Appealing from the AAT to the Federal Court of Australia

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Victoria Legal Aid

Acknowledgement to Country

We would like to acknowledge that this meeting is taking place on Aboriginal land across many locations, and we acknowledge the Traditional Owners of these lands and pay our respect to their Elders, both past, present and emerging.

Overview

- Section 44 of the *Administrative Appeals Tribunal Act 1975*
- Question of law
- Timeframes
- Procedural considerations
- Practical tips

Section 44 of the AAT Act

- Key provision for appealing
- (1) "*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*."
- The Federal Court's jurisdiction is limited to questions of law. It does not have jurisdiction to conduct merits review or review questions of fact.

Powers of the Federal Court on appeal

Section 44:

(4) The Federal Court of Australia shall hear and determine the appeal and may make such order as it thinks appropriate by reason of its decision.

(5) Without limiting by implication the generality of subsection (4), the orders that may be made by the Federal Court of Australia on an appeal include an order affirming or setting aside the decision of the Tribunal and an order remitting the case to be heard and decided again, either with or without the hearing of further evidence, by the Tribunal in accordance with the directions of the Court.

What is a *question of law*?

The leading case is *Haritos v Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315. Summary at [62]. Key points:

- (1) The subject-matter of the Court's jurisdiction under s 44 of the AAT Act is confined to a question or questions of law. The ambit of the appeal is confined to a question or questions of law. (See also *Federal Court Rules 2011* r33.12(2)(b): Notice of Appeal must state the precise question or questions of law to be raised on the appeal.)

- (6) Whether or not the appeal is on a question of law is to be approached as a matter of substance rather than form. (See [94])

- (8) The expression "may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal" in s 44 should not be read as if the words "pure" or "only" qualified "question of law". Not all so-called "mixed questions of fact and law" stand outside an appeal on a question of law. (See [192])

Things that do not give rise to a Question of Law

- Factual findings made by the Tribunal.
- Decision reached by the Tribunal.
- Weight given to evidence, matters or submissions (in the absence of any statutory indication).
- Findings about the credibility of a witness.

Categories of Questions of Law conceptualised (not exhaustive)

The correct legal test

Federal Commission of Taxation v Trail Brothers Steel & Plastics Pty Ltd [2010] 186 FCR 410 at [13]
Collector of Customs v Pozzolanic Enterprises Pty Ltd [1993] 43 FCR 280 at [23]

- Whether the AAT has identified the relevant legal test
- Whether the AAT has applied the correct legal test
- Whether a word or phase in a statute is to be given its ordinary or technical meaning
- The meaning of a technical legal term in statute

Procedural

- Whether the AAT denied procedural fairness: *Clements v Independent Indigenous Advisory Committee* (2003) 131 FCR 28 at [8].
- Whether there was actual/apprehended bias by the AAT.
- Whether the AAT failed to provide adequate reasons: s43 *AAT Act*; *SDEWR v Homewood* [2006] FCA 779 at [40].
- Whether the AAT failed to deal with a substantial and clearly articulated submission: *Applicant WAEE v MIMIA* (2003) 236 FCR 593 at [47]; *SZSSC v MIBP* (2014) ALR 365 at [75]-[78], [81].

Legal errors in the course of fact finding or decision making

- No evidence for finding of fact or inference drawn: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356.
- Legal unreasonableness (eg “plainly unjust”, “arbitrary”, “capricious”, “irrational”, “lacking in evident or intelligible justification”, and “obviously disproportionate”): *MIC v Li* (2013) 249 CLR 332.
- Irrational, illogical and not based upon findings or inferences of fact supported by logical grounds: *MIMIA v SGLB* (2004) 78 ALJR 992 at [38].
- Failing to take into account a relevant consideration or taking into account irrelevant consideration: *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162CLR 24 at 39-40.

Assessing the AAT's reasons

- Tribunal's reasons are not to be construed minutely and finely with an eye keenly attuned to the perception of error: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272, [30].

Some examples of Questions of Law

SDSS v Vaneski [2015] FCA 433

AAT determined that Mr V had a severe impairment entitling him to unlimited portability of DSP (s121AAA(1)(b) *Social Security Act 1991*). Secretary appealed.

Question of law: Whether in construing ss 1218AAA(1), 1217 and/or and 94(3B) of the *Social Security Act 1991* (Cth) (the Act), and the *Social Security (Tables for the Assessment of Work Related Impairment for Disability Support Pension) Determination 2011*(the Determination), the Tribunal had applied the wrong test.

Tribunal's reasons: "I am satisfied that Mr Vaneski has *significant* difficulties with most of the activities listed in the *severe* section of Table 5." (emphasis added)

Court: Appeal dismissed. "It would have been preferable had the Tribunal used the words of the Table. However, on a consideration of the decision of the Tribunal as a whole, it is clear that the Tribunal directed itself properly. This can be seen, …where the Tribunal uses the word 'severe' three times in defining the task it is undertaking… the Tribunal related the facts of the case to the examples given in Table 5 of what constitutes severe difficulties."

Applicant 0108 of 2014 v SDSS [2016] FCA 421; 152 ALD 521

AAT determined that the Applicant's severe impairment did not prevent her from performing work independently of a program of support within the next 5 years, and therefore she did not qualify for unlimited portability of DSP (s1218AAA(1)(d) SSA).

Section 1218AAA(5) defines work as follows:

> ***work*** means work:
>
> (a) that is on wages that are at or above the relevant minimum wage; and
>
> (b) that exists in Australia, even if not within the person's locally accessible labour market.

Tribunal's reasons:

- It was bound by the terms of the Act and policies (the E-reference guide) relevant to the matter and required clear evidence that she could not work more than two hours per week.
- Referred to Applicant's evidence at SSAT that she "spent several hours every morning on her computer and could undertake odd jobs around the house, including watering the garden".

Tribunal's reasons continued:

- "Her own written evidence and her appearance before this Tribunal evidence a determined individual with a strong work ethic who, can, when it is required, undertake written and reflective work of a sort that would allow her to work at least 2 hours in a given week."

- " Evidence that the employment market is difficult and that people with disabilities are discriminated etc; while troubling, are not the sort of evidence this Tribunal can look to when assessing whether the Applicant meets the requirements of section 1218AAA(1)(d)."

Question of law: Whether the AAT erred in its construction of s1218AAA(1)(d) concerning work capacity, including by relying on the two hour rule found in the E-reference guide.

Court: AAT did not correctly apply s s1218AAA(1)(d). Appeal allowed.

- Not just any capacity for physical effort that qualifies as "work" for the purposes of para (d), but work "(a) that is on wages that are at or above the relevant minimum wage; and (b) that exists in Australia, even if not within the person's locally accessible labour market". This requires the severe impairment must prevent the person from performing any work "in the open labour market".

Court continued:

- The AAT must identify the work on the open labour market that the applicant can perform.
- The AAT failed, in my view, correctly to apply the para (d) consideration. It failed to address the question whether the applicant, by her severe impairment, was prevented from performing any work on wages that exists in Australia for the next five years. Rather, it assumed she could do such work – which was not relevantly identified – simply because, in part, she could perform some non-wage activities (such as odd jobs around the house, watering the garden).
- The AAT further limited its purview of the question it needed to answer by considering it was bound to apply the two hour rule stated in the E-reference guide, when it was not so bound. See *Drake v Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60 at 69-71* (Bowen CJ and Deane J)… The two hour rule is apt to lead a decision-maker into error when applying para (d), even though its good intentions may be noted.

Bornecrantz v Secretary, Department of Social Services [2017] FCA 1010; 169 ALD 453

Tribunal found applicant's and his wife's combined asset value under s1208E(1) exceeded limit for eligibility to receive age pension under the SSA. Tribunal determined that the couple's combined assets included:

- Value of loans made by the couple to their private companies – these were assets of the couple in their capacity as lenders; and
- The value of the companies, without deducting the companies' liability to pay the loans to the couple.

Question of law #1: Whether the Tribunal's decision was unreasonable because assets (company loans) were counted twice in calculating combined asset value.

Court: The Tribunal's decision was legally unreasonable. It artificially inflated the value of the applicant's and his wife's combined assets.

Question of law #2: Whether the Tribunal failed to have regard to a relevant consideration, being the outcome of applying s1208E(1) in a particular case.

Court: An essential precondition to the application of s1208E(1) is the consideration of whether to exercise the discretion in s1208E(2) to exclude any asset. The existence of the discretion in in s1208E(2) indicates that a mandatory relevant consideration is whether the application of s1208E(1) would lead to an anomalous, unfair or unintended outcome. The Tribunal wrongly denied the existence of the discretion and failed to take into account the unfair outcome of double counting the loans.

Negri v Secretary, Department of Social Services [2016] FCA 879; 246 FCR 1

DSP case. Applicant had submitted there was evidence that she suffered from depression during the claim period though it was later diagnosed by a psychiatrist, and relied on *Re Eid and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2013) 138 ALD 180 argue that this satisfied the requirement of being fully diagnosed.

Tribunal determined there was no firm evidence of a diagnosis of depression during the claim period, and therefore no impairment rating could be assigned for the condition. Applicant's submission was not mentioned in the Tribunal's reasons.

Question of law: Whether Tribunal erred by failing to deal with clearly-articulated submission upon which strong reliance was put.

Court: Appeal allowed

- The submission relating to evidence of the psychiatrist's diagnosis was substantial. If it had been averted to, it might have led to a different finding of fact in relation to whether applicant had been diagnosed with depression. That would have led to consideration of whether the depression was fully diagnosed, treated and stabilised and whether an impairment rating ought to be assigned.
- The submission was clearly articulated, the applicant had plainly submitted that the evidence established a diagnosis of depression relating to the relevant period.
- In that light, the Tribunal should have been dealt with the submission and fell into error when it failed to do so.

Timeframe for appealing a decision

- 28 days to appeal
- When the AAT decision is ‘given’ – s.44(2A)(a)
- Request written reasons within 28 days – s.43(2A)
- If the AAT provides both oral and written reasons, which prevail?: *Negri v SDSS* (2016) 246 FCR 1 at [27]-[30]; ss 43(2), (2A), (2B), 44(2B)(a) *AAT Act*

Practical considerations – Part 1

- Review written reasons
- If oral decision – request written reasons
- Consider Questions of Law
- Consider opinion from Barrister

Practical considerations – Part 2

- Apply for legal assistance (if applicable)
- Transcript
- Prepare Notice of Appeal – Form 75
- Costs are an important consideration

Costs

Negri v Secretary, Department of Social Services (No 2) [2016] FCA 1125

The Secretary argued that the Applicant only succeeded on one ground and that the issues raised by that ground constituted a relatively minor proportion of the written and oral submissions to the Court.

Therefore each party should be ordered to bear its own costs as the Applicant failed on her other grounds of appeal.

The Secretary argued that large amount of work involved in the appeal arose in relation to an issue of proper identification of the Tribunal's reasons.

Court: Secretary to pay Applicant's costs of appeal

- Rejected that the grounds upon which the Applicant failed significantly increased her legal costs and consequently those that the Respondent will be liable to pay.
- Applicant was represented by Victoria Legal Aid and by Counsel whose fees were set at a flat rate.
- No misconduct or unreasonable act of any kind asserted against the Applicant.
- In relation to the issue of oral and written reasons (s 43 issue) - additional costs were incurred, that issue raised a matter of general importance the determination of which it is likely to be of assistance to the Tribunal and of particular assistance to regular litigants before the Tribunal such as the Secretary.

Procedural tips

- Take detailed notes of the hearing i.e., submissions made by the Respondent, comments made by the Tribunal Member.
- Transcript – costs can be high
- Transcript – Tribunal does have the ability to cover cost
- Review *Federal Court Rules 2011* (Div 2 Part 3)
- Review Practice Notes (in particular Administrative and Constitutional Law and Human Rights Practice Note (ACLHR-1))
- Federal Court Registry are very helpful

Legal Aid assistance

- Victoria Legal Aid may make a grant of legal assistance for certain Federal Court matters if there is a strong prospect the person will gain substantial benefit. Subject to:
- *Merits test*: The case is more likely than not to succeed. This requires much more than just having an arguable case.
- *Prudent self-funding litigant test*
- *Appropriateness of spending limited public legal aid funds test*

Questions??