RELEASE OF COUNCIL REPORT NO 41 APPEALS FROM THE ADMINISTRATIVE APPEALS TRIBUNAL TO THE FEDERAL COURT

By Gabrielle Lewis*

Summary of the Report

Decisions of the Administrative Appeals Tribunal (the AAT) are subject to judicial review by the Federal Court—principally by means of appeal on a question of law under section 44 of the *Administrative Appeals Tribunal Act 1975* (the AAT Act) or by way of an application under the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act) (or under section 39B of the *Judiciary Act 1903*). Section 44 of the AAT Act provides 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.

Determining whether a particular question is a question of law or a question of fact may not be easy. Despite this, the task is of central importance in an appeal from the AAT, because the Federal Court does not have jurisdiction directly to review any findings of fact made by the AAT, nor does the Court have jurisdiction to make supplementary findings of fact where the Tribunal has made no finding on the relevant issue.

The principal criticisms identified during the Council's study of section 44 were:

(a) the wastage of cost and time on the jurisdictional argument about whether there is, and what is the extent of, the question of law;

(b) the inability to appeal from findings of fact by the AAT which are wrong; and

(c) that when the Court allows an appeal but considers that further findings of fact need to be made, it is ordinarily required to remit the proceeding to the AAT because it has no jurisdiction to make findings of fact.

The Report examines the background to section 44, analyses the constitutional context and case law which assists interpretation of the concept of a question of law[1] and examines the views put forward in the submissions received in response to the Discussion Paper, to consider whether the grounds of appeal should be altered so as to provide for:

(a) administrative law remedies only;
(b) appeals on questions of fact as well as of law; or
(c) a separate regime for taxation and patents appeals.

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* Project Officer, Administrative Review Council Secretariat.

In the Council's view, the scope of review under section 44 should remain unchanged.

However, the Council recommended that the Court's powers be expanded slightly, so as to give it a discretion to receive evidence and to make findings of fact where there has been an error of law by the AAT, provided that the Court's findings are not inconsistent with those of the AAT. This change would address one of the major criticisms which has been made of the operation of appeals from the AAT. That is, where an error of law is identified in the Federal Court, it will usually be necessary for the Court to remit the matter to the AAT for redetermination if further findings of fact need to be made. The need to remit causes delay, increased costs, and the possibility of 'looping' if there is a further appeal from the AAT.

The Council commissioned Mark Leeming, a Sydney barrister, to prepare the draft of this report which was subsequently settled and adopted by the Council.

Publication of the Discussion Paper

In light of the concerns that had been expressed in the taxation area (and also in relation to patents matters), the Council issued a Discussion Paper, *Appeals from the Administrative Appeals Tribunal to the Federal Court*, in May 1995.

The issues raised by the Discussion Paper were:

(a) Should section 44 be deleted, leaving parties to rely on other administrative law remedies to review decisions of the AAT?

(b) Should the scope of section 44 be expanded, to include a full appeal to the Federal Court, whether by leave or as of right?

(c) Should taxation and patent matters be treated differently from other matters?

(d) Should the Court have jurisdiction to make additional findings of fact, and to receive additional evidence, and should the AAT be able to refer not just a question of law but an entire proceeding to the Court?

The Report's recommendation:

The Report recommends that the power of the Federal Court should be expanded to include making findings of fact where there has been an error of law by the AAT, provided that:

(a) such findings of fact are not inconsistent with findings made by the AAT; and

(b) it appears to the Court convenient to make such findings, having regard to:
    (i) the timely and economical resolution of the whole of the subject matter of the application before the AAT;

(ii) the relative expense to the parties of the Court, as opposed to the AAT, making additional findings;
(iii) the relative delay to the parties of the Court, as opposed to the AAT, making additional findings;
(iv) the extent (if any) to which it is necessary for facts to be found and the means by which those facts might be established; and
(v) whether any of the parties considers that it is appropriate for the Court, as opposed to the AAT, to make additional findings of fact.

For the purposes of making such findings of fact, the Court may permit evidence to be adduced which was not before the AAT.

The Council considered that such an amendment to the AAT Act will improve the efficiency of the Commonwealth system of administrative law, without displacing the AAT from its role as the primary arbiter of questions of fact. Efficient administration of justice will be served by permitting a small but significant class of appeals to be resolved more quickly and efficiently by the Federal Court without the need to remit the proceeding to the AAT.

Reasons for Council's findings in the report

(a) Administrative law remedies only

Noting the difficulties in distinguishing between questions of fact and questions of law, the Council considered whether section 44 should be repealed altogether, leaving review of AAT decisions to be based instead solely upon the grounds of review under the AD(JR) Act and the *Judiciary Act 1903*. Those grounds would permit judicial review of decisions of the AAT on the grounds, among others, that the Tribunal had breached the rules of natural justice, had failed to observe procedures required by law or that the Tribunal's decision had involved an error of law.

Notwithstanding the considerable overlap between the scope of Federal Court review under section 44 and under the AD(JR) Act, the Council was of the view that the right of review under section 44 should be retained for the following reasons.

First, it is not clear that the repeal of section 44 would resolve the identified defects. Only a larger power in the Federal Court in respect of facts, such as a jurisdiction to deal with "appeals involving a question of law" would be certain to achieve that result.

Second, the narrower section 44 formulation is consistent with the Court's more limited role in fact finding where the Court is reviewing a decision of the Tribunal under section 44 as compared to the AD(JR) Act. This flows from the policy which gives the Tribunal, the peak merits review tribunal, primacy in fact finding. The retention of section 44 in its present form, in which the appeal is limited to a question of law, supports that primacy.

Third, it is important that the AAT Act contains a statement that the Tribunal is subject to judicial review and makes it clear that judicial review by the Federal Court

is the primary remedy contemplated by the Parliament for review of the Tribunal's decisions, as opposed to the AD(JR) Act or section 39B of the Judiciary Act.

Fourthly, the retention of section 44 tends to impose some discipline on the parties to an appeal in that it requires that the questions of law be identified. This is often not the case in applications under the AD(JR) Act.

For these reasons, Council decided that the answer is not to repeal section 44 but to confer minor additional powers on the Court in relation to facts, where the exercise of that power would not conflict with the fact-finding by the Tribunal in the particular case.

Council also considered the inability of section 44 review to extend to review of preliminary decisions of the AAT concerning jurisdiction. This was a consequence of the full Federal Court in *Director-General of Social Services v Chaney*[2] which held that a preliminary ruling by the AAT that it had jurisdiction to deal with an application was not a "decision" for the purposes of section 44. That preliminary ruling could not therefore be the subject of an appeal under section 44.

The Council decided that no change was warranted as a consequence of this decision for the following reasons:

(a) the decision is similar to the approach adopted in construing the term "decision" in the AD(JR) Act;
(b) if the AAT rules that it has no jurisdiction, an appeal will lie under section 44;
(c) if the question of jurisdiction is disputed, then the parties may seek to have the question referred to the Federal Court under section 45; and
(d) jurisdiction can also be challenged in the Federal Court by seeking prohibition.

(b) Appeals on questions of fact as well as law

The report discusses the relative merits of broadening the scope of appeals under section 44. Arguments in favour of broadening the scope include that it would remove or at least reduce the need to distinguish between questions of fact and law, that the Federal Court would be able to review the AAT's findings of fact and that it would cure the problem of proceedings "looping" between the AAT and the Federal Court as the Federal Court cannot make its own findings of fact.

An argument against broadening the scope of section 44 was that it might impact negatively upon the operation of the AAT to promote excessive legality and technicality in the proceedings of the AAT and hinder the effectiveness of its fact-finding. Other arguments include that the AAT is often the second or third tier of merits review and there is no need to broaden section 44 to include factual material which may have been traversed several times before; that an appeal as of right may deter some applicants from seeking review in the AAT; and that it would lead to a significantly larger number of appeals.

The Council concluded that broadening the scope of section 44 will clearly result in significant resource implications. The report goes on to say that if the result is:

(a) a substantial increase in the likelihood that a party successful before the AAT will be taken to the Federal Court;
(b) the certainty of additional time and costs incurred in preparing and conducting the Federal Court appeal; and
(c) an increased waiting time before the Federal Court is able to hear the appeal,

then it may fairly be said that access to justice has suffered.

Accordingly, the Council was of the opinion that section 44 should not be extended so as to provide for a full right of appeal to the Federal Court, across all jurisdictions of the AAT.

(c) A separate regime for patents and taxation appeals

The Council considered whether a separate regime should apply to taxation and patents appeals.

In relation to taxation appeals, the Council considered that the differences between taxation appeals and some other heads of AAT jurisdiction do not warrant further differentiation in the system of administrative law, given the desirability of developing a comprehensive, coherent and integrated system of Commonwealth administrative law. Moreover, certain of the current problems (such as the need to remit proceedings to the AAT to make further findings of fact) are problems which are shared throughout the AAT's jurisdictions and should be addressed on a general basis.

In relation to patents appeals, the Council concluded that the issues would be considered more closely in the Council's report on patents decisions. Under the legislative regime as it presently stands, the Council was of the opinion that those decisions of the Commissioner of Patents which are reviewable by the AAT should be subject to the same rights of appeal as other decisions of the AAT.

Effect of Proposed Changes to the Merits Review System

The Council's recommendation applies equally to the proposed Administrative Review Tribunal.

However, the Attorney-General's press release of 20 March 1998 raised the issue of the "basis and scope of administrative review, [which is] designed to reduce the number of applications, the overall costs of merits review and excessive legalism". If the basis of review by the new tribunal was to be something less than substituting the correct and preferable decision for that of the primary decision maker, the scope of the right of appeal to the Federal Court would also need further consideration. In these circumstances the Council would need to consider whether the basis for an appeal to the Federal Court should be that the matter *involves* a question of law – a wider ground than section 44.

The Administrative Review Council's report to the Attorney-General, *Appeals from the Administrative Appeals Tribunal to the Federal Court*, was tabled in the Parliament on 3 December 1997. Copies of the report are available free of charge from the Council's Secretariat (tel (02) 6250 5800).

Notes

[1] The Federal Court in recent times has most regularly relied upon the five guiding propositions formulated (with reference to many cases not cited below) by the Full Court in *Collector of Customs v Pozzolanic Enterprises Ltd* (1993) 43 FCR 280, 287:

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.
2. The ordinary meaning of a word or its non-legal technical meaning or interpretation is a question of fact.
3. The meaning of a technical legal term is a question of law.
4. The effect or construction of a term whose meaning is established is a question of law.
5. The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law. However, where a statute uses words according to their ordinary meaning and it is reasonably open to hold that the facts of the case fell within those words, the question as to whether they do or do not is generally one of fact.

[2] (1980) 47 FLR 80