How to State a Case under Section 5B of the *Criminal Appeal Act* 1912 (NSW)

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INTRODUCTION

1. Criminal lawyers will be aware of the lack of a statutory appeal route from an adverse ruling by a District Court judge ("*Judge*") sitting in his or her appellate capacity pursuant to Part 3 of the *Crimes (Appeal and Review) Act* 2001 (NSW).

2. Sometimes overlooked, however, is the availability of a statutory route pursuant to which in limited circumstances such decisions can be tested.

3. This route is found in s. 5B of the *Criminal Appeal Act* 1912 (NSW), which allows a 'case to be stated' to the Court of Criminal Appeal ("*CCA*") from a District Court appeal proceeding.

PART [A]: STATING A CASE UNDER SECTION 5B OF THE *CRIMINAL APPEAL ACT* 1912 (NSW)

The Provision

4. Section 5B of the *Criminal Appeal Act* 1912 (NSW) states:

> **Case stated from District Court**
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> 5B Case stated from District Court
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> (1) A Judge of the District Court may submit any question of law arising on any appeal to the District Court in its criminal and special jurisdiction coming before the Judge to the Court of Criminal Appeal for determination, and the Court of Criminal Appeal may make any such order or give any such direction to the District Court as it thinks fit.
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> (2) At the request of a person who was a party to appeal proceedings referred to in subsection (1), a question of law may be submitted under that subsection to the Court of Criminal Appeal for determination even though the appeal proceedings during which the question arose have been disposed of. The question of law must be submitted not later than 28 days after the end of the appeal proceedings, or within such longer period as the Court of Criminal Appeal may allow.
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> (3) The Court of Criminal Appeal may, in connection with the determination of a question of law in the circumstances referred to in subsection (2), quash any acquittal, conviction or sentence of the District Court on the appeal to the District Court.

The Purpose of the Provision

5. The provision permits a Judge hearing an appeal from a decision of the Local Court, to obtain advice from the CCA on a question of law[1]. In the decision of *Talay v R* [2010] NSWCCA 308, Simpson J (Schmidt J and Howie AJ agreeing) explained the purpose of the provision at [12]:

> A stated case is, in effect, a limited form of appeal. It enables a party aggrieved by a ruling of law to move this Court for correction (if appropriate) of that ruling. It allows this Court the opportunity of providing advice, on a specified question (or questions) of law to the District Court judge; it enables the District Court judge to receive advice on questions of law relevant to the ultimate determination of a proceeding. By s 5B(2) the process is available even where the proceedings have been finally disposed of.

The Jurisdiction of the CCA

6. Section 5B empowers the CCA to answer questions of law only. The CCA is not empowered to make an ultimate determination of the case. There is no provision under the *Crimes (Appeal and Review) Act* 2001 (NSW) or the *Criminal Appeal Act* 1912 (NSW) allowing for a statutory appeal from the District Court determination of a Local Court appeal matter to the CCA (as there is from the Local Court to the District Court) and s. 5B has been interpreted to not allow such an appeal route[2]. In the decision of *R v Madden* (1995) 85 A Crim R 367, Hunt CJ at CL remarked at 370:

> The procedure is not intended to provide a means of challenging the ultimate determination made (or to be made) by the judge upon that appeal to the district court, as there is no right of appeal to this Court from that determination.

7. Nor is the CCA empowered to determine any questions of fact. Further, it can not draw any factual inferences. In the decision of *Sasterawan v Morris* [2007] NSWCCA 185, Basten JA wrote at [10]:

> Section 5B provides that a judge of the District Court may submit a "question of law" to this Court "for determination" and empowers this Court to make appropriate orders or give appropriate directions. What it does not do is authorise this Court to determine any questions of fact or to draw factual inferences. This Court is constrained to act on the facts as stated by the District Court: see *Mack v Commissioner of Stamp Duties (NSW)* [1920] HCA 76; (1920) 28 CLR 373 at 381 (Isaacs J); *The Queen v Rigby* [1956] HCA 38; (1956) 100 CLR 146 at 150-151 (Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ) and *Brisbane City Council v Valuer-General (Qld)* [1978] HCA 40; (1978) 140 CLR 41 at 58 (Gibbs J, Stephen, Mason, Murphy and Aickin JJ agreeing).

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[1] *Elias v The DPP (NSW)* [2012] NSWCA 302 at [18] per Basten JA; *R v Madden* (1995) 85 A Crim R 367 at 370 per Hunt CJ at CL.

[2] *Talay v R* [2010] NSWCCA 308 at [16] per Simpson J (Schmidt J and Howie AJ agreeing).

8. Although dealing with Queensland legislation, the High Court in *R v Rigby* [1956] HCA 38; (1956) 100 CLR 146 stated at [12]:

> Upon a case stated the court cannot determine questions of fact and it cannot draw inferences of fact from what is stated in the case. Its authority is limited to ascertaining from the contents of the case stated what are the ultimate facts, and not the evidentiary facts, from which the legal consequences ensue that govern the determination of the rights of parties.

Duty of the Judge to State a Case

9. Once a party makes an application to the District Court to state a case to the CCA on a question of law, the Judge is under a duty to state a case[3]. However, the power to state a case and the duty to do so only arises if the question stated is truly a question of law. The Judge must therefore be satisfied that a relevant question of law has been identified by the applicant[4] (see Part [B] of this Paper on the distinction between a question of law and a question of fact).

10. However, the duty is not absolute. The Judge may decline to state a case if to do so would be an abuse of process. It could be an abuse of process if:

> … the question is so obviously frivolous and baseless that its submission would be an abuse of process.[5]

11. It could also be an abuse of process where the applicant has sought to initiate concurrent appeals: for example an application for leave to pursue a statutory appeal as well as an application for judicial review[6]. However, the potential for abuse of process in the latter example must be balanced against the possible confusion over which jurisdiction is properly invoked[7].

What if the Judge Declines to State a Case?

12. The Judge may refuse to state a case on the basis that the question is not a question of law, or if to state a case would be an abuse of process. However, if that determination is erroneous then such refusal can equate to a refusal to

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[3] *Elias v The DPP (NSW)* [2012] NSWCA 302 at [35] per Basten JA; *DPP v Cassell* (1995) 80 A Crim R 160 at 164 per Kirby P; *Ex parte McGavin; Re Berne and Others* (1946) 46 SR 58 at 61 per Jordan CJ.

[4] *Elias v The DPP (NSW)* [2012] NSWCA 302 at [8] per Basten JA.

[5] *Ex parte McGavin; Re Berne and Others* (1946) 46 SR 58 at 61 per Jordan CJ. See also, *Elias v The DPP (NSW)* [2012] NSWCA 302 at [8] per Basten JA; *Sasterawan v Morris* [2007] NSWCCA 185 at [8] per Basten JA.

[6] *Sasterawan v Morris* [2007] NSWCCA 185 at [8] per Basten JA. See also *Meagher v Stephenson* (1993) 30 NSWLR 736 at 739; *Hill v King* (1993) 31 NSWLR 654.

[7] *Sasterawan v Morris* [2007] NSWCCA 185 at [8] per Basten JA. See also *Fordham v Fordyce* [2007] NSWCA 129.

exercise jurisdiction[8]; it may also be a denial of procedural fairness. In that instance prerogative relief would be available[9] (now statutory relief pursuant to s. 69 of the *Supreme Court Act* 1970 (NSW))[10].

How the Judge is to State a Case

13. The starting point is the *Criminal Appeal Rules* (made under the *Supreme Court Act* 1970 (NSW)). Rule 29 states:

> **Submission of question of law**
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> **29 Submission of question of law**
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> Any question of law submitted to the Court for determination under sections 5A, 5B or 5BA of the Act shall be in writing and signed by the Judge. Such submission shall be sent to the Registrar together with a summary of the evidence and a statement showing the names of the parties and their legal representatives, if any.

14. The Judge must state the ultimate facts that did dictate or would dictate his or her decision, including those found by inference. The statement of facts must not include any of the evidence upon which the ultimate facts were founded or inferred. Thereafter the question(s) of law must be stated[11].

Making an Application to the Judge to State a Case

15. An application to state a case must be made during the course of the District Court appeal proceedings (subs. 5B(1)) or within 28 days of the Judge's decision (subs. 5B(2)).

16. An extension of time can be sought from the CCA: subs. 5B(2). Seeking an extension of time has been described as "procedurally awkward"[12]. This is because a late application is made to the District Court and not to the CCA. Therefore it is for the Judge to 'guess' the attitude of the CCA in granting an extension of time. In practical terms, the Judge is required to state a case even in circumstances of a late application, unless satisfied that the application for an extension of time would obviously be refused as an abuse

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[8] See *Charara v The Director of Public Prosecutions & Ors* [2001] NSWCA 140.

[9] *West v Director of Public Prosecutions* [1999] NSWCA 398 at [19] per Priestley JA, (Meagher and Beazley JJA agreeing).

[10] This is despite the privative clause in s. 176 of the *District Court Act* 1973 (NSW).

[11] *Industrial Equity Ltd v Commissioner for Corporate Affairs* [1990] VR 780 at 781 per the Court: "But what is absolutely essential, and should be reasonably practicable in every case, is that the case stated must contain at least a statement of all the ultimate facts which in the opinion of the judge [in the court below] dictated his ultimate conclusion. ... The case must state all the ultimate facts, including those found by inference, but not the evidence upon which the ultimate facts were founded/"

[12] *Elias v The DPP (NSW)* [2012] NSWCA 302 at [14] per Basten JA.

of process[13]. Notwithstanding that the Judge states a case out of time, the CCA may refuse to grant an extension of time and therefore dispose of the case[14].

17. As a matter of good practice, an application for a case to be stated should be made well within the 28 day period[15]. The parties should then seek to finalise the facts to be included in the stated case as well as the formulation of the question(s) of law.

18. It is crucial for the parties to settle the facts and question(s) of law together. It is inappropriate to make an application to state a case without serving the notice on the other party[16]. Moreover, as a matter of procedural fairness, the judge should not state a case without having the input of both parties[17].

How to State the Facts

19. A properly prepared stated case will state the facts found in the form of numbered paragraphs[18]. The stated case should not include any annexures (such as exhibits) but must encapsulate the entirety of the facts to be considered by the CCA in order to determine the question(s) of law. For example, if there are relevant facts appearing from the transcript of either the proceedings in the Local Court or the District Court, they should be included as facts stated, and not be left to be gleaned from an annexed transcript[19]. In the decision of *Sasterawan v Morris* [2007] NSWCCA 185, Basten JA stated at [11]:

> … the Court is not obliged (nor should it be expected) to sift through documents to identify "facts found" which the applicant has not thought it necessary to include in the case requested to be stated.

20. Furthermore, it is not appropriate for the facts to be stated by appending the judgment of the District Court[20]. A full and proper statement of facts is crucial to the stated case. This is because the CCA is constrained to decide on the

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[13] *Sasterawan v Morris* [2007] NSWCCA 185 at [5] per Basten JA (Grove and Hidden JJ agreeing), citing: *Ex parte McGavin; Re Berne* (1945) 46 SR (NSW) 58 at 60 per Jordan CJ, applied in *Director of Public Prosecutions v Cassell* (1995) 80 A Crim R 160 at 164-165 per Kirby P (Priestley and Powell JJA relevantly agreeing).
[14] *Talay v R* [2010] NSWCCA 308.
[15] *Elias v The DPP (NSW)* [2012] NSWCA 302 at [14] per Basten JA.
[16] *Talay v R* [2010] NSWCCA 308 at [63] per Howie AJ.
[17] *Talay v R* [2010] NSWCCA 308 at [63] per Howie AJ.
[18] *Talay v R* [2010] NSWCCA 308 at [27] per Simpson J (Schmidt J and Howie AJ agreeing).
[19] *Ryde City Council v Pedras* [2009] NSWCCA 248 at [4] per Giles JA; *R v Madden* (1995) 85 A Crim R 367 at 371 per Hunt CJ at CL.
[20] *Talay v R* [2010] NSWCCA 308 at [18] per Simpson J (Schmidt J and Howie AJ agreeing).

facts contained in the stated case[21]. The CCA can only have regard to matters outside the stated case with the consent of the parties[22].

21. The case law is replete with examples of cases stated not to the satisfaction of the CCA. Attached at Annexure A is the case stated in the matter of *Hammond v R* [2013] NSWCCA 93, which was found by the CCA to satisfactorily state the facts of the matter[23].

How to State the Question(s) of Law

22. There is no authoritative way in which to formulate a question of law. The case law focuses more on how not to formulate a question of law.

23. The question must not in essence ask the CCA to determine what the ultimate decision should have been or should be in the District Court. To do so would be to ask the CCA to exercise a non-existent right of appeal, and certainly a right not granted by the terms of s. 5B. For example, the following was held to be a request to the CCA to make an ultimate determination in the matter before the District Court, and therefore not a question of law:

> Did I err in law in interpreting s 13(2) of the Act by finding that the Defendant (owner of the dog), on the facts fully found, was not guilty of an offence against s 13(2)?[24]

24. The question of law should not commence with the words “did I err” or include the words “error of law”. In the decision of *Ryde City Council v Pedras* [2009] NSWCCA 248, Harrison J wrote at [42]:

> This Court has held that "recitation of a determination by the first instance judge preceded by the interrogatory 'did I err in law' does not create [a question of law]": *Castlebar Holding v Riley* (supra) at [13].

25. In the decision of *Elias v The DPP (NSW)* [2012] NSWCA 302, after taking issue with the formulation “did I err”, Basten JA observed at [18]:

> The preferred form of question proposed by applicants is along the lines 'Did I err in law in making finding x?'. The finding referred to is usually an ultimate conclusion which inevitably involves a composite of various legal and factual

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[21] *Brisbane City Council v Valuer-General (Qld)* [1978] HCA 40; (1978) 140 CLR 41 at 58 per Gibbs J (Stephen, Mason, Murphy and Aickin JJ agreeing); *The Queen v Rigby* [1956] HCA 38 at [12] per the Court; *Mack v Commissioner of Stamp Duties (NSW)* (1920) 28 CLR 373 at 381 per Isaacs J.

[22] *Talay v R* [2010] NSWCCA 308 at [16] per Simpson J (Schmidt J and Howie AJ agreeing); *Regina v Wayne Stephen Roome No. 60636 of 1995 Criminal Law and Procedure* [1996] NSWSC 42 at [7] per Hunt CJ at CL.

[23] With one exception, regarding the fact that the chair said to have been damaged was not described in the stated facts as being made of stainless steel: see [12]-[13].

[24] *Ryde City Council v Pedras* [2009] NSWCCA 248.

elements: see *Robinson v Woolworths Ltd [*2005] NSWCCA 426; 64 NSWLR 612 at [7]- [10].

26. In any event, an error of law is not a determinant of whether there is a question of law that is capable of being referred: *Assadourian v Roads and Traffic Authority of New South Wales (Northern Region)* [2011] NSWSC 1052 at [38] per Rothman J, applying *Edyp & Ors v Brazbuild Pty Ltd* [2011] NSWCA 218 at [35] per Allsop P.

27. The question of law should be formulated with some degree of precision, as it is that question which enlivens the CCA's jurisdiction[25].

28. In the recent case stated matter to be determined (*Hammond v R* [2013] NSWCCA 93) the question of law was stated in the following terms:

> Can these facts (the facts set out in the case stated) support a finding of guilt for an offence contrary to section 195 (1)(a) of the Crimes Act 1900, in particular was the evidence capable of proving beyond reasonable doubt that the seat had been damaged by the conduct of [the appellant]?

29. This formulation was not criticised by the CCA.

Curing a Poorly Formulated Question of Law

30. If the question stated by the Judge is truly a question of fact, or a question going to the ultimate determination of the matter, then it is not appropriate for the CCA to reformulate the question so as to state a question of law. Further, if there is essentially no question of law asked of the CCA, or one that is not readily ascertainable, it does not remain for the CCA:

> to grope through the case as stated and try to discover for itself what are the specific questions of law involved.[26]

31. However, it is not required that the question of law be perfectly formulated. The CCA in the decision of *Ryde City Council v Pedras* [2009] NSWCCA 248 held:

> This Court ought not too readily reject a case stated for determination by adopting an overly technical approach to the issue if practical effect can be afforded to the parties' intentions in framing the case in the way that they have.[27]

32. Similarly, Simpson J in *Talay* stated at [25]:

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[25] *Commissioner of Taxation v Crown Insurance Services Ltd* [2012] FCAFC 153 at [13] per Lander and Foster JJ.
[26] *Re van der Lubbe* (1949) 49 SR (NSW) 309 at 312 per Jordan CJ.
[27] *Ryde City Council v Pedras* [2009] NSWCCA 248 at [49] per Harrison J.

> In *Industrial Equity* the court found that the stated case as presented was so flawed that it ordered that it be set aside. In the circumstances of the present case, it is tempting to take the same course, and set aside the case stated. However, it is, I have concluded, more appropriate to attempt to deal with it within the constraints of its deficiencies, and, in the words used in *City of Hawthorn*, attempt:
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> *"to extract ... enough findings of fact to enable this Court to perform its function ..."*

33. The decision of *R v Madden* (1995) 85 A Crim R 367 is an example of a reformulated question of law. The accused was convicted In the Local Court of goods in custody, contrary to s. 527C of the *Crimes Act* 1900 (NSW). The relevant goods consisted of cash held in a safety deposit box at a bank. The accused had raised the statutory defence, submitting that the cash was as a result of a loan agreement between himself and a Mr Khodjasteh. His defence was rejected in the Local Court.

34. The District Court dismissed the conviction appeal. A case was then stated to the CCA. Hunt CJ at CL (Allen and Dunford JJ agreeing) ruled that the case stated from the District Court contained a number of contentions rather than identified questions of law. One such contention, as construed by his Honour, was:

> It was not open in law for the judge to draw inferences adverse to the appellant from the facts that he had not executed the loan document, that the loan was effected by cash, that no interest or instalments had been paid and no part of the loan had been repaid, and that he had made the false statements to the police to which reference has already been made.[28]

35. With the benefit of submissions, Hunt CJ at CL reformulated the contention into the following question of law:

> The question of law was finally expressed in this way — whether, in order to be satisfied beyond reasonable doubt that the money found in the appellant's safety deposit box may be reasonably suspected of being unlawfully obtained, the judge had to be satisfied beyond reasonable doubt that that money was not the money received by the appellant by way of a loan from Mr Khodjasteh.[29]

36. Similarly, the Court in *Robinson v Woolworths Ltd* [2005] NSWCCA 426 was referred the following question by the Judge pursuant to s. 5B:

> Did I err in holding that, for the purposes of s 138(1) of the *Evidence Act* 1995 (NSW), the [investigator's] conduct was improper?

37. Basten JA reformulated the question as thus:

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[28] At [11].
[29] At [15].

On the findings of fact [identified in the case stated] was the conduct capable of constituting "improper" conduct for the purposes of s 138(1) of the Evidence Act 1995 (NSW)?

Filing Written Submission with the CCA

38. Once the Judge states a case, the matter enters into the CCA callover. The Registrar will set a date for hearing the matter in the CCA and establish a timetable for written submissions from both the parties.

39. Practice Note No. SC CCA 1 sets out the following requirements:

> **Filing written submissions**
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> 16. The following paragraphs detail the procedures for filing written submissions in relation to matters in the Court of Criminal Appeal.
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> **Direction to file written submissions**
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> 17. The Registrar, when fixing a date for the hearing of an appeal or applications, will direct both the appellant or the applicant (as the case may be) and the respondent to file and serve written submissions on or before particular dates prior to that hearing. In appeals against conviction, or applications for leave to appeal against sentence, ordinarily the appellant's or applicant's submissions will have been filed with the notice of appeal or notice of application for leave to appeal, pursuant to clause 23C of the Rules.
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> 18. The party filing written submissions shall lodge at least four copies of the submissions with the Registrar.
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> **Other Appeals Which Are Not Rehearings**
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> 25. In cases stated for the determination of the Court and other proceedings in the nature of an appeal which is not a rehearing, the submissions of both parties are to contain:
> - a brief statement in narrative form of the factual background against which the questions are raised for the determination of the Court, but only where that background is not sufficiently apparent from the stated case or from some other document already filed;
> - an outline of the argument to be put in support of each question for determination with:
>   - the terms of that question set out in full;
>   - page references to any transcript relating to any evidence referred to, and appropriate citations of authority relied upon for the propositions of law stated (including, where appropriate, page references); and
>   - a separate list of any authorities to which it is expected that the members of the Court may have to turn during the argument.

List of Authorities

30. Authorities cited in submissions which are not likely to be needed in Court should not be included in a list of authorities. The list should only include authorities to which it is expected the Court will have to turn to during oral argument.

31. Where reliance is to be placed on an authority which is unreported, the party citing that authority shall attach a copy of the unreported judgment to the list of authorities. An authority published on CaseLaw with a case neutral citation is not considered by the Court to be a reported judgment.

32. Lists of authorities need not be filed at the same time as the written submissions but must be filed not later than one full working day before the hearing.

33. The party filing a List of Authorities shall file at least four copies of the List with the Registrar.

PART [B]: QUESTION OF LAW v QUESTION OF FACT

40. Section 5B empowers a Judge to state a case on a question of law. The matter is competent, and the CCA's jurisdiction enlivened, only if the stated case involves a question of law or a mixed question of law and fact. If the stated case involves a question of fact alone the appeal must be dismissed for want of jurisdiction.

41. There is no bright line between what constitutes a question of law on the one hand, and a question of fact, on the other. It is often difficult to make the distinction. The Court will always be guided by the specific facts and merits of any case stated.

42. Much relevant authority on the distinction comes from decisions of the Federal Court of Australia, which has jurisdiction to determine questions of law arising from the decisions of the Administrative Appeals Tribunal: s. 44(1) of the *Administrative Appeals Tribunal Act* 1975 (Cth) (the "*AAT Act*"). Decisions of that court are relatable to the determination under s. 5B[30].

43. Two oft-cited decisions have sought to consolidate the various propositions laid down in making the distinction between a question of law and a question of fact. These are *The Australian Gas Light Company and The Valuer-General* (1940) 40 SR (NSW) 126 and *Collector of Customs v Pressure Tankers Pty Ltd and Pozzolanic Enterprises Pty Ltd* [1993] FCA 322.

44. In the decision of *The Australian Gas Light Company and The Valuer-General* (1940) 40 SR (NSW) 126, Jordon CJ said at 137:

[30] For example, see *Elias v The DPP (NSW)* [2012] NSWCA 302 at [18] per Basten JA.

Before proceeding to the questions which have been submitted, it is necessary to keep in mind that this Court has jurisdiction to determine only questions of law and only such questions of law as are submitted to it. In cases in which an appellate tribunal has jurisdiction to determine only questions of law, the following rules appear to be established by the authorities:

(1) 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: *Girls' Public Day School Trust v. Ereaut*; *Life Insurance Co. of Australia Ltd. v. Phillips*; *McQuaker v. Goddard*. 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: *Camden v. Inland Revenue Commissioners*; *In re Ripon (Highfield) Housing Confirmation Order*, *1938*. *White and Collins v. Minister of Health*; although evidence is receivable as to the meaning of technical terms: *Caledonian Railway v. Glenboig Union Fireclay Co*.; *Attorney-General for the Isle of Man v. Moore*; and the meaning of a technical legal term is a question of law: *Commissioners for Special Purposes of Income Tax v. Pemsel*.

(2) The question whether a particular set of facts comes within the description of such a word or phrase is one of fact: *Girls' Public School Trust v. Ereaut*; *Attorney-General for the Isle of Man v. Moore*.

(3) 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: *Farmer v. Cotton's Trustees*; *Currie v. Inland Revenue Commissioners*; *Inland Revenue Commissioners v. Lysaght*.

(4) Such a finding can be disturbed only (a) if there is no evidence to support its inferences, or (b) if the facts inferred by it and supported by evidence are incapable of justifying the finding of fact based upon those inferences: *In re Ripon (Highfield) Housing Confirmation Order, 1938*. *White & Collins v. Minister of Health*, or (c) if it has misdirected itself in law: *Farmer v. Cotton's Trustees*; *Colonial Mutual Life Assurance Society Ltd. v. Federal Commissioner of Taxation*. Thus, 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: *Farmer v. Cotton's Trustees*; *Mersey Docks and Harbour Board v. West Derby Assessment Committee and Bottomley*, etc. 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: F*armer v. Cotton's Trustees; Currie v. Inland Revenue Commissioners*; *Inland Revenue Commissioners v. Lysaght; Mersey Docks and Harbour Board v. West Derby Assessment Committee and Bottomley*, etc.

45. In the decision of *Collector of Customs v Pressure Tankers Pty Ltd and Pozzolanic Enterprises Pty Ltd* [1993] FCA 322, the Full Court of the Federal Court of Australia (Neaves, French and Cooper JJ in a joint judgment) stated:

[23] There are five general propositions which emerge from the cases:

> 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 – Jedko *Game Co. Pty Ltd v. Collector of Customs* (1987) 12 ALD 491; *Brutus v. Cozens* [1972] UKHL 6; (1973) AC 854.
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> 2. The ordinary meaning of a word or its non-legal technical meaning is a question of fact - *Jedko Game Co. Pty Ltd v. Collector of Customs* (supra); *NSW Associated Blue Metal Quarries Ltd v. Federal Commissioner of Taxation* (1956) 94 CLR 509 at 512; *Life Insurance Co. of Australia Ltd v. Phillips* [1925] HCA 18; (1925) 36 CLR 60 at 78; *Neal v Secretary, Department of Transport* (1980) 29 ALR 350 at 361-2.
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> 3. The meaning of a technical legal term is a question of law. *Australian Gas Light Co. v. Valuer General* (1940) 40 SR (NSW) 126 at 137-8; *Lombardo v. Federal Commissioner of Taxation* (1979) 28 ALR 574 at 581.
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> 4. The effect or construction of a term whose meaning or interpretation is established is a question of law - *Life Insurance Co. of Australia v. Phillips* (supra) at 79.
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> 5. The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law - H*ope v. Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1 at 7 per Mason J with whom Gibbs, Stephen, Murphy and Aickin JJ agreed; Austra*lian National Railways Commission v. Collector of Customs* (supra) at 379 (Sheppard and Burchett JJ).

24. The fifth proposition as stated by the High Court in *Hope v. Bathurst City Council* (supra) was elaborated by reference to the remarks of Fullagar J in *Hayes v. Federal Commissioner of Taxation* [1956] HCA 21; (1956) 96 CLR 47 at 51:

> "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."

25. This principle is qualified when a statute uses words according to their ordinary meaning and the question is whether the facts as found fall within those words. Where it is reasonably open to hold that they do, then the question whether they do or not is one of fact - Hope v. Bathurst City Council (supra) at 8. Mason J there cited the observation of Kitto J in NSW Associated Blue Metal Quarries Ltd v. Federal Commissioner of Taxation (supra) at 512:

> "The next question must be whether the material before the Court reasonably admits of different conclusions as to whether the ... operations fall within the ordinary meaning of the words as so determined; and that is a question of law... If different conclusions are reasonably possible, it is necessary to decide which is the correct conclusion; and that is a question of fact…"

The Typical Case Stated: Do the Stated Facts fall within a Term of a Statutory Provision?

46. Cases stated under s. 5B (and s. 44 of the *AAT Act*) will typically raise the question of whether the stated facts fall within a term of a statutory provision. Some examples include:

    - does the obtaining of a loan under the stated circumstances constitute a "financial advantage" under s. 178BB of the *Crimes Act* 1900 (NSW)[31];
    - can an individual bank note be a "thing" under s. 40(1) of the *Summary Offences Act* 1970 (NSW)[32];
    - do the stated facts amount to "damage" under s. 195(1) of the *Crimes Act* 1900 (NSW)[33];
    - was income of a certain source "assessable income" for the purposes of s. 6-5 of the *Income Tax Assessment Act* 1997 (Cth)[34];
    - does the stated activity constitute "mining operations" for the purposes of s. 23(1) of the *Income Tax Assessment Act* 1922-1934 (Cth)[35], and
    - on the stated facts was the conduct capable of constituting "improper" conduct for the purposes of s 138(1) of the *Evidence Act* 1995 (NSW)[36].

47. There is mixed authority on whether a question so formulated is a question of law, question of fact, or mixed question of law and fact. The following is a **dichotomy** that emerges from the case law. It is helpful as a starting point when embarking on the determination. It is a **pair of propositions, where one applies to the exclusion of the other**[37]:

    i. If it is reasonably open to the Judge to determine that the stated facts fall within the term of the provision, and also reasonably open to the Judge to determine that the stated facts fall without the term of the

[31] *Elias v The DPP (NSW)* [2012] NSWCA 302
[32] *R v Dittmar* [1973] 1 NSWLR 722
[33] *Hammond v R* [2013] NSWCCA 93
[34] *Commissioner of Taxation v Crown Insurance Services Ltd* [2012] FCAFC 153
[35] *Federal Commissioner of Taxation v Broken Hill South Ltd* [1941] HCA 33
[36] *Robinson v Woolworths Ltd* [2005] NSWCCA 426
[37] See *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1 at [14] per Mason J (Gibbs, Stephen, Mason, Murphy and Aickin JJ agreeing); *Sharp Corporation of Australia Pty Ltd v Collector of Customs* (1995) 59 FCR 6 at 12 per Davies and Beazley JJ and at 15-16 per Hill J.

provision, then the determination of within or without is a **question of fact**.

ii. However, if there is only one conclusion reasonably open (or, put differently, no other conclusion is reasonably open) as to whether the stated facts fall within the provision, then the **question is one of law**.

The Dichotomy in the Case Law

Hammond v R [2013] NSWCCA 93

Per Slattery J (Hoeben CJ at CL and Bellew J agreeing):

[21] *A question of law*. Cases stated under *Criminal Appeal Act* s 5B(1) must be limited to questions of law. The applicant argued that the question posed by Lerve DCJ was a question of law. The respondent disagreed.

[22] The test of what is a question of law for the purpose of statutory provisions such as *Criminal Appeal Act* s 5B(1) is well established. In *Australian Gaslight Co v The Valuer-General* (1940) 40 SR (NSW) 126, at 137-8 Jordan CJ stated the distinction between a question of law and a question of fact (or a mixed question of law and fact)…

[23] The respondent contended that the facts inferred by the District Court "are capable of being regarded as either within or without the description [of damage], according to the relative significance attached to them" and accordingly this is not a decision which can be disturbed by a Court which can determine only questions of law. The respondent further submitted that this was not a case in which there is no evidence to support the determination, nor is it one in which the evidence is inconsistent with and contradictory of the determination, nor one in which the only true and reasonable conclusion contradicts the determination: see also *Edwards v Bairstow* [1955] UKHL 3; [1956] AC 14, at 36. The respondent contended that the present application involved no more than deciding the meaning of an ordinary English word, "damages", used in a statute or deciding whether a particular set of facts comes within such a phrase, which are only questions of fact.

[24] But the applicant's submissions are the more persuasive on this question. The applicant points out that the question for determination is framed to raise only a question of law: "was the evidence capable of proving beyond reasonable doubt that the seat had been damaged?" The applicant is only asking the Court to decide whether the facts actually inferred by the District Court are necessarily outside the meaning of "damages" in Crimes Act s 195(1) and therefore incapable of supporting a conviction beyond reasonable doubt. The applicant accepts all Lerve DCJ's findings of fact and contends on the basis of Jordan CJ's statement in *Australian Gaslight Co v The Valuer-General* (1940) 40 SR (NSW) 126, at 137-8 that the question is one of law. I agree it is a question of law. It comes within Jordan CJ's category (4): the applicant contends that facts inferred by the tribunal below from the evidence before it are necessarily outside the description of a word "damages" in this statute, so that a contrary decision is said to be wrong in law.

Hope v Bathurst City Council [1980] HCA 16; (1980) 144 CLR 1

Per Mason J (Gibbs, Stephen, Mason, Murphy and Aickin JJ agreeing):

10. 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. One example is the judgment of Fullagar J. in *Hayes v. Federal Commissioner of Taxation* [1956] HCA 21; (1956) 96 CLR 47… at p 51:

> "…this seems to me to be the only reasonable view. 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). The 'facts' referred to by Lord Parker . . . are the facta probantia. 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." (at p7)

11. However, special considerations apply when we are confronted with a statute which on examination is found to use words according to their common understanding and the question is whether the facts as found fall within these words. *Brutus v. Cozens* [1972] UKHL 6; (1973) AC 854 was just such a case. The only question raised was whether the appellant's behaviour was "insulting". As it was not unreasonable to hold that his behaviour was insulting, the question was one of fact. (at p7)

12. The judgment of Kitto J. in N.*S.W. Associated Blue-Metal Quarries Ltd. v. Federal Commissioner of Taxation* (1956) 94 CLR 309 is illuminating. Kitto J. observed that the question whether certain operations answered the description "mining operations upon a mining property" within the meaning of s. 122 of the *Income Tax Assessment Act* 1936, as amended, was a mixed question of law and fact (1956) 94 CLR, at pp 511-512. He went on to explain why this was so: "First it is necessary to decide as a matter of law whether the Act uses the expressions 'mining operations' and 'mining property' in any other sense than that which they have in ordinary speech." Having answered this question in the negative, he noted that the "common understanding of the words has . . . to be determined" as "a question of fact". He continued (1956) 94 CLR, at p 512:

"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 (1941) 65 CLR, at p 155: see also per Isaacs and Rich JJ in *Australian Slate Quarries Ltd. v. Federal Commissioner of Taxation* [1923] HCA 69; (1923) 33 CLR 416, at p 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 the *Broken Hill South Case* [1941] HCA 33; (1941) 65 CLR 150, at p 160." (at p8)

…

14. I accept, then, that "business' in the sub-section has the ordinary or popular meaning which it would be given in the expression "carrying on the business of grazing". It denotes grazing activities undertaken as a commercial enterprise in the nature of a

going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis. Putting aside the question whether the activities have a "grazing" character, the critical issue for decision is whether the material before the Court reasonably admits of different conclusions on the question whether the appellant's activities constitute a "business". On the facts as found, I conclude that the appellant's activities amounted to a business and that no other conclusion was reasonably open.

Sharp Corporation of Australia Pty Ltd v Collector of Customs (1995) 59 FCR 6

Per Davies and Beazley JJ at 12:

Thus, it is primarily a question of fact, not of law, as to what is the meaning of an ordinary English word or phrase as used in a statute in its ordinary sense and so also is the question whether, there being different conclusions reasonably open, a particular set of facts comes within the description of such a word or phrase. This principle was enunciated in detail and explained by Jordan CJ in *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126 at 137-138 and by Mason J in *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1 at 7-8. The principle was followed by Beaumont and Burchett JJ in *Jedko Game Co Pty Ltd v Collector of Customs (NSW)* (unreported, Federal Court, 10 March 1987); noted 12 ALD 491.

Per Hill J at 15-16:

At the heart of the submission lies the well-established rule that the ascertainment of the ordinary meaning of a word is but a question of fact: *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126 at 137-138 per Jordan CJ; *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1 at 7-8 per Mason J. So it is said that the meaning of the phrase “essential character”, that phrase being made up of ordinary English words, is likewise a question of fact.

The next step in the argument is to say that the question whether a particular set of facts comes within the description of such a word or phrase is likewise one of fact, a proposition for which *Australian Gas Light Co* is also authority. A finding by the Tribunal that a particular material component gave to particular goods their essential character would be a finding of fact: *Times Consultants Pty Ltd v Collector of Customs (Qld)* (1987) 16 FCR 449.

The rule that a question of fact is involved in determining whether facts fall within the meaning of a word once that meaning is ascertained, may cause confusion. The confusion comes about because there are actually two related rules, the distinction between which is not always readily apparent. The first of these rules is generally expressed as being that where the facts have been fully found or there is no dispute as to the facts and the question is whether those facts necessarily fall within the description of a word or phrase in a statute, that will be a question of law. This is the sixth proposition enunciated by Jordan CJ in the *Australian Gas Light Co* case. The rationale for this principle is clear enough. If only one meaning is open but a tribunal arrives at a different meaning, underlying the Tribunal’s conclusion must be an error of principle, that is to say, an error of law.

The second related principle is that where the facts found are capable of falling within or without the description used in the statute, the decision which side of the line they fall on will be a decision of fact and not law. Such a decision will generally involve weight being given to one or other element of the facts and so involve matters of degree.

The Dichotomy is not Perfect

48. The above dichotomy is not without its issues. The decision of *Elias v The DPP (NSW)* [2012] NSWCA 302 is instructive. That case concerned the question of whether the obtaining of the loan in the relevant circumstances constituted a "financial advantage".

49. The applicant had stated a false income to secure a loan facility and was charged under s. 178BB of the *Crimes Act* 1900 (NSW). Blanch J noted the following circumstances at [46]:

> The words financial advantage are plain words as O'Bryan J noted in *Walsh* supra. To obtain two significant loans would appear on the face of it to be a financial advantage even if secured by a mortgage. The loans put the claimant in a position to use funds he would not otherwise have at his disposal and gave him the opportunity to repay over a period of time. In this case he was wanting to assist his sons and he needed the finance to do so. The inference can be drawn that he saw an advantage in obtaining the loans that being an ability to help his sons at a time they needed help and when otherwise he would not have been able to do so. In my view it clearly was a financial advantage.

50. Based on the above, Blanch J (Beazley JA and Basten JA agreeing) concluded that the question was one of fact. His Honour described the term financial advantage as "*plain words*"[38] and Basten JA in a separate judgment considered the term as one of "*ordinary English usage*"[39] which, following the judgment of Jordan CJ in *The Australian Gas Light Company and The Valuer-Genera*l (1940) 40 SR (NSW) 126, would make it a question of fact.

51. Blanch J remarked the stated facts were "*clearly*" a financial advantage. Similarly, Basten JA wrote at [20]:

> The question whether a loan constitutes a financial advantage may depend upon the circumstances at the time the loan is obtained, but does not require some objective assessment of the consideration obtained by each party to the contract… [I]t may safely be assumed that the vast majority of people believe that they obtain an advantage when obtaining financial accommodation, for which they have to pay. The advantage is sometimes so attractive that individuals will make false declarations to obtain a loan. The proposition that the obtaining of a loan, on ordinary commercial terms, known to the borrower at the time the loan was obtained, was incapable of constituting a financial advantage in the ordinary sense of that phrase, might variously be described as hopeless, baseless,

[38] At [46].
[39] At [19].

misconceived or unworthy of serious attention. The question sought to be raised by the applicant did not in truth involve any question of law; nor was it reasonably arguable.

52. On either judgment, it would appear the only conclusion reasonably open to the District Court was that the stated facts fell within the term “financial advantage”; or put differently, it was not reasonably open to the District Court to conclude that the stated facts fell without that term. Applying the dichotomy, the stated question would have been a question of law. This is because the applicant was essentially asking the Court to decide whether the stated facts necessarily fell outside the meaning of "financial advantage" under 178BB of the *Crimes Act* 1900 and were therefore incapable of supporting a conviction beyond reasonable doubt.

53. However, the question was one of fact. It concerned an ordinary English word and the CCA were mindful of the specific facts as well as the unmeritorious nature of the appeal.

54. The tension lies in the relationship between the construction of ordinary or non-technical words, which is a question of fact, and the second proposition of the dichotomy, where only one conclusion is reasonably open and therefore it is a question of law.

55. The tension can be seen by comparing the decision in *Elias* with the subsequent decision in *Hammond v R* [2013] NSWCCA 93. That case required determination of whether spittle deposited on a stainless steel chair constituted “damage”, contrary to s. 195(1) of the *Crimes Act* 1900. Although the respondent had argued that “damage” was an ordinary English word, the Court (Slattery J, Hoeben CJ at CL and Bellew J agreeing) stated:

> [23] The respondent contended that the facts inferred by the District Court "are capable of being regarded as either within or without the description [of damage], according to the relative significance attached to them" and accordingly this is not a decision which can be disturbed by a Court which can determine only questions of law… The respondent contended that the present application involved no more than deciding the meaning of an ordinary English word, "damages", used in a statute or deciding whether a particular set of facts comes within such a phrase, which are only questions of fact.
>
> [24] But the applicant's submissions are the more persuasive on this question. The applicant points out that the question for determination is framed to raise only a question of law: "was the evidence capable of proving beyond reasonable doubt that the seat had been damaged?" The applicant is only asking the Court to decide whether the facts actually inferred by the District Court are necessarily outside the meaning of "damages" in *Crimes Act* s 195(1) and therefore incapable of supporting a conviction beyond reasonable doubt. The applicant accepts all Lerve DCJ's findings of fact and contends on the basis of Jordan CJ's statement in *Australian Gaslight Co v The Valuer-General* (1940) 40 SR (NSW)

> 126, at 137-8 that the question is one of law. I agree it is a question of law. It comes within Jordan CJ's category (4): the applicant contends that facts inferred by the tribunal below from the evidence before it are necessarily outside the description of a word "damages" in this statute, so that a contrary decision is said to be wrong in law.

56. The decisions of *Elias* and *Hammond* would appear to be in conflict with one another if it is accepted that in each case the CCA was dealing with a **non-technical term of ordinary English usage and that there was only one conclusion reasonably open on the stated facts**.

57. In short, the dichotomy is helpful but not perfect. Its simplicity and general application make it a relevant starting point. The more expansive set of principles laid down in *The Australian Gas Light Company and The Valuer-General* (1940) 40 SR (NSW) 126 and other decisions must always be considered. Finally, the determination of whether the question is one of fact or law, or of mixed fact and law, is not exact and can only be made with reference to the specific facts in each case stated.

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* The Author was the Solicitor (with Mark Dennis of Counsel) for the Appellant in the matter of *Hammond v R* [2013] NSWCCA 93

ANNEXURE A: The Case Stated in the Decision of *Hammond v R* [2013] NSWCCA 93

IN THE SUPREME COURT OF NEW SOUTH WALES
SYDNEY REGISTRY
COURT OF CRIMINAL APPEAL

...../.....

CASE STATED FROM THE DISTRICT COURT

Filed for

Dion John Hammond
APPLICANT

Director of Public Prosecutions
RESPONDENT

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I, Gordon Bruce Lerve, a Judge of the District Court of New South Wales having on 20 September 2012 at the District Court sitting at Dubbo dismissed an appeal against conviction brought by Dion John Hammond in respect of a charge of Damage to Property contrary to section 195(1)(a) of the Crimes Act, 1900 committed on 13 January 2012, at Warren in the State of New South Wales and found proven in the Local Court of New South Wales sitting at Warren on 30 May 2012, at the request of Dion John Hammond submit the following facts and question of law to the Court of Criminal Appeal pursuant to section 5B of the Criminal Appeal Act, 1912:

Facts

In determining the appeal against conviction by Dion John Hammond on 20 September 2012 I was satisfied of the following beyond reasonable doubt:

1. Dion John Hammond was apprehended by Constable Emily MAY of the Warren Police at the address of 18 Wilson Street, Warren, New South Wales at about 5.20pm on 13 January 2012;

2. Upon being apprehended he was taken in police custody to the Warren Police Station;

3. Once at the Police Station at Warren he was placed in the dock area, which is used by police to detain persons who are in police custody at the Warren Police Station;

4. At the Warren Police Station he was charged with the offences commonly or shortly known as "Common Assault" contrary to s. 61 of the Crimes Act, 1900 and "Resist Police Officer in the Execution of Duty" contrary to s. 58 of the Crimes Act, 1900;

5. While so detained at about or shortly before 7pm (time is taken from the original Court Attendance Notice, part of the Tender Bundle tendered by the Crown and marked as Exhibit "A" on the Appeal) projected spittle or mucus from his mouth causing it to land on the metal seat of the dock. The amount of spittle or mucus was considerable. The substance so projected is depicted in the photograph marked Exhibit "D" on the Appeal before me;

6. The act of Dion John Hammond in so projecting that spittle or mucus was an intentional act;

7. No permanent or ongoing damage was occasioned to the dock of the Warren Police Station; and

8. Police informed Dion John Hammond that the presence of the spittle or mucus in the dock area would require professional cleaning.

Inferences drawn

I drew an inference that the dock area of the Warren Police Station had to be cleaned. I drew a further inference that such cleaning required some degree of effort by some person.

Question of Law

The question I now submit is:

Can these facts support a finding of guilt for an offence contrary to section 195(1)(a) of the Crimes Act, 1900, in particular was the evidence capable of proving beyond reasonable doubt that the seat had been damaged by the conduct of Dion John Hammond?

Date: 18th October 2012

Gordon B Lerve
Judge of the District Court of NSW