

## **The distinction between questions of fact and law: a question without answer?**

### **Introduction**

- 1 The topic of this morning's discussion is the distinction between questions of fact and law. It is, as the High Court has commented, a "*vital distinction in many fields of law*".<sup>1</sup> It is a distinction that turns on context. As Windeyer J wrote, the "*distinction between matters of fact and of law depends upon, is influenced by, and differs with the circumstances in which the question arise*".<sup>2</sup> Similarly, Spigelman CJ in *Attorney-General for the State of New South Wales v X* [2000] NSWCA 199; 49 NSWLR 653 observed, at [28]:

"The determination of whether a particular alleged error ... answers the description "question of law", will depend on the scope, nature and subject matter of the statute, including the nature of the body making the relevant decision."

- 2 The context for the distinction, and the reason why I chose this topic, is the appeal provisions in the *Land and Environment Court Act* 1979, ss 56A and 57. Section 56A of the *LEC Act* provides:

**"56A Class 1, 2 and 3 proceedings - appeals to the Court against decisions of Commissioners**

- (1) A party to proceedings in Class 1, 2, 3 or 8 of the Court's jurisdiction may appeal to the Court against an order or a decision of the Court on a question of law, being an order or a decision made by a Commissioner or Commissioners.
- (2) On the hearing of an appeal under subsection (1), the Court shall:
  - (a) remit the matter to the Commissioner or Commissioners for determination by the Commissioner or Commissioners in accordance with the decision of the Court, or

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<sup>1</sup> *Collector of Customs v Agfa-Gevaert Limited* [1996] HCA 36; 186 CLR 389 at 394.

<sup>2</sup> *Da Costa v The Queen* [1968] HCA 51; 118 CLR 186 at 194.

- (b) make such other order in relation to the appeal as seems fit.
- (3) Notwithstanding subsection (1), an appeal shall not lie to the Court under that subsection in respect of a question of law that has been referred to, and determined by, a Judge pursuant to section 36.”

3 Section 57 of the *LEC Act* provides:

**“57 Class 1, 2 and 3 proceedings-appeals**

- (1) A party to proceedings in Class 1, 2, 3 or 8 of the Court’s jurisdiction may appeal to the Supreme Court against an order or decision (including an interlocutory order or decision) of the Court on a question of law.
- (2) On the hearing of an appeal under subsection (1), the Supreme Court shall:
  - (a) remit the matter to the Court for determination by the Court in accordance with the decision of the Supreme Court, or
  - (b) make such other order in relation to the appeal as seems fit.
- (3) Despite subsection (1), an appeal does not lie to the Supreme Court against an order or decision of the Court that has been made by a Commissioner or Commissioners, other than a decision of the kind referred to in subsection (4) (a) or (b).
- (4) Despite subsection (1), an appeal does not lie to the Supreme Court against any of the following orders or decisions of the Court except by leave of the Supreme Court:
  - (a) a decision on a question of law determined by a judge pursuant to a reference under section 36 (5),
  - (b) a decision of a Commissioner or Commissioners made after a judge’s determination referred to in paragraph (a), where the judge’s determination is itself the subject of an appeal to the Supreme Court,
  - (c) an order or decision made on an appeal under section 56A,
  - (d) an interlocutory order or decision,
  - (e) an order made with the consent of the parties,

(f) an order or decision as to costs.

4 My observations are, therefore, directed to appeals from a decision by: (i) a Commissioner/s to a judge of the Land and Environment Court; and (ii) a judge of the Land and Environment Court to judges of the Supreme Court, the latter an appeal being allocated to the NSW Court of Appeal by virtue of the *Supreme Court Act* 1970, s 48(1)(a)(i). In the interests of completeness, I note that because of the class based scope of ss 56A and 57, today's discussion is primarily relevant to environmental planning and protection appeals (class one); local government and miscellaneous appeals and applications (class two); land tenure, valuation, rating and compensation matters (class three); and mining matters (class eight).

5 In recent years, the High Court of Australia has given consideration to provisions such as ss 56A and 57 of the *Land and Environment Act* 1979. In *Kostas v HIA Insurance Services Pty Limited* [2010] HCA 32, French CJ, at [27], quoted McHugh, Kirby and Callinan JJ in *Walsh v Law Society (NSW)* [1999] HCA 33; 198 CLR 73, at [50], with approval: "*it is always important, where a process called 'appeal' is invoked, to identify the character of the appeal and the duties and powers of the court or tribunal conducting it*".

6 In *Osland v Secretary to the Department of Justice* [2010] HCA 24, the High Court was concerned with the *Victorian Civil and Administrative Tribunal Act* 1998, s 148 pursuant to which a party to a proceeding may appeal, **on a question of law**, from an order of the Tribunal. Citing *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* [2001] HCA 49; 207 CLR 72 at [15] per Gaudron, Gummow, Hayne and Callinan JJ, French CJ, Gummow and Bell JJ, at [18], held that:

"Section 148 confers 'judicial power to examine for legal error what has been done in an administrative tribunal'. Despite the description of proceedings under the section as an 'appeal', it

confers original not appellate jurisdiction; the proceedings are ‘in the nature of judicial review.’”

- 7 The same point was made in *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue* [2011] HCA 41 where the Court stated at [5]:

“An ‘appeal’ from an administrative decision to a court ... confers original and not appellate jurisdiction.”

The High Court emphasised that the powers, functions and duties of the court were those found in the statute conferring jurisdiction.

- 8 In *Osland* Hayne and Keifel JJ stressed that the task of the appellate body is twofold. The first and essential task is to determine whether the decision maker (the Tribunal in that case or a Commissioner in the case of an appeal under s 56A) erred in law. The second task required the appellate body to make the orders that it was empowered to make by the statute. The appellate body was not permitted, under a provision such as s 148 (and therefore s 56A) to assume the role of the Tribunal and substitute its own decision: see at [75].

- 9 *Osland* is also important for the following reasons (albeit incidental to the topic of this paper):

- First it contains a clear reminder
  - of the necessity of having a clearly defined question of law;
  - and that the existence of a question of law is ... not merely a qualifying condition, but is also the subject matter of the appeal itself (*TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation* [1988] FCA 119; 82 ALR 175 at 178
- Secondly, it states what the function of a court is when a matter is remitted to it. If the orders of the decision maker are set aside, that is a final decision of the appellate court, not an interlocutory one. In

other words, on remitter, the decision maker or lower court does not proceed on the basis that any unchallenged portion of its decision remains in place.

- 10 With these introductory observations aside, I propose to examine the scope of the jurisdiction of the reviewing court under s 56A of the Act, as well as the circumstances in which an appeal lay from the Land and Environment Court to the Court of Appeal under s 57(1), that is, on a question of law. I will then examine the distinction between questions of law and fact in: (i) the process of determining the facts; (ii) findings of fact; (iii) the determination of the applicable law; and (iv) the application of the law to the facts found.

### **The scope of jurisdiction**

- 11 The importance of the language of the statute in determining the nature of the proceeding in the appellate court and its powers and functions was central to the High Court's decision in *Kostas v HIA Insurance Services Pty Limited* [2010] HCA 32. In the Court of Appeal in *HIA Insurance Services Pty Ltd v Kostas* [2009] NSWCA 292, Basten JA, at [84]-[86], had characterised statutory appeals into three categories:

- (1) appeal from a decision that "*involves a question of law*".
- (2) appeal "*on a question of law from a decision of*" a tribunal.
- (3) appeal from a decision of a Tribunal "*on a question of law*".

- 12 In the first type of appeal, the High Court has held that "*if some question of law be involved, the whole decision of the Board, and not merely the question of law, is open to review*": *XCO Pty Ltd v Federal Commissioner of Taxation* [1971] HCA 37; 124 CLR 343 at [10]; see also *Ruhamah Property Co Ltd v Federal Commissioner of Taxation* [1928] HCA 22; 41 CLR 148, at 151.

- 13 The second type of appeal was of the kind considered by the High Court in *Osland* and *Tasty Chicks* and the comments made earlier apply. In particular, a provision in these terms does not “*provide a simple gateway to an appeal by way of rehearing upon the identification of some question of law that is sought to be argued in the appeal*”: *B & L Linings Pty Limited & Anor v Chief Commissioner of State Revenue* [2008] NSWCA 187, at [39], (per Allsop P, Giles JA agreeing).
- 14 What is to be noticed in respect of the third category is the different approach taken by the High Court on appeal from that taken by Basten JA. Basten JA considered that the words “*appeal from a decision*” were important. According to his Honour, at [86], in this category:

“... it is not sufficient to identify some legal error attending the judgment or order of the Tribunal; rather it is necessary to identify a decision by the Tribunal on a question of law, that decision constituting the subject matter of the appeal.”

The practical import of this approach was that e.g. a ‘no evidence’ finding did not fall within this category of appeal because there was no ‘decision’ on a question of law. There was an error of law but that did not fall within the appeal provision.

- 15 The High Court rejected that approach, commenting that “[t]he language of the statute must be the relevant starting point, not a taxonomy which seeks to reduce a wide variety of statutory provisions to a few discrete categories”: *Kostas v HIA Insurance Services Pty Limited* [2010] HCA 32 at [89].

### **The reviewing court’s jurisdiction under ss 56A**

- 16 In *Kostas*, the Court was concerned with an ‘appeal’ from a decision of the Consumer Trader and Tenancy Tribunal (the Tribunal) to the Supreme Court “*of a question with respect to a matter of law*”. The underlying

matter was a building dispute. The Tribunal had held that Mr and Mrs Kostas had not validly terminated the building contract. On appeal to a single judge of the Supreme Court, it was held the contract had been validly terminated. On appeal from the judge's decision, the Court of Appeal held that the judge did not have jurisdiction, as there was **no decision** of a Tribunal on a question of law.

17 The High Court, in allowing the appeal from the Court of Appeal, observed that the finding of the Tribunal that the contract had not been validly terminated was a finding for which there was no evidence. The Court pointed out that an appeal under the relevant provision was not limited to an appeal against explicit findings. It extended to implicit findings, such as is involved in a 'no evidence' point: see French CJ at [24].

18 French CJ noted, at [24], the controlling effect of the words "**with respect to**" in the appeal provision, pointing out that it was a "*prepositional phrase of indefinite content*", as was the case with like phrases such as "*in relation to*" and "*in connection with*". Given the width of those words, his Honour considered that the appeal provision, whilst obviously excluding appeals on a question of fact, encompasses appeals on questions of law and on questions of mixed fact and law. To the extent that earlier Court of Appeal authority confined an appeal under this section to a question of law only, his Honour considered those decisions were wrong.

19 His Honour had noted in the previous paragraph, [23], that the right of appeal under s 67 was not limited to **explicit decisions formulated in the proceedings**, but that s 67:

“... extends to decisions which **were necessary steps** in the Tribunal's reasoning, whether or not made explicit by the Tribunal.”  
(emphasis added)

20 The same point was made in the joint judgment by Hayne, Heydon, Crennan and Kiefel JJ who stated, at [69]:

“Section 67(1) of the Tribunal Act permitted the appellants to appeal to the Supreme Court against the Tribunal's decision that there was material properly before the Tribunal which supported the conclusion that the disputed claims for extension of time had been served on the appellants. **The conclusion that there was material of that kind, necessarily implicit in making the finding that the disputed claims had been served, was a decision with respect to a question of law.**” (emphasis added)

21 Their Honours further stated, at [78]:

“... that there was no evidence that the builder had served the two critical claims for extension of time. (It will be recalled that the conclusion that those two claims for extension had been validly served was a **necessary step in the Tribunal reaching its conclusion** that the appellants had repudiated the contract.)” (emphasis added)

22 There were a series of cases in the Court of Appeal awaiting the High Court's decision in *Kostas*. I will refer to the reasons of Allsop P to demonstrate how the Court of Appeal looked at the question following the High Court's decision: *Edyp & Ors v Brazbuild Pty Ltd* [2011] NSWCA 218. That case was also a building case and involved an appeal from the Tribunal to the Supreme Court pursuant to s 67 of the Act.

23 Allsop P observed, at [24], that an appeal from a decision with respect to a question of law included an implied decision. His Honour referred to the passages quoted above.

24 His Honour next identified when an implied decision could be subject of an appeal under a provision presently under consideration, relying upon the way it had been explained in *Kostas* as follows:

- “decisions which were necessary steps in the Tribunal's reasoning”: at [23]) per French CJ;
- “necessarily implicit in making the finding”: at [69] per the plurality;
- “necessary step in the Tribunal reaching its conclusion”: at [78];
- “necessarily depended upon”: at [91].



25 Allsop P then said that once it was recognised that the statutory language encompassed any implicit decision expressed in these terms, it followed that the decision may concern a question or matter not specifically addressed by the parties. His Honour observed that French CJ said as much, at [23] and [59].

26 His Honour, at [57], suggested this approach to the determination of whether there was a decision on a question of law:

“Whether or not a decision on a question with respect to a matter of law exists will generally be discerned from the nature of the asserted error giving rise to the plaintiff’s dissatisfaction. From the error, the question and decision will be identifiable. Each of the question and decision may be express (or implied in the way described by the High Court in *Kostas*).”

27 Having regard to the High Court’s statement that a mixed question of fact and law fell with s 67, it can safely said that a mixed question of fact and law constitutes a question of law for the purposes of s 56A (and s 57) and that decisions of the Court of Appeal to that effect remain good law. For example, Mason P, Tobias JA agreeing, in *NSW Aboriginal Land Council v Minister Administering The Crown Lands Act* [2007] NSWCA 281; 157 LGERA 18 held, at [8], that:

“An appeal on a question of law is not confined to an error of law and it extends to questions of mixed law and fact (*Maurici v Chief Commissioner of State Revenue* [2003] HCA 8; 212 CLR 111 at [8]; *Mir Bros Unit Constructions Pty Ltd v Roads and Traffic Authority (NSW)* [2006] NSWCA 314 at [27]).”

28 See also Sackville AJA in *Minister Administering the Crown Lands Act v La Perouse Local Aboriginal Land Council* [2012] NSWCA 359, at [62].

29 The first is the level of scrutiny that should be given to the language of the primary decision maker. An appeal under s 56A is from a Commissioner.

Kirby P in *Brimbella Pty Ltd v Mosman Municipal Council* (1985) 79 LGERA 367, at 368, commented:

“I believe that it is undesirable in an appeal from a lay tribunal where the appeal court is confined to a question of law, that it should examine too narrowly the words used in the decision, at least unless the words are central to the decision involved ...

Here, the parliament has specifically envisaged a tribunal which included lay assessors. It would be quite wrong, in my opinion, for this Court to examine their decisions as if they were written by a lawyer. I am not, by these comments, suggesting double standards; simply that the Court should take into proper account the composition of the tribunal, as it has been created by the parliament.”

- 30 Such an approach has been endorsed in subsequent cases: see *Carstens v Pittwater Council* [1999] NSWLEC 249; 111 LGERA 1 at [68]; *Bonim Stanmore Pty Ltd v Marrickville Council* [2007] NSWLEC 286; 156 LGERA 12 at [6]-[7]. However, to say that the appellate body should not overly scrutinise the language is not to say that the appellate can overlook or “tread softly in finding’ errors of law. It is necessary to discern what it was that the decision maker decided, either expressly or implicitly.

#### **The appellate court’s jurisdiction under s 57**

- 31 The jurisdiction exercised under s 57(1) is a true appellate jurisdiction. However, as was said by Allsop P, at [70], in respect of s 54 of the *Government and Related Employees Appeal Tribunal Act 1980* (GREAT Act), it is the “*underlying decision from whose decision the appeal lies, and not the appeal itself, which must be ‘on a question of law’*”.
- 32 Another important distinction between appeals brought pursuant to ss 56A and 57 is the content of s 57(4) which mean that an appeal brought pursuant to that section must satisfy different conditions than an appeal under s 56A. Section 57(4) of the *LEC Act* provides that for certain categories of decision, an appeal lies only by way of leave. In *Huang v*

*Hurstville City Council* [2012] NSWCA 177, at [9]-[10], the Court of Appeal held:

“The question sought to be agitated on appeal is undoubtedly a ‘question of law’ within the meaning of s 57(1) of the [*LEC*] Act but the legislative intent manifested by s 57(4) is that that circumstance is insufficient of itself to entitle a party to appeal to this Court against a decision such as that of Pain J. Something more is required. ... Section 57 makes it clear that the legislature intended that in some, and perhaps many, cases the LEC’s decision on a question of law will not be subject to appeal.”

- 33 Finally, it is to be remembered that an appeal pursuant to s 57, although on a question of law, is by way of rehearing: s 75A. This leads to the next area to be discussed.

### **The powers of the reviewing court**

- 34 In terms of what needs to be shown for demonstrated legal error to lead to remedial consequences and the exercise the powers granted by subs 2 of both ss 56A and 57 of the *LEC Act*, reference is typically made to Moffitt P in *Leichhardt Municipal Council v Seatainer Terminals Pty Ltd* (1981) 48 LGRA 409 at 419. Moffitt P there held:

“It is not sufficient to show that some error of law appears in the judgment or during the course of the trial. The error has to be one upon which the decision depends, so the decision is vitiated by the error. It will not suffice to establish that one or some only of a number of alternate findings upon which the decision depends, so the decision is vitiated by the error. It will not suffice to establish that one or some only of a number of alternate findings upon which the decision was given involved errors of law, if one alternative involved no error of law.”

- 35 See also *Darley Australia Pty Ltd v Walfertan Processors Pty Ltd* [2012] NSWCA 48; 188 LGRA 26 where McColl JA, Macfarlan and Whealy JA agreeing, stated, at [78], the “*question of law complained of must be one on which the impugned decision depended, so as to vitiate the ultimate decision*”: citing *Seatainer Terminals*; *Sydney Water Corporation v Caruso and Others* (2009) 170 LGRA 298; and *Trazivuk v Motor*

*Accidents Authority (NSW) & Others* (2010) 57 MVR 9. See also *Brinara Pty Ltd v Gosford City Council* [2010] NSWLEC 230; 177 LGERA 296 at [30].

36 Next, it is important to note that sub (2) in ss 56A and 57 of the *LEC Act* does not expand the scope of the reviewing courts jurisdiction. This is the point made at [9] above. As already stated, the Court in *Osland v Secretary to the Department of Justice* [2010] HCA 24 was concerned with the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). Section 148(1) of that Act provides that a party to a proceeding may appeal, on a question of law, from an order of the Tribunal. Section 148(7) specifies the powers of the reviewing court if error of law was found.

Those powers are:

- (a) an order affirming, varying or setting aside the order of the Tribunal;
- (b) an order that the Tribunal could have made in the proceeding; an order remitting the proceeding to be heard and decided again;
- (c) and any other order the court thinks appropriate.

37 French CJ, Gummow and Bell JJ stated, at [19], that s 148(7) does not enlarge the court's jurisdiction. Rather, s 148(7) confers powers on the court in aid of its exercise. See also Hayne and Kiefel JJ at [78].

38 This approach mirrors the position of the High Court in respect of the *AAT Act*, s 44(4) which grants the reviewing Court the power to "*make such order as it thinks appropriate by reason of its decision*". Despite the width of that provision, the High Court had held that in the exercise of jurisdiction "*the appellate body should not usurp the fact-finding function of the AAT*": *Repatriation Commission v O'Brien* [1985] HCA 10; 155 CLR 422 at 430 per Gibbs CJ, Wilson and Dawson JJ. In *Osland*, French CJ, Gummow

and Bell JJ commented that this observation was determined by the text of s 44 and not separation of powers concerns: see at [19].

39 Put in simple terms, subs (1) defines jurisdiction and subs (2) defines the power of the court in exercising this jurisdiction. As Allsop P in *Sydney Water Corporation v Caruso* [2009] NSWCA 391; 170 LGERA 298 explained, at [7], “[w]hilst [the language of s 57(2) uses] wide words, their content is to be assessed by their place in the remedial consequences of dealing with an error of law”.

40 That brings me to the interplay of s 57 and s 75A of the *Supreme Court Act*. In *Maurici v Chief Commissioner of State Revenue* [2001] NSWCA 78, 51 NSWLR 673, Handley JA, with whom Beazley and Giles JJA agreed, was of the opinion that under s 57 the Court had no power to make findings of fact or re-exercise a discretion: see at [54]-[56]. This decision was based primarily on the precedents relating to the supposedly indistinguishable provisions of the *Compensation Court Act* 1984, s 32(2) considered in *North Broken Hill Ltd v Tumes* [1999] NSWCA 309; 18 NSWCCR 412.

41 Whilst *Maurici* was not followed in *Thaina Town (On Goulburn) Pty Ltd v City of Sydney Council* [2007] NSWCA 300; 71 NSWLR 230, this was only to the extent that it was seen as restricting the reviewing court’s power beyond making findings of fact. Spigelman CJ commented, at [102], Mason P, Beazley, Giles and Ipp JJA agreeing:

“It is not necessary for this Court to reconsider the earlier line of authority with respect to the power of the Court to make findings of fact. Plainly it is generally undesirable for this Court to exercise such a power, if any. The position is not, however, the same with respect to the exercise of a discretion ...”

42 The Court in *Thaina Town* held that it could exercise a costs’ discretion pursuant to subs (2)(b) of s 57 of the *Land and Environment Court Act*. Spigelman CJ explained, at [104]:

“The reasoning in *Tumes* adopted in *Maurici* is based on implication as to what Parliament’s intention was by confining the Court’s jurisdiction to a question of law. However, confining a power conferred as ancillary or consequential upon the hearing of an appeal, involves a further step that does not ineluctably flow from the fact that the jurisdiction is identified in such terms.”

43 Earlier, at [72], Spigelman CJ had noted:

“Where no new findings of primary fact are required to be made, this Court should exercise a power {viz s 23 of the Supreme Court Act] conferred upon it in wide terms so as to ensure the just and efficient administration of justice.”

44 This question was the subject of consideration in *Kostas*. Although s 75A(5) provides that an appeal to the Court is by way of rehearing, s 75A(4) provides that the section has effect “*subject to any other Act*”. That was important in *Kostas* because the appeal to a judge of the court was also governed by s 75A and French CJ pointed out that the effect of s 75A(4) was such that the limited appeal under s 67 was not converted into an appeal by way of rehearing. French CJ also expressly endorsed what had been said by Spigelman CJ in *Thaina Town* in the passage quoted above.

45 In *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council* [2009] NSWCA 138: 166 LGERA 379. Ipp JA held, at [63], that, following *Thaina Town*, the Court of Appeal is entitled to modify “the formulation of a judgment on the basis of facts found by the primary judge and facts that are not in dispute”. Tobias JA, at [167], was of the opinion that following *Thaina Town*, if the Court finds error on the part of the court below on a question of law, the reviewing court “*has the power to determine any question consequential upon that finding which does not require the finding of any new or further facts or the making of inferences from the facts as found*”. Basten JA was of a similar view.

46 In *Murlan Consulting Pty Ltd v Ku-ring-gai Municipal Council* [2009] NSWCA 300 Basten JA (Macfarlan JA agreeing) suggested, at [70], that the following principles could be extracted from the case law:

- “(a) despite the apparent breadth of sub-s (2), the kind of orders permitted will be limited by reference to the subject matter of the appeal;
- (b) because the appeal is limited to a decision by the Land and Environment Court on a question of law, the orders should properly be limited to that which is appropriate to correct an erroneous decision in that Court;
- (c) a finding of error does not open a gateway to reconsideration of factual findings made in the Land and Environment Court;
- (d) nor is a review of factual findings permitted under s 75A of the Supreme Court Act 1970 (NSW);
- (e) on the other hand, the Court is not necessarily limited to orders of the kind which would be appropriate on judicial review;
- (f) in particular, the Court may make orders disposing of the proceedings on the basis of facts fully found by the Land and Environment Court or otherwise agreed, or (arguably) on the basis of findings which are the only ones reasonably open in the circumstances, and
- (g) the Court may exercise a discretionary judgment in disposing of costs orders in the Land and Environment Court.”

### **The distinction between questions of law and fact**

47 Despite the familiarity of provisions such as ss 56A and 57 and their importance, the distinction between questions of fact and law have been, and continue to be, mired in uncertainty. The case law has described the distinction as “*elusive*”<sup>3</sup> and “*slippery*”.<sup>4</sup> The High Court in *Collector of Customs v Agfa-Gevaert Limited* [1996] HCA 36; 186 CLR 389 explained at 394:

“Notwithstanding attempts by many distinguished judges and jurists to formulate tests for finding the line between the two questions, no satisfactory test of universal application has yet been formulated.”

<sup>3</sup> *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 322; 43 FCR 280 at 287

<sup>4</sup> *Inn Leisure Industries Pty Ltd (Prov Liq) v DF McCloy Pty Ltd (No 1)* (1991) 28 FCR 151 at 168. See Mark Aronson, “Unreasonableness and Error of Law” (2001) 24(2) *University of New South Wales Law Journal* 315 at [64]. *Nizich v Commissioner of Taxation (Cth)* (1991) 22 ATR 438 at 444.

48 On one level, there is a concern that reviewing courts manipulate the distinction for their own purposes. In an often quoted statement, Scrutton LJ in *Currie v Commissioners of Inland Revenue* [1921] 2 KB 332 commented at 339:

“... there has been a very strong tendency, arising from the infirmities of human nature, in a judge to say, if he agrees with the decision ... that the question is one of fact, and if he disagrees . . . that it is one of law, in order that he may express his own opinion the opposite way.”

49 On another level, the nature of facts and law makes the distinction inherently hard to make clear. As Professor Dickinson wrote in 1927:

“Matters of law grow downward into roots of fact and matters of fact reach upward without a break, into matters of law. The knife of policy alone effects an artificial cleavage where the court chooses to draw the line.”<sup>5</sup>

50 The difficulty in any categorisation of questions of fact and law thus “[/lies] at the intersection of these two groups of kinds of questions”.<sup>6</sup>

### **The conceptual apparatus**

51 For the purposes of clarity, it is useful to structure an analysis of questions of law and fact into the steps that a trial judge/tribunal member must overcome to resolve the matter under dispute. Glass JA provided a tripartite classification in *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139. At 156, Glass JA suggested that there were three points at which a judge could fall into error:

(1) “*determining the facts by way of primary findings and inferences*”;

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<sup>5</sup> Dickinson, *Administrative Justice and the Supremacy of the Law* (1927) at 55

<sup>6</sup> Etienne Mureinik, “The Application of Rules: Law or Fact?” [1982] 98 *The Law Quarterly Review* 587 at 587.



(2) “*directing [themselves] as to the law*” and

(3) “*applying the law to the facts found*”.

52 There is, however, an antecedent point at which a trial judge/tribunal member may fall into error. Aronson and Dyer suggest that a legal error may be committed in the process of “*determining the facts*”: Mark Aronson and Mathew Groves, *Judicial Review of Administrative Action*, 5<sup>th</sup> ed (2013) Lawbook Co at [4.130].

### **The process of determining the facts**

53 The notion that the legal error may occur in the process of determining the facts is familiar and uncontroversial. An archetypal example is the denial of procedural fairness: see *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; 204 CLR 82.

54 Does such an error fall within a provision such as subs (2) of s 56A and s 57 where the ‘appeal’ is conditioned on a decision on a question of law? Unlike in *Kostas*, where the question was whether there was an implied decision, the question presently under discussion relates to the manner in which the decision acted in making the decision.

55 *Kostas*, would, in my opinion, give a positive answer to that question.

56 However, there is pre-*Kostas* authority to the contrary.

57 In *Hutchinson v Roads and Traffic Authority* [2000] NSWCA 332 (a decision relating to the GREAT Act, s 54, which is in the same terms as subs (2) of s 56A and s 57), Giles JA (with whom Meagher and Powell JJA agreed) said, at [33]:

“S54 of the Act enables an appeal against any decision, whether final or interlocutory, which is a decision on a question of law ...

The word "decision" is important. **It includes an opinion of the Tribunal on a question of law upon which its determination is based** (*Clisdell v Commissioner of Police* at 559; *Commissioner of Police v Donlan* (CA, 8 August 1995, unreported)), **but it is not enough that an error of law has occurred in the course of a hearing before the Tribunal** (*Totalisator Agency Board of New South Wales v Casey* (1994) 54 IR 354 at 359; *Wijesuriya v The Director-General of Conservation and Land Management* (1994) 54 IR 384 at 385). (emphasis added).

58 His Honour noted that In *Totalisator Agency Board of New South Wales v Casey* Kirby P, at 360, had held that when the Tribunal denied procedural fairness by relying on matters not the subject of evidence or argument, it had made an error of law but had not made an error in deciding a question of law. The other members of the Court did not think there had been a denial of procedural fairness.

59 In *Director-General, Dept of Ageing, Disability and Home Care v Lambert* [2009] NSWCA 102; 74 NSWLR 523 Basten at [75], referred to the comments of Kirby P and observed that:

"There is something to be said for the view that, where a tribunal has exceeded the bounds of its legal authority by failing to accord procedural fairness, such an error does not constitute a decision of the tribunal on a question of law: see *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208, (2005) 3 DDCR 1 (at 53 [159]) and, in relation to a failure to give reasons, *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 at 399 [130]."

60 How do these statements stand having regard to what has been decided by the High Court in *Kostas*? Accepting that the decision of the court below on a question of law may be an implicit decision, it would seem that a failure to accord with the requirements of procedural fairness involves a determination where implicitly, the matter in issue was decided in circumstances where there was an error of law. This position is already reflected in the judgments of the Land and Environment Court: see *Cavasinni Constructions Pty Ltd v Fairfield City Council* [2010] NSWLEC 65; 173 LGERA 456 at [39]; *Aldi Stores v Newcastle City Council* [2010] NSWLEC 227 at [41]-[42].

61 Interestingly, in *Lambert* the various members of the Court considered that provided that there was a decision on a question of law implicit in the reasoning there was a ‘decision on a question of law’. Hodgson JA, with whom Tobias JA agreed, in finding that the reviewing court had jurisdiction pursuant to s 54, commented, at [28]:

**“It is not necessary that the question of law be explicitly stated and decided by the Tribunal. It is sufficient if a decision of the Tribunal is such that a resolution of a question of law is manifested by it: see *Scicluna v New South Wales Land and Housing Corporation* (2008) 72 NSWLR 674 at 676 [3]–[4], and *Douglas v New South Wales Land and Housing Corporation* [2008] NSWCA 315 at [17]–[18]” (emphasis added).”**

62 Basten JA, at [70]-[71], agreed with the majority on this issue. Basten JA believed that the “*appropriate approach*” with respect to s 54 was described by court in *Grygiel v Baine* [2005] NSWCA 218, at [29], from which he quoted:

**“It is not necessary that the matter of law be separately identified by the Tribunal and expressly addressed as such: it is sufficient that the Tribunal reaches a conclusion with respect to some matter which requires for its determination the identification of a relevant matter of law and that error is alleged with respect to that matter of law” (emphasis added).**

63 In *Lambert* it was held that errors with respect to relevant and irrelevant considerations fell within the terms of the statutory appeal. Basten JA explained, at [71]:

**“Because such questions involve assessment of the proper scope of the Tribunal’s power and jurisdiction, there is an implicit decision on a question of law with respect to any consideration which is deemed relevant or irrelevant. Such a conclusion involves the view that a consideration is mandatory (relevant) or prohibited (irrelevant) as a matter of law.”**

64 High Court authority on this question is to be found in *Maurici v Chief Commissioner of State*: see at [8], where the Court stated:

“An appeal lay, and was taken from that decision to a judge of the Land and Environment Court on a question of law pursuant to s 56A of the *Land and Environment Court Act 1979* (NSW). We do not doubt that the question argued there, and again here, as to the relevance of scarcity, was a question of at least mixed law and fact. The making of a valuation will frequently involve an application of legal principle or principles. Questions of law, fact and opinion do not always readily and neatly divide themselves into discrete matters in valuation cases and practice. The Privy Council took this view, with which we respectfully agree, of what may constitute a point, or question of law in relation to a valuation of land.”

- 65 The Court referred to *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426 at 432:

“If it should appear that the Land Appeal Court ignored a principle of assessment of compensation for compulsory acquisition (resumption), such as for example that commonly known as the *Point Gourde* principle, that in their Lordships' opinion would be an error in law. So also if the Land Appeal Court rejected as wholly irrelevant to assessment of compensation a transaction which prima facie afforded some evidence of value and rejected it for reasons which were not rational, that in their Lordships' opinion would be an error in law. And as will be seen, it is on those lines that the developer contends that the Land Appeal Court erred in this case.”

- 66 Another type of error that falls within the a provision such as subs (2) was described by Glass JA in *Azzopardi* in these terms, at 156:

“[The trial judge] [*misdirects themselves*] *ie has defined otherwise than in accordance with law the question of fact which he has to answer*”

### **Findings of facts (the first stage)**

- 67 One would assume that the finding of facts would, by definition, be unassailable by a reviewing court whose jurisdiction is limited to questions of law. The reality is more complex.

68 It is accepted that the question whether there is any evidence for a finding of fact is a question of law. Kirby P in *Azzopardi* commented that a trial judge is exposed to review on point of law if “*it can be shown that there is no evidence of a primary fact*”: see at 151. Glass JA agreed with Kirby P in this regard. Glass JA, at 155, made reference to Jordan CJ in *McPhee v S Bennett Ltd* (1934) 52 WN (NSW) 8 at 9 (Davidson and Stephen JJ concurring). Jordan CJ there held:

“The question whether there is any evidence of a particular fact is also a question of law: *Sittingbourne Urban District Council v Lipton Ltd* [1931] 1 KB 539 at 544 and *Mersey Docks and Harbour Board v West Derby Assessment Committee* [1932] 1 KB 40 at 110, 111. But if there is evidence of the fact, the question whether that evidence ought to be accepted in whole or in part, or ought to be accepted as sufficient to establish the fact, is itself a question of fact and not a question of law, unless, of course, there is some law which provides that the particular evidence, when given, is to be taken to establish the fact. If a tribunal which has exclusive jurisdiction to determine facts decides that it does not accept the evidence tendered as establishing a particular fact, its decision, apart from the exceptional case which I have just mentioned, is conclusive. ... There is no rule of law that such a tribunal must believe the evidence, because it is all one way. It can accept all, or some, or none of it.”

69 Glass JA also made reference to Jordan CJ’s judgment in *Australian Gas Light Co* at 137-138. Jordan CJ held that “[a] *finding of fact by a tribunal of fact cannot be disturbed if the facts inferred by the tribunal, upon which the finding is based, are capable of supporting its finding, and there is evidence capable of supporting its inferences.*” Jordan CJ did, however, go on to observe that such a finding of fact could be disturbed by a reviewing court whose jurisdiction was limited to questions of law, where there is either “*no evidence to support its inferences*”, or “*if the facts inferred by it and supported by evidence are incapable of justifying the finding of fact based upon those inferences*”.

70 The issue was also considered by Mason J (Brennan J agreeing) in *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321, a case concerned with judicial review under the *Administrative Decisions*

(*Judicial Review*) Act 1977 (Cth). At [87]-[89], Mason J commented on the position at common law as follows:

“The question whether there is any evidence of a particular fact is a question of law: *McPhee v S Bennett Ltd.* (1934) 52 WN (NSW) 8, at p 9; *The Australian Gas Light Co v The Valuer-General* (1940) 40 SR (NSW) 126, at pp 137-138. Likewise, the question whether a particular inference can be drawn from facts found or agreed is a question of law: *Australian Gas Light*, at pp 137-138; *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1, at pp 8-9. This is because, before the inference is drawn, there is the preliminary question whether the evidence reasonably admits of different conclusions: *Federal Commissioner of Taxation v Broken Hill South Ltd* [1941] HCA 33; 65 CLR 150, at pp 155, 157, 160. **So, in the context of judicial review, it has been accepted that the making of findings and the drawing of inferences in the absence of evidence is an error of law:** *Sinclair v Maryborough Mining Warden* [1975] HCA 17; 132 CLR 473, at pp 481, 483.

But it is said that ‘(t)here is no error of law simply in making a wrong finding of fact’: *Waterford v The Commonwealth* [1987] HCA 25; 163 CLR 54, per Brennan J. at p 77. Similarly, Menzies J. observed in *Reg. v The District Court; Ex parte White* [1966] HCA 69; (1966) 116 CLR 644, at p 654:

‘Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (e.g. illogical) inference of fact would not disclose an error of law.’

Thus, at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is some basis for an inference - in other words, the particular inference is reasonably open - even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place” (emphasis added).

71 That a “no evidence” ground of appeal will raise a question of law has recently been confirmed by the High Court: *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; 241 CLR 390 at [91]. Hayne, Heydon, Crennan and Kiefel JJ held, at [91], that:

“Whether there was no evidence to support a factual finding is a question of law, not a question of fact.”

A tribunal that decides a question of fact when there is “no evidence” in support of the finding makes an error of law (134). What amounts to material that could support a factual finding is ultimately a question for judicial decision. It is a question of law.

- 72 In New South Wales, there is also authority for the proposition that acting without probative evidence is an error of law. In *Bruce v Cole* (1998) 45 NSWLR 163 Spigelman CJ (Mason P, Sheller and Powell JJA agreeing) held at 188 that “*acting without probative evidence is the equivalent of no evidence*”. *Bruce v Cole* was, however, concerned not with the proper construction of statutory appeal formulas. Rather, it was concerned with the application of common law principles identifying the proper basis for judicial review of administrative action, which Spigelman CJ recognised raised “*different considerations*”: see at 189. Spigelman CJ’s judgment has, however, been cited with approval in the context of appeals limited to an error of law: *Skiwing Pty Ltd v Trust Company of Australia (trading as Stockland Property Management)* [2006] NSWCA 276, at [52], per Spigelman CJ (Bryson JA agreeing); *Ormwave Pty Limited & Anor v Smith* [2007] NSWCA 210; (2007) 5 DDCR 180 at [13] per Beazley JA (Santow and Ipp JA agreeing). But see *Marrickville Metro Shopping Centre Pty Ltd v Marrickville Council* [2010] NSWCA 145; 174 LGERA 67 at [95]-[97] per Tobias JA.
- 73 In *Haider v JP Morgan Holdings Aust Ltd (t/as JP Morgan Operations Australia Ltd)* (2007) 4 DDCR 634, Basten JA (McColl JA agreeing), explained, at [33]:

“... Broadly speaking, error of law will arise in circumstances where a fact is found where there is in truth no relevant and probative material capable of supporting it, or an inference is drawn from a particular fact, which is not reasonably capable of supporting the inference: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 367 (Deane J), referred to by Gleeson CJ in *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at [25]; and see *Bruce v Cole* (1998) 45 NSWLR 163 at 187-189 (Spigelman CJ).”

74 Whilst a ‘no evidence’ ground is a question of law, as the judgments of Jordan CJ and Mason J indicate, the situation is different if there is evidence for the impugned finding. Glass JA in *Azzopardi* explained, at 155, that:

“To say of a finding that it is perverse, that it is contrary to the overwhelming weight of the evidence, that it is against the evidence and the weight of the evidence, that it ignores the probative force of the evidence which is all one way or that no reasonable person could have made it”

may involve an error of fact, but it does not involve an error of law. Glass JA also observed that:

“... It is also pointless to submit that the reasoning by which the Court arrived at a finding of fact was demonstrably unsound as this would not amount to an error of law”

75 Similarly, at 156-157, Glass JA explained that:

“... the determination of facts by a reasoning process marred though it be by patent error, illogicality or perversity will ... never be vulnerable to attack as an error of law”.

76 Kirby P in *Azzopardi* was in dissent on this point. Kirby P was of the opinion, at 151, that if a trial judge:

“... exposes [their] reasons and these reasons demonstrate manifest error or illogicality in the reasoning process; rely on facts which are not established by the evidence or indicate such an unexplained perversity as to suggest that an error has taken place in one of the three stages of the process of judicial decision-making, an error in point of law will be established such as will attract the jurisdiction of this Court and warrant its intervention.”

77 Despite Kirby P’s advocacy for the adoption of his perspective on this fact/law distinction,<sup>7</sup> Aronson and Groves report that “[t]he New South Wales Court of Appeal repeatedly refused to reargue or otherwise constrict

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<sup>7</sup> See eg *Re Minister for Immigration and Multicultural Affairs; ex parte S20/2002* [2003] HCA 3; 77 ALJR 1165 at [78] (Kirby J)



***Azzopardi's principle***: see at [4.200]. For example, in *Commissioner of Police v May* [2001] NSWCA 431 leave to challenge *Azzopardi* was sought and refused: see at [9]. Whilst the Court has queried how the principle of *Azzopardi* will continue to operate within the modern statement of the 'no evidence' rule (that is, that no probative evidence equals no evidence), the Court has held that Glass JA's view remains "*good law*": *Ormwave Pty Limited & Anor v Smith* [2007] NSWCA 210; (2007) 5 DDCR 180 at [13]-[15] per Beazley JA (Santow and Ipp JA agreeing). See also *CSR Ltd v Amaca Pty Ltd* [2009] NSWCA 338; 9 DDCR 221 at [16] and [26] per Allsop P and [86] per Basten JA. As Aronson and Groves suggest, at [4.200], Kirby P's fears about the restrictions placed on the jurisdiction of reviewing courts by Glass JA's approach have not come to fruition because a reviewing court confined to questions of law can "*correct perverse or unreasonable applications of the law to the facts found*". This is the third stage of *Azzopardi*, to be discussed below.

### **Determining the applicable law (the second stage)**

78 Whilst Glass JA in *Azzopardi*, at 157, stated that at the stage of determining the applicable law, "*any error made will by definition be an error of law*", the situation is not so simple. As the Federal Court in *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 322; 43 FCR 280 explained, "*[t]he proper interpretation, construction and application of a statute to a given case raises issues which may be or involve questions of fact or law or mixed fact and law*".<sup>8</sup> The court identified a number of propositions as to whether a question of law or fact is at issue:

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 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 or interpretation is established is a question of law ...” (citations omitted)
5. The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law.” (citations omitted)

79 The first proposition, that the question whether a word or phrase in a statute has an ordinary or some technical/ other meaning is a question of law, is not open to much doubt. In *New South Wales Associated Blue-Metal Quarries Ltd v Commissioner of Taxation (Cth)* [1956] HCA 80; 94 CLR 509 at 512 the High Court, in its original jurisdiction, was concerned with whether expenditure had been incurred in connection with “*mining operations upon a mining property*” for income tax purposes. In his reasons, Kitto J held that “[f]irst it is necessary to decide as a **matter of law** whether the Act uses the expression ‘mining operations’ and ‘mining property’ in any other sense than that which they have in ordinary speech” (emphasis added).

80 The second proposition also has substantial support in the case law. In *Blue-Metal Quarries Ltd*, for example, Kitto J commented that “[t]he common understanding of the words has therefore to be determined, and that is a question of fact”. See also *Federal Commissioner of Taxation v Broken Hill South Ltd* [1941] HCA 33; 65 CLR 150 at 155 per Starke J; and 160 per Williams J. Jordan CJ in *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126, at 137, said:

“The question what is the meaning of an ordinary English word or phrase as used in the Statute is one of fact not of law. This question is to be resolved by the relevant tribunal itself, by considering the word in its context with the assistance of dictionaries and other books, and not by expert evidence ...” (citations omitted).

81 The proposition is also supported by the decision of the House of Lords in *Brutus v Cozens* [1973] AC 854. That case concerned an individual who was charged under the *Public Order Act 1936* for “*insulting behaviour*” in relation to a protest at Wimbledon. The Divisional Court had set aside the

judgment of the Magistrates (that the behaviour was not insulting within the terms of the Act) and remitted the case for rehearing. The Divisional Court's judgment was based on the belief that "*insulting behaviour*" in the Act was behaviour that affronted other people and evidenced a disrespect or contempt for their rights.

- 82 An appeal was brought from the Divisional Appeal to the House of Lords. The House of Lords reversed the Divisional Court on the basis that a question of fact, not law, was involved. Lord Reid held, at 861, that the "*meaning of an ordinary word of the English language is not a question of law*". As Lord Morris of Borth-y-Gest commented, at 863, "[t]he words '*insulting behaviour*' are words that permit of ready comprehension". The thrust of the House of Lords' criticism was that the Divisional Court had formulated a definition of insulting behaviour and then tested the appellant's behaviour against that. This was incorrect, because:

"... The Act contains no such definition and indeed no words of definition are needed. The words of the section are clear and they convey of themselves a meaning which the ordinary citizen can well understand."

- 83 Authority for the third proposition is found in the judgment of Jordan CJ in *Australian Gas Light Co*. Following his comment that the ordinary meaning of a word is a question of fact, Jordan CJ stated, at 137, that "*evidence is receivable as to the meaning of technical terms and the meaning of a technical legal term is a question of law*" (citations omitted).

- 84 There is also authority for the fourth proposition. Lord Reid in *Cozens*, for example, held, at 861, that:

"The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what that unusual sense is."

- 85 Isaacs J in *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 adopted a distinction between the meaning of words and their "*legal*

*effect*”: see at 78. Isaacs J, at 79, held that whilst the meaning of a word may be a question of fact, construction is a “*pure matter of law*”. (Isaacs J was dealing with the interpretation and construction of a contract and *not* the distinction between questions of law and fact in the process of statutory interpretation. However, the same principle applies.)

### Reflections on the *Pozzolanic* propositions

86 The High Court in *Collector of Customs v Agfa-Gevaert Limited* [1996] HCA 36; 186 CLR 389 commented, at 396, that:

“Such general expositions of the law are helpful in many circumstances. But they lose a degree of their utility when, as in the present case, the phrase or term in issue is complex or the inquiry that the primary decision-maker embarked upon is not clear.”

87 In particular, the Court in *Agfa-Gevaert*, at 396-397, questioned the distinction between the second and fourth propositions identified in *Pozzolanic*, that is, that the ordinary meaning of a word is a question of fact and that the construction of a term whose meaning is established is a question of law. The Court stated, at 396, that the “*strongest support for the distinction between meaning (a question of fact) and construction (a question of law)*” lay in the judgment of Isaacs J in *Phillips*. In *Phillips* Isaacs J stated:

“A document purporting to be a contract may be ambiguous. But the term ‘ambiguity’ is itself not inflexible. It may arise from doubt as to the construction in their totality of the ordinary and in themselves well-understood English words the parties have employed. That is true construction. Or it may arise from the diversity of subjects to which those words may in the circumstances be applied. That is rather interpretation of terms. Or again, it may arise from obscurity as to the full expression in ordinary language of some abbreviated term or arbitrary form that has been adopted. That again is interpretation of terms. Very different consequences attach according as the ambiguity rests in construction or in interpretation. Lindley LJ in *Chatenay v Brazilian Submarine Telegraph Co* (1891) 1 Q.B. 79, at 85 employs the same word ‘construction’ for both ideas, but keeps the ideas distinct. He says: ‘The expression ‘construction,’ as applied to a

document, at all events as used by English lawyers, includes two things: first, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them. The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law.' The 'meaning of the words' is what I call interpretation, whether the words to be interpreted into ordinary English are foreign words or code words or trade words or mere signs or even ordinary English words which on examination of surrounding circumstances turn out to be incomplete. Their effect when translated into complete English is construction. If that distinction be borne in mind very little difficulty remains."

- 88 After quoting Isaacs J, the High Court in *Agfa-Gevaert* at 396-397, commented that:

"With respect this distinction seems artificial, if not illusory. The meaning attributed to individual words in a phrase ultimately dictates the effect or construction that one gives to the phrase when taken as a whole and the approach that one adopts in determining the meaning of the individual words of that phrase is bound up in the syntactical construction of the phrase in question. In *R v Brown* [1996] 1 AC 543 at 561, a recent House of Lords decision, Lord Hoffmann said:

"The fallacy in the Crown's argument is, I think, one common among lawyers, namely to treat the words of an English sentence as building blocks whose meaning cannot be affected by the rest of the sentence ... This is not the way language works. The unit of communication by means of language is the sentence and not the parts of which it is composed. The significance of individual words is affected by other words and the syntax of the whole."

**If the notions of meaning and construction are interdependent, as we think they are, then it is difficult to see how meaning is a question of fact while construction is a question of law without insisting on some qualification concerning construction that is currently absent from the law."** (emphasis added)

- 89 It was not necessary for the High Court in *Agfa-Gevaert* to resolve the issue for the resolution of the case. The Court held it had jurisdiction in that case because, at 397, "[a]ll that is required for a reviewable question of law to be raised is for a phrase to be identified as being used in a sense different from that which it has in ordinary speech." This is a generally accepted exception to the proposition that the ordinary meaning of a word

is a question of fact and follows logically from the fact a word may bear multiple meanings.

90 Lindgren J, with whom Branson and Mansfield JJ agreed, explained in *Industry Research and Development Board v Bridgestone Australia Ltd* [2001] FCA 954; 109 FCR 564, at [54], the choice between the multiple meanings is “*not a matter of discretion; the statute truly bears only one of the two suggested meanings; the choice made will be correct or incorrect in law ... These considerations show that a question of law is involved*”. Lord Hoffman has suggested, “[t]he meaning of an English word is not a question of law because it does not in itself have any legal significance. It is the meaning to be ascribed to the intention of the notional legislator in using that word which is a statement of law.”<sup>9</sup>

91 It is apparent, therefore, that the distinction drawn between the second and fourth propositions by the Court in *Pozzolanic* may be too simplistic to operate as stand alone propositions of statutory construction. The ordinary meaning of a word may be a question of fact, but it is a question that is subsumed within the process of interpreting the statutory language. When the Court is engaged in a task of statutory construction, it is required to ascertain the proper construction of the statutory provision having regard to the language used by Parliament and the context in which it is used. This process of construction of the statute or the particular provision in the statute is a question of law. As was explained by Mark Aronson, Bruce Dyer and Mathew Groves, *Judicial Review of Administrative Action* (2009) Lawbook Co, Sydney at 213:

“Misunderstanding the governing law has always been an error of law in its own right, and that should include misunderstanding the legal meaning of a statutory term, ordinary or special. Misunderstanding is the error, and that can occur in relation to ordinary as well as technical terms. In other words, the proper meaning of *any* legal term should itself be a question of law. ... If it is error of law to stray beyond the boundaries of an ordinary

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<sup>9</sup> *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44; [2003] 1 WLR 1929 at [24].

meaning, then fixing the ordinary meaning must surely itself be a question of law.”

- 92 The point is made clear by Mason J’s judgment in *Hope v Bathurst City Council* (1980) 144 CLR 1, Gibbs, Stephen, Murphy and Aickin JJ agreeing. The question in issue was whether the appellant was “*carrying on one or more of the businesses or industries of grazing*” (*Local Government Act* 1919, s 118(1)), Mason J noted that the word ‘business’ “*has many meanings*”: see at 8. Mason J went on:

“In truth it is the popular meaning of the word as used in the expression ‘carrying on a business’, rather than the popular meaning of the word itself, that is enshrined in the statutory definition ... This conclusion serves to emphasize that it is necessary to engage in a process of construction in order to arrive at the meaning of the word in s. 118 (1).”

- 93 Mason J, after identifying that the ordinary meaning of a word is typically considered a question fact (see at 9), held that a question of law was involved in the case. His Honour stated, at 10:

“His Honour may have erred in arriving at the common understanding of the word “business”. However, if this was an error, it was associated with an omission to relate the word to the expression with which it was associated, this being an error in construction and accordingly of law.”

- 94 In *Vetter v Lake Macquarie City Council* [2001] HCA 12; 202 CLR 439 Gleeson CJ, Gummow and Callinan J, at [27], observed that “*Mason J pointed out that when it is necessary to engage in a **process of construction of the meaning of a word (or phrase)** in a statute a question of law will be involved, but that the question may be a mixed one of fact and law*” (emphasis added).

- 95 The passage in *Agfa-Gevaert* at 396-397 was cited with approval by Gleeson CJ, Gaudron, Gummow and Hayne JJ, at [36]; and Kirby J, at [138], in *Aktiebolaget Hassle v Alphapharm Pty Ltd* [2002] HCA 59; 212 CLR 411.

96 Santow J confronted the issue in *Anderson Stuart and Ors v Treleaven* [2000] NSWSC 283. Santow J, at [48], noting that it is “*clear that the construction of a statute is a question of law*”, identified that the meaning of the relevant word in the statute “*only arises in interpreting the statute in which the word appears*”. It was only after considering the tenet of statutory construction, that words should be given their natural and ordinary meaning, that Santow J considered the ordinary meaning of the relevant statutory term: see at [49]-[50]. The danger inherent in the *Pozzolanic* formulation is that it suggests that part of the process of construction falls for the determination of the first instance court and cannot be reconsidered upon review. Aronson has explained it well:

“The distinction between ordinary and special meanings is the result of determining a legal term’s proper meaning or meanings. It is not a test for deciding when the court need not determine that meaning or those meanings.”<sup>10</sup>

97 In *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council*, Basten JA, at [204], explained that because the relevant statutory phrase “*gains meaning from its statutory context, the proper construction of that phrase involves a question of law, despite the fact that each word, taken individually, may be treated as an ordinary English word and not as a term of art*” (citations omitted).

98 In *OV v Members of The Board of Wesley Mission Council* [2010] NSWCA 155; 79 NSWLR 606 applied *Agfa-Gevaert*: see [2]-[8] and [27]-[31]. Basten JA and Handley AJA, at [29], explained that the *Pozzolanic* propositions suggested a tripartite approach to construction where the judge is required to: (1) ask whether a word is used in its ordinary or technical meaning; (2) identify the ordinary meaning; and (3) place that meaning into the statutory context in order to identify the proper construction of the provision. Their Honours described such an approach

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<sup>10</sup> Mark Aronson, “Unreasonableness and Error of Law” (2001) 24(2) *University of New South Wales Law Journal* 315 at [40].



as “*misconceived*” and held that the better approach was to “*look at the structure of the provision*”: see at [29]. Allsop P, as his Honour then was, at [6], explained that *Agfa-Gevaert*:

“... cast a significant qualification upon the utility of the distinction in many cases between meaning or interpretation as a question of fact (on the one hand) and construction as a question of law (on the other hand), at least for the purposes of the distinction between a question of law and a question of fact.”

99 Allsop P commented, at [8], that the High Court’s decision in *Agfa-Gevaert*:

“... should not be taken as denying the conceptual distinction between the ascertainment of semantic meaning (interpretation) and determining legal effect or legal content (construction) of a legal text. The processes can be seen to be distinct in terms of legal theory and function. What the High Court stated was that their inter-relationship in the process of ascription of meaning to a legal text meant that for the purpose, at least, of distinguishing between questions of law and fact, the distinction was illusory.”

100 Allsop P held, at [6], that the relevant passages from *Agfa-Gevaert* should be followed by an intermediate court of appeal because it “*was plainly seriously considered obiter dicta of a unanimous High Court*” (per *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89) and because it was cited with approval in *Alphapharm*.

101 A similar approach to that taken by the Court of Appeal has been adopted by the Federal Court: see Lindgren J, with whom Branson and Mansfield JJ agreed, in *Industry Research and Development Board v Bridgestone Australia Ltd* [2001] FCA 954; 109 FCR 564; and *Screen Australia v EME Productions No 1* [2012] FCAFC 19; 200 FCR 282 at [39]-[42]. The Full Federal Court in *Screen Australia v EME Productions No 1* commented that:

“Where there is uncertainty as to the meaning of a statutory word or expression, as here, the process of construction raises a question of law.”

### **Applying the law the facts found (the third stage)**

102 It has been suggested that there are two approaches to the application of the law to the facts: an analytic approach and a pragmatic approach.<sup>11</sup> Aronson and Groves explain that pursuant to the analytic approach, “*the application of the law to the facts as found must always be a question of law*”.<sup>12</sup>

103 There is support for such an approach in the case law: see *Hayes v Federal Commissioner of Taxation* [1956] HCA 21; 96 CLR 51. Identifying the difficulty associated with the distinction between questions of law and fact, Fullagar J cited with approval the decision of Lord Parker in *Farmer v Cotton’s Trustees* [1915] AC 922 at 932 where his Honour observed that “*where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only*”.

104 After noting the difficulty in distinguishing questions of fact and law, Fullagar J stated:

“The distinction between the two classes of question is, I think, greatly simplified, if we bear in mind the distinction, so clearly drawn by Wigmore, between the *factum probandum* (the ultimate fact in issue) and *facta probantia* (the facts adduced to prove or disprove that ultimate fact). ... *Where the factum probandum involves a term used in a statute, the question whether the accepted facta probantia establish that factum probandum will generally - so far as I can see, always - be a question of law.*”  
(emphasis added)

105 This may be contrasted to the so called pragmatic approach. Reference is typically made to the judgment of Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow* [1955] UKHL 3; [1956] AC 14 at 36. Lord Radcliffe held

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<sup>11</sup> See Mark Aronson and Mathew Groves, *Judicial Review of Administrative Action*, 5th ed (2013) Lawbook Co at [4.250]

<sup>12</sup> See Mark Aronson and Mathew Groves, *Judicial Review of Administrative Action*, 5th ed (2013) Lawbook Co at [4.250]

that an error of law occurs when “*the true and only reasonable conclusion* [of the application of the law to the facts found] *contradicts the determination*” of the Court/tribunal below. Lord Radcliffe explained that “*it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal*”: see at 36. In such circumstances, Lord Radcliffe held that the Court must “*assume that there has been some misconception of the law and that this has been responsible for the determination*”.

106 As Aronson and Groves observe, the two approaches ultimately “*converge*” primarily because of the over-inclusiveness, in terms of the jurisdiction of the reviewing court, inherent in the analytical approach. One only needs to look to the judgment of Mason J in *Hope v Bathurst City Council* (1980) 144 CLR 1 (Gibbs, Stephen, Murphy and Aickin JJ agreeing). Mason J, at 7, appeared to adopt the analytical approach when he held, with reference to Fullagar J in *Hayes*, that:

“Many authorities can be found to sustain the proposition that the question whether facts fully found fall within the provisions of a statutory enactment properly construed is a question of law.”

107 Mason J, however, placed a significant caveat on this proposition. Mason J held that when a reviewing court is confronted with a statute that uses words according to their common understanding and the question is whether the facts fall within these words, a question of fact, not law, is at issue: see at 7. Mason J cited the decision in *Brutus v Cozens* (referred to above) and the decision of Kitto J in *NSW Associated Blue-Metal Quarries Ltd* for this proposition. Kitto J at 512 had held that:

“The next question must be whether the material before the Court reasonably admits of different conclusions as to whether the appellant’s operations fall within the ordinary meaning of the words as so determined; and that is a question of law: *Commissioner of Taxation (Cth) v Broken Hill South Ltd* (1941) 65 CLR 150 at 155 per Starke J; see also per Isaacs and Rich JJ in *Australian Slate Quarries Ltd v Federal Commissioner of Taxation* (1923) 33 CLR

416, at 419. If different conclusions are reasonably possible, it is necessary to decide which is the correct conclusion; and that is a question of fact: see per Williams J in *Commissioner of Taxation (Cth) v Broken Hill South Ltd* (1941) 65 CLR 150 at 160.”

108 In *Vetter v Lake Macquarie City Council* [2001] HCA 12; 202 CLR 439 at 450, Gleeson CJ, Gummow and Callinan JJ in a five judge bench, held that Mason J in *Hope* had “discussed the matter comprehensively and stated the law on this topic in this country”.

109 A similar proposition was advanced by Jordan CJ in *Australian Gas Light*, at 138:

“ ... if the facts inferred by the tribunal from the evidence before it are necessarily within the description of a word or phrase in a statute or necessarily outside that description, a contrary decision is wrong in law. If, however, the facts so inferred are capable of being regarded as either within or without the description, according to the relative significance attached to them, a decision either way by a tribunal of fact cannot be disturbed by a superior Court which can determine only questions of law.” (citations omitted)

110 Jordan CJ’s observation was not confined to the case where a word bore its ordinary meaning. However, the approach of Jordan CJ in this passage is one that arrives after the meaning of the word has been determined. There is no distinction, therefore, between Mason J and Jordan CJ on this question.

111 A similar approach may be found in Mason J’s judgment in the NSW Court of Appeal in *Williams v Bill Williams Pty Ltd* [1971] 1 NSWLR 547 at 557. Mason JA, as his Honour then was, after holding that the application of the law to the facts is generally a question of law, observed:

“[I]t may happen that the Tribunal at first instance is confronted with the task of applying the statutory expression to primary facts in such circumstances that it is reasonably possible to arrive at different conclusions, the question being largely one of degree upon which different minds may take different views. Here, again, it is not possible to conclude that the decision appealed from is erroneous in point of law.

The principle has been enunciated that, if different conclusions are reasonably possible, the determination of which is the correct conclusion is a question of fact (*N.S.W. Associated Blue-Metal Quarries Ltd v. Federal Commissioner of Taxation* (1956) 94 C.L.R. 509, at p. 512.; *Australian Iron & Steel Pty Ltd v Luna* (1969) 44 ALJR 52; *Hall v Yellow Cabs of Australia Ltd* (1970) 92 WN (NSW) 426.”

112 His Honour’s approach was not qualified by reference to whether the statute used words according to their ordinary meaning. Mason JA found that the case stated presented a question of law, the question being whether the facts fell within the statutory expression “*course of employment*”. This passage from Mason JA’s judgment was quoted with approval by the majority in *Vetter*, at [26].

113 In *Azzopardi*, Glass JA, at 157, made the following observations regarding errors at this third stage:

“An erroneous conclusion that facts properly determined fail to satisfy a statutory test, for example, injury arising out of the cause of employment, substantial interruption to journey, or failure to provide suitable employment will ordinarily be an erroneous conclusion of fact. It is only in marginal cases that the statutory test is satisfied or not satisfied as a matter of law, because no other application is reasonably open” (citations omitted).

114 Prior to quoting Mason J with approval, the majority in *Vetter* commented, at 450:

“Whether facts as found answer a statutory description or satisfy statutory criteria will very frequently be exclusively a question of law ... To put the matter another way ... whether the facts found by the trial court can support the legal description given to them by the trial court is a question of law. However, not all questions involving mixed questions of law and fact are, or need to be susceptible of one correct answer only.” (citation omitted)

115 For my part, I would not be overly concerned with whether an analytical or pragmatic approach should be adopted. The question is, when will the application of the law to the facts found involve a question of law? The answer that appears from the case law is that a question of law will be

involved when the facts necessarily fall within the statutory description. If there is more than one correct answer following the construction of the statute, the margin of a question of fact is involved. This approach is supported by Spigelman CJ in *Attorney-General (NSW) v X* where his Honour concluded that an error of law may only arise at the third *Azzopardi* stage “if the facts as found are **necessarily** within or without the statutory description”: at [126]. The Chief Justice stated that “[i]f reasonable minds may differ there is no error.”

## Conclusion

116 I provocatively titled this paper “*The distinction between questions of fact and law: a question without answer?*” The distinction, whilst slippery, can be made good by focussing on the nature of the reviewing court’s jurisdiction and by identifying, with specificity, which stage of the decision making process the question supposedly arises: the finding of facts, the determination of the applicable law and the application of the law to the facts as found. Whilst there is no panacea for the difficult aspects of the distinction between questions of law and fact, I hope I have demonstrated that with these anchors a workable distinction is available for reviewing courts pursuant to sections such as ss 56A and 57 of the *Land and Environment Court Act*.

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