane and Edelman JJ).

¹⁷⁷ Michael Grant, 'Foreword' in Dean Mildren, *The Appellate Jurisdiction of the Courts in Australia* (Federation Press, 2nd ed, 2023) i, v.

¹⁷⁸ Prince, 'Civil Appeals: Part 2' (n 113) 283.

¹⁷⁹ Grant (n 177) v.

¹⁸⁰ Prince, 'Civil Appeals: Part 2' (n 113) 283.



This legal briefing draws heavily on a presentation by the then Justice Catherine Branson of the Federal Court of Australia on 5 July 2005, on the topic of appeals to the Federal Court of Australia.

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