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Full Federal Court clarifies nature and scope of appeals on a 'question of law'

In 2 recent judgments, the Full Federal Court of Australia has clarified the nature and scope of appeals on a 'question of law' brought under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) to the Federal Court from the Administrative Appeals Tribunal.

Section 44(1) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act) states that a 'party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding' (emphasis added).

In [Haritos v Commissioner of Taxation \[2015\] FCAFC 92](#) and [May v Military Rehabilitation and Compensation Commission \[2015\] FCAFC 93](#), the Full Federal Court clarified that it is not necessary for an appellant to identify a 'pure' question of law in a notice of appeal brought from an Administrative Appeals Tribunal decision and that a question of mixed fact and law may be sufficient.

Background

Haritos v Commissioner of Taxation

Mr George Haritos and Mr Alex Kyritsis (the Taxpayers) sought leave to appeal from the judgment and orders of Pagone J dismissing as incompetent an appeal they sought to bring from the Administrative Appeals Tribunal (the Tribunal) under s 44 of the AAT Act. The Tribunal had upheld various assessments made by the Commissioner of Taxation under the *Income Tax Assessment Act 1936* as to the Taxpayers' taxable income and tax payable between 2005 and 2009.

Justice Pagone had determined that the appeal was incompetent, as the Taxpayers' Notice of Appeal did not properly identify and articulate 'questions of law' for the purposes of s 44(1) of the Act. His Honour considered that the jurisdiction conferred in s 44(1) of the Act had not been enlivened, and for this reason, the appeal was dismissed (at [30]).

May v Military Rehabilitation and Compensation Commission

Mr Benjamin May, a former officer of the Royal Australian Air Force, had sought compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (the SRC Act) on the basis of his having vertigo. The Military Rehabilitation and Compensation Commission concluded it was not liable to pay Mr May under the SRC Act.

Mr May sought review of that decision in the Tribunal and the Tribunal affirmed the Commission's decision. Mr May then sought to appeal the Tribunal's decision on a question of law pursuant to s 44(1) of the AAT Act. The Federal Court (Buchanan J) dismissed Mr May's appeal on the basis that there was no legal error in the Tribunal's decision. Justice Buchanan considered it unnecessary to determine the Commission's contention that Mr May failed to identify a 'pure' question of law for the purposes of s 44(1) of the Act (at [57] and [77])

Haritos v Commissioner of Taxation

In *Haritos v Commissioner of Taxation*, the Full Federal Court of Australia (Allsop CJ, Kenny, Besanko, Robertson & Mortimer JJ) granted leave to appeal and allowed the appeal, set aside the decision of the Tribunal and remitted the matter to the Tribunal for reconsideration. In essence, this was because the Taxpayers' Notice of Appeal, read 'fairly', did identify questions of law for determination.

In coming to this conclusion, the Full Court considered the text, context, legislative history, relevant case authority and purpose of s 44 of the Act. The Full Court determined that (at [62]):

- Appeals to the Federal Court under s 44 are confined to consideration of a question or questions of law.
- The statement of a question of law with sufficient precision is a matter of great importance to the efficient and effective hearing and determination of appeals from the Tribunal.
- The Federal Court has jurisdiction to decide whether or not an appeal from the Tribunal is on a question of law and has the power to grant a party leave to amend a notice of appeal.
- Any requirements of drafting precision concerning the form of the question of law do not go to the existence of the Federal Court's jurisdiction conferred by s 44(3) of the Act to hear and determine appeals properly instituted under s 44(1); rather, they go to the exercise of the Federal Court's jurisdiction.
- As a matter of practice and procedure, it may be preferable in certain circumstances to determine whether or not the appeal is on a question of law as part of the hearing of the appeal.
- Whether or not the appeal is on a question of law is to be approached as a matter of substance rather than form.
- A question of law within s 44 is not confined to a jurisdictional error and includes non-jurisdictional errors of law.

The Full Federal Court also explained that the jurisdiction in s 44(1) of the Act is not confined to consideration of 'pure' questions of law and that a 'mixed question of fact and law' may come within the ambit of s 44(1) of the Act. The Full Court expressly concluded that previous judgments of the Federal Court of Australia – for example, *Birdseye v Australian Securities & Investments Commission* [2003] FCA 232 and *Comcare v Etheridge* [2006] FCAFC 27 – that held that it was necessary to identify a 'pure' question of law and an appeal could not be brought where it involved a mixed question of fact and law were incorrect (at [193]). The Full Court noted the significant difficulty in identifying with precision what constitutes a 'mixed question of fact and law' and relevantly concluded (at [192]):

the terms, the context ... the history, authority and 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], 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 ... 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.

The Full Court also emphasised that the purpose of limiting an appeal to a question of law is to ensure that the merits of the case are dealt with by the Tribunal and not the Federal Court

(at [194]). The Federal Court's role is not to determine whether the Tribunal 'should have made a particular finding of fact, but whether it may lawfully have done so' (at [201]).

May v Military Rehabilitation and Compensation Commission

In *May v Military Rehabilitation and Compensation Commission*, the Full Court (identically constituted by Allsop CJ, Kenny, Besanko, Robertson & Mortimer JJ) adopted the construction outlined in *Haritos v Commissioner of Taxation* as to the nature and scope of an appeal brought under s 44 of the AAT Act (at [6] and [161], [164] and [167]). The Full Court found that the Tribunal had engaged in legal error by misconstruing the definition of 'injury' in s 4 of the SRC Act and applying that misconception to the facts of Mr May's claim (at [231]).

The Full Court allowed the appeal, set aside the decision of the Tribunal and remitted the matter to the Tribunal, differently constituted, to determine Mr May's claim according to law.

The Full Court also refrained from determining the scope and nature of any application that might also be brought under s 39B of the *Judiciary Act 1903* or s 5 of the *Administrative Decisions (Judicial Review) Act 1977* where an appeal under s 44(1) of the Act had been heard and determined (at [181]).

Implications and significance of the judgments

The judgments are significant, as the Federal Court has definitively stated that it is not necessary to identify a 'pure' question of law, and that in certain circumstances mixed questions of fact and law may come within the ambit of s 44(1) of the Act. This is contrary to previous case authority.

Also, the Federal Court's jurisdiction to hear appeals from decisions of the Tribunal may be invoked in circumstances that are potentially broader than previously understood.

The judgments make it clear that the Federal Court will determine for itself, as a matter of substance and not form, whether a question of law has been properly identified and articulated, having regard to a fair reading of any notice of appeal. The Federal Court has clarified that this identification process is a matter of practice and procedure, not a matter of jurisdiction.

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