Federal Court of Australia

Stark v Commissioner of Taxation [2023] FCA 1523

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| Appeal from: |  |
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| File number: | QUD 42 of 2023 |
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| Judgment of: | **DERRINGTON J** |
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| Date of judgment: | 19 December 2023 |
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| Catchwords: | **TAXATION** – income tax – employment termination payment – payment received by taxpayer in settlement of claims for breach of employment agreement and misleading or deceptive conduct – whether payment was exempt capital gain under s 118-37(1)(a)(i) of the *Income Tax Assessment Act 1997* (Cth) (*ITAA97*) – whether payment was an employment termination payment under s 82-130 of the *ITAA97* – appeal dismissed |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth)*Income Tax Assessment Act 1936* (Cth)*Income Tax Assessment Act 1997* (Cth)*Taxation Administration Act 1953* (Cth)*Termination Payments Tax (Assessment and Collection) Act 1997* (Cth)*Trade Practices Act 1974* (Cth)*Federal Court Rules 2011* (Cth)*Fair Trading Act 1985* (Vic) |
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| Cases cited: | *Ahamed v Secretary, Department of Human Services* [2022] FCA 1207*Ascic v Secretary, Department of Social Services* [2016] FCA 1122*Australian Telecommunications Corporation v Lambroglou* (1990) 12 AAR 515*Avetmiss Easy Pty Ltd v Australian Skills Qualifications Authority* [2014] FCA 314*Berry v Commissioner of Taxation* (2015) 149 ALD 270 *Bond v Federal Commissioner of Taxation* (2015) 101 ATR 85*Bornecrantz v Secretary, Department of Social Services* (2017) 169 ALD 453*Budd v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 961*Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389*Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280*Commissioner of Taxation v Brixius* (1987) 16 FCR 359*Commissioner of Taxation v Pitcher* (2005) 146 FCR 344*Dibb v Commissioner of Taxation* (2004) 136 FCR 388*Dibb v Federal Commissioner of Taxation* (2003) 53 ATR 290*Director of Public Prosecutions for the Commonwealth of Australia v JM* (2013) 250 CLR 135*Ellis v Secretary, Department of Social Services* [2016] FCA 1469*Federal Commissioner of Taxation v Crown Insurance Services Ltd* (2012) 207 FCR 247*Federal Commissioner of Taxation v Scully* (2000) 201 CLR 148*Federal Commissioner of Taxation v Sydney Refractive Surgery Centre Pty* *Ltd* (2008) 172 FCR 557*Galpin trading as Australian Online Racing Accreditation v Australian Skills Quality Authority* [2021] FCA 697*Graham v Robinson* [1992] 1 VR 279*Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315*Harris v Director-General of Society Security* (1985) 59 ALJR 194*Ibarcena v Secretary, Department of Family and Community Services* [2003] FCA 1354*Jamal v Secretary, Department of Social Services* [2017] FCA 916*Johnson v Perez* (1988) 166 CLR 351*Kowalski v Chief Executive Officer of Medicare Australia* (2010) 185 FCR 42*Le Grand v Commissioner of Taxation* (2002) 124 FCR 53*Luck v Secretary, Department of Human Services* (2015) 233 FCR 494*McIntosh v Federal Commissioner of Taxation* (1979) 25 ALR 557*Nugawela v Commissioner of Taxation* [2022] FCA 1474*Onassys v Comcare* [2022] FCA 90*Orfali v Chief Executive Officer, Services Australia* [2020] FCA 747*Osland v Secretary to the Department of Justice* (2010) 241 CLR 320*P v Child Support Registrar* (2013) 62 AAR 17*Rana v Repatriation Commission* (2011) 126 ALD 1*Reeves v Nulis Nominees (Australia) Limited (Trustee)* [2022] FCA 627*Repatriation Commission v O’Brien* (1985) 155 CLR 422*Reseck v Commissioner of Taxation (Cth)* (1975) 133 CLR 45*Romanin v Federal Commissioner of Taxation* (2008) 73 ATR 760*Screen Australia v EME Productions No 1 Pty Ltd* (2012) 200 FCR 282*SDCV v Director-General of Security* (2022) 96 ALJR 1002*TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation* (1988) 82 ALR 175*Todorovic v Waller* (1981) 150 CLR 402*Waterford v Commonwealth* (1987) 163 CLR 54, 77*Weeks v Commissioner of Taxation* (2012) 128 ALD 24*Wills v Chief Executive Officer of the Australian Skills Quality Authority* [2022] FCAFC 10*Yao v Minister for Immigration and Border Protection* (2014) 140 ALD 21 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 192 |
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| Date of hearing: | 11 July 2023  |
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| Counsel for the Applicant: | The Applicant appeared in person |
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| Counsel for the Respondent: | Ms F Chen |
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| Solicitor for the Respondent: | HWL Ebsworth Lawyers |

ORDERS

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|  | QUD 42 of 2023 |
|   |
| BETWEEN: | DAVID PAUL STARKApplicant |
| AND: | COMMISSIONER OF TAXATIONRespondent |

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| order made by: | DERRINGTON J |
| DATE OF ORDER: | 19 December 2023 |

THE COURT ORDERS THAT:

1. The appeal is dismissed
2. The applicant pay the respondent’s costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DERRINGTON J:

## Introduction

1. The applicant, Mr Stark, appeals to this Court pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*) from a decision of the Administrative Appeals Tribunal (the Tribunal) made on 29 July 2021. At the centre of the appeal lies a question as to how a payment of $505,500 ought properly to be characterised for tax purposes. Mr Stark received that payment from his former employer, Indigenous Business Australia (IBA), pursuant to a Deed of Settlement, which was entered into at the conclusion of a mediation that took place in 2009 in the context of a proceeding that he commenced against IBA in the Supreme Court of Queensland. The Tribunal found that the payment was subject to taxation as an “employment termination payment” (ETP) in accordance with s 82-130(1) of the *Income Tax Assessment Act 1997* (Cth) (*ITAA97*). Mr Stark asserts that the payment is instead capital in nature and, as such, is not taxable.
2. Mr Stark appeared for himself at the hearing of the appeal before this Court, as he had in the hearings before the Tribunal and the Supreme Court. Whilst the genuineness of his faith in the veracity of his claims could not be doubted, he was hampered by his misunderstanding of the nature of an appeal under s 44 of the *AAT Act* and the issues that might permissibly be addressed therein.
3. For the purposes of the appeal, he filed a 133-page document, part of which was described as a witness statement and part of which was described as submissions. It is convenient to refer to this document as his “written submissions”, notwithstanding the fact that it purported to serve other purposes. He also filed a further 17 pages of written submissions in reply to the written submissions filed by the Commissioner, and provided to the Court by email a document described as “draft orders” in which he raised, amongst other things, several monetary claims against the Australian Taxation Office (ATO). Following the hearing, he sent to the Court by email a miscellany of other documents that related to his past dealings with the ATO, as well as the hearings before the Tribunal and the Supreme Court in which he was involved. The Commissioner did not oppose the Court’s receipt and consideration of these additional documents.
4. Ultimately, it was apparent from a review of the material put before the Court by Mr Stark that he desired to re-litigate almost every issue that had arisen in the course of his disputes with both IBA and the Commissioner, which had consumed a vast amount of his time over many years. Amongst other things, his written material raised complaints about the manner in which the proceedings in the Supreme Court had progressed, the circumstances in which the Deed of Settlement was drafted and executed, and the way in which his claims proceeded through the Tribunal. Complaints of this nature could, as a matter of law, have little to no bearing on the outcome of the appeal.
5. Despite the fact that Mr Stark’s written material was voluminous, and raised a wide range of matters of varying relevance to this proceeding, it was apparent that the Commissioner’s legal representatives were aware of the principal issues requiring determination. Those were distilled and addressed in the Commissioner’s written submissions. To his credit, Mr Stark made oral submissions at the hearing of the appeal that also addressed the principal issues. Unfortunately, however, his oral address strayed periodically from these more relevant points and dealt instead with the extraneous matters that had been the subject of much of his written material. In connection with several issues, he effectively invited the Court to make findings of fact as if the matter was being heard *de novo*. The effect of s 44 of the *AAT Act* is such that the Court cannot properly take up that invitation. As the ensuing reasons explain, this conclusion has significant consequences for the outcome of Mr Stark’s appeal.

## Factual background

1. Whilst it is unnecessary to set out in full the factual background against which the issues before the Tribunal arose, it is appropriate to contextualise those issues to some extent in order to give meaning to the decision.
2. The account that follows is constructed principally from facts that were not in dispute. Those facts are supplemented at certain points with Mr Stark’s own claims and assertions to the extent that they assist in explaining his broader grievances with IBA and with the Commissioner, which seem to have motivated certain aspects of his overall approach to this appeal.

### Mr Stark’s employment with IBA

1. In 2000, Mr Stark was seeking employment. He was 55 years of age at the time.
2. In September of that year, he received an offer of employment from an entity known as “GPS Online Ltd” (GPS). He now claims that, if he had accepted that offer when it was made, his employment with that entity would have continued for a number of years and left him “financially comfortable” in retirement.
3. In October 2000, however, he received a competing offer of employment in a division of IBA known as “Indigenous Business Consulting Services” (IBCS). He accepted that offer on 16 October 2000 and rejected the prior offer from GPS. He has since claimed, including in the context of this appeal, that:
4. the offer from IBA was accompanied by assurances that the work to develop IBCS had been “independently assessed as viable” and that, if the division did not continue, there would be other work for him within IBA; and
5. the offer should not have been made, as IBCS was at that time being considered for closure.
6. In December 2001, he was terminated from his position of employment with IBA. Mr Stark asserts that, on this date, all of the staff in IBCS were terminated because the division was considered by IBA to be unprofitable and not financially viable.

### The proceedings in the Supreme Court of Queensland and the Deed of Settlement

1. In October 2003, Mr Stark commenced proceedings against IBA in the Supreme Court of Queensland, seeking damages for breach of the terms of his employment and for misleading or deceptive conduct. According to him, the latter of these aspects of the proceedings ultimately assumed foremost importance. The thrust of his claim, as can be discerned from his written submissions in the present appeal, was essentially that:
2. he had been induced by an offer of stable employment with IBA to abandon his prospective employment with GPS;
3. the offer from IBA was deceptive, in that his employment proved to be unstable (and he had been terminated as a result);
4. he had been unable to find alternative employment after his termination due to his age and outdated skillset; and
5. accordingly, IBA’s deceptive offer had destroyed his earning capacity.
6. The litigation in the Supreme Court continued slowly through to February 2009, at which time a trial of the matter commenced. That trial was adjourned in early March 2009, in order to allow the parties to mediate.
7. The mediation ultimately proved successful, and Mr Stark entered into a Deed of Settlement with IBA. The Deed was not before the Court on this appeal, but a number of its terms were summarised by the Tribunal in its decision. Mr Stark contended that certain of the summarised terms contained mistakes (as addressed later in these reasons) but he did not assert that the summary itself was erroneous. Accordingly, it is convenient to draw from that summary the terms relevant to this appeal, as set out below.
8. The recitals to the Deed of Settlement defined the following terms:

(i) “***Employment***”, as Mr Stark’s employment at [the Employer] (Recital A);

(ii) “***Termination***”, as the termination of the Employment on 19 December 2001 (Recital B);

(iii) “***Proceedings***”, as the Supreme Court proceedings instituted by Mr Stark against [the Employer] (Recital C);

(iv) “***Complaint***”, as Mr Stark’s allegations in the Proceedings of “breach of the terms of his Employment, breach of the *Trade Practices Act 1974*, breach of the *Workplace Relations Act 1996* and deceptive conduct by [the Employer]” (Recital D).

1. Clause 2.1(a) provided as follows:

***2.1*** ***Release by Mr Stark***

In consideration of the payment by [the Employer] to Mr Stark under clause 2.2 of this deed, Mr Stark:

(a) releases [the Employer] from all Claims arising out of or in any way connected with the Employment, its Termination, the Complaints and the Proceedings or any one or more of them (**Released Claims**);

1. The expression “Claim” was defined in comprehensive terms in cl 1.1 of the Deed.
2. Clause 2.2 then provided:

***2.2*** ***Settlement Payment***

In consideration of the release in clause 2.1 [The Employer] agrees to pay to Mr Stark the amount of $555,500, being:

(a) $50,000 for general damages; and

(b) $505,500 in respect of the claim by Mr Stark for lost earnings (less any amount required to be withheld by [the Employer] on account of taxation);

within 28 days of the date on which [the Employer’s] solicitors (Mallesons Stephen Jaques) receive this deed duly signed by Mr Stark and witnessed, and the Proceedings are discontinued according to clause 3, whichever is the later.

1. Clause 2.3 provided that the employer, IBA, made no admission of liability in respect of Mr Stark’s claims.
2. By cl 6, Mr Stark made certain warranties about his entry into the Deed, including that:

(a) before executing this deed he was provided a reasonable opportunity to consider his position; and

(b) he understands the effect of this deed …

1. Clause 7 of the Deed relevantly provided:

***7.2*** ***Entire agreement***

This deed constitutes the entire agreement of the parties about its subject matter and supersedes all previous agreements, understandings, and negotiations on that subject matter.

***7.3 No representations and warranties***

Mr Stark acknowledges that in entering this deed he has not relied on any representations or warranties about its subject matter except as expressly provided by the written terms of this deed.

1. The Deed of Settlement having been signed by Mr Stark and IBA, the settlement payment was paid to Mr Stark on 27 April 2009.

### The private ruling

1. On 29 April 2010, Mr Stark sought a private ruling from the ATO as to whether the $505,500 amount paid to him under the Deed of Settlement was subject to taxation.
2. In the context of this appeal, he provided to the Court by email a Microsoft Word document entitled “100429 IBA Application for Private Ruling”. Because that email was sent after the hearing of the appeal, and the various attachments to it were not independently described in the email in any detail, the precise significance of this document was never fully explained. However, it appears on its face to be his application for a private ruling, or at least part of it, or otherwise a contemporaneous document quite closely related to it. In that document, he lists two “questions and issues for the ruling”, as follows:

1. Whether the payment of $505,500 by my former employer, Indigenous Business Australia ABN 25 192 932 833 (“IBA”) on 27 April 2009 to settle my prosecution of it for its deceptive conduct was, by virtue of Income Tax Assessment Act 1997 S82-135(i), not an Employment Termination Payment?

2. If it was an Employment Termination Payment, will the Commissioner of Taxation determine pursuant to S82-130(5) that the payment should be subject to a maximum taxation rate of 15% plus any applicable Medicare levy, recognising that the payment related to my loss of employment from October 2002 to April 2010?

1. The ATO’s ruling was issued on 30 June 2010. It stated the question asked of it as follows:

Is the payment of $505,500 made to you under a Deed of Settlement an employment termination payment in accordance with subsection 82-130(1) of the *Income Tax Assessment Act 1997* (ITAA 1997)?

1. This question was answered affirmatively. In a summary given at the outset of its reasons for decision, the ATO explained that the $505,500 amount was an ETP because:
* it is made in consequence of the termination of your employment;
* the Commissioner has determined that the ‘12 month rule’ does not apply, and
* it is not payment which is excluded from being an employment termination payment.
1. The summary also seemed to address, to some extent, the second question appearing in the aforementioned Microsoft Word document by stating:

As you have reached your preservation age, the taxable component of your settlement payment is taxed at 15%, plus Medicare levy, for amounts below the employment termination payment cap of $145,000 for the 2008-09 income year, and at the top marginal rate for the amount above this cap ($360,500).

1. The three conclusions stated in the bullet points in the summary correspond to the three requirements for an ETP stated in s 82-130(1)(a) – (c) of the *ITAA97*. It is useful to extract the relevant parts of that provision here, as follows:

**82‑130 What is an employment termination payment?**

(1) A payment is an ***employment termination payment*** if:

(a) it is received by you:

(i) in consequence of the termination of your employment; or

…

(b) it is received no later than 12 months after that termination (but see subsection (4)); and

(c) it is *not* a payment mentioned in section 82‑135.

…

*Exemption from 12 month rule*

(4) Paragraph (1)(b) does not apply to you if:

(a) you are covered by a determination under subsection (5) or (7); or

(b) the payment is a \*genuine redundancy payment or an \*early retirement scheme payment.

…

(5) The Commissioner may determine, in writing, that paragraph (1)(b) does not apply to you if the Commissioner considers the time between the employment termination and the payment to be reasonable, having regard to the following:

(a) the circumstances of the employment termination, including any dispute in relation to the termination;

(b) the circumstances of the payment;

(c) the circumstances of the person making the payment;

(d) any other relevant circumstances.

1. In the balance of its ruling, the ATO gave detailed reasons in support of its conclusions.
2. First, by reference to authority, it stated that, in order for a payment to have been made “in consequence of the termination of your employment”, as required by s 82-130(1)(a)(i), it had to “follow on as a result or effect of the termination of employment”. The ATO noted that it was not necessary for the termination of employment to be the sole or dominant cause of the payment. On this point, it determined as follows:

[T]he settlement payment of $505,500 was made in consequence of your termination of employment, as the settlement payment under clause 2.2 of the Deed was dependant on your release at clause 2.1 in respect of, among other things, that termination.

The termination of employment, the Deed and the settlement payment are all intertwined and connected. If not for the termination of employment, the settlement payment would not have been paid.

1. Secondly, it recorded that the Commissioner had determined pursuant to s 82-130(5) of the *ITAA97* that the requirement in s 82-130(1)(b), that the payment in question be received “no later than 12 months after that termination”, should be waived in this case. This determination was made on the basis that the delay in the receipt of the $505,500 payment was reasonable, given that “it arose as a result of a legal dispute over the entitlement”.
2. Finally, it found that the $505,500 payment was not of a kind mentioned in s 82-135 of the *ITAA97*, thereby satisfying the third requirement for an ETP, stated in s 82-130(1)(c). It also found, in response to a particular contention made by Mr Stark, that the payment was not a capital gain made from a capital gains tax (CGT) event relating directly to “compensation or damages you receive for any wrong or injury you suffer in your occupation” within the ambit of s 118-37(1)(a)(i). That provision is set out and addressed later in these reasons.

### The objection to the private ruling, the objection decision, and the first application for review

1. On 24 August 2010, Mr Stark objected to the private ruling. In that objection, he made complaints about (amongst other things) the validity of the Deed of Settlement, the ATO’s reliance on the “anti-overlap provision”, s 118-20 of the *ITAA97*, and the finding that the settlement was in consequence of termination of his employment.
2. The ATO disallowed this objection on 14 October 2010, effectively reaffirming its prior decision that the $505,500 payment was an ETP. It concluded, again, that the payment was received in consequence of the termination of Mr Stark’s employment in accordance with s 82-130(1)(a)(i), having considered a number of authorities that had interpreted and applied the relevant statutory language. It also noted that the Commissioner had determined under s 82-130(5) that the requirement in s 82-130(1)(b) was to be waived. Finally, it determined that the $505,500 payment was not a payment mentioned in s 82-135, as required by s 82-130(1)(c), and that the CGT provisions of the *ITAA97* did not apply on account of ss 118-20 and 118-22.
3. Mr Stark was dissatisfied with the ATO’s conclusion. On 13 December 2010, he filed an application for review with the Tribunal in relation to both the private ruling and the ATO’s disallowance of his objection.
4. During the course of that Tribunal proceeding, it was identified that the ATO’s original private ruling had incorrectly been issued in respect of the financial year ended 30 June 2010. As a result, the parties agreed that the private ruling did not apply to the $505,500 payment. They consented to an order by Senior Member McCabe that the application should be dismissed. That order was before the Court, and provides as follows:

The parties to the proceedings for review have notified the Tribunal that they consent to the dismissal of the application.

The Tribunal dismisses the application pursuant to section 42A(1) of the *Administrative Appeals Tribunal Act 1975*.

1. Mr Stark contended, in the context of this appeal, that the parties at that time reached an agreement that the best way forward was for him to file his tax return for the financial year ended 30 June 2009 and then raise an objection if he was dissatisfied with the ATO’s assessment of that return.

### Mr Stark’s tax return for the financial year ended 30 June 2009

1. Mr Stark did not lodge his tax return for the financial year ended 30 June 2009 until 9 June 2017. The Commissioner thereafter issued a notice of assessment on 29 June 2017, in which Mr Stark’s taxable income for that year was found to be $515,182. He objected to that notice of assessment on 15 October 2018.
2. The Commissioner disallowed that objection by an objection decision made on 18 January 2019. In the objection decision, it was determined that the $505,500 payment was not an ETP but instead assessable income, which was to be taxed at marginal rates. It has since been acknowledged by the Commissioner that this aspect of the objection decision was incorrect.
3. A notice of amended assessment was issued to Mr Stark on 29 January 2019. On 6 February 2019, he made an application for review to the Tribunal.
4. On 29 July 2021, the Tribunal decided that the sum of $505,500 was an ETP and was taxable as such under the *ITAA97*. It held, in accordance with the Commissioner’s concession, that the amount had incorrectly been assessed as ordinary income. The matter was remitted to the Commissioner for Mr Stark’s tax liability to be re-assessed in accordance with the Tribunal’s determination.
5. It is from this decision that Mr Stark now appeals. It is necessary to set out the Tribunal’s reasoning in support of this decision in some more detail.

## The Tribunal’s decision

1. In its reasons for decision, the Tribunal commenced by recounting briefly the factual background to the matter before explaining the parties’ competing positions. Early in its reasons, it gave some indication of its ultimate conclusion as follows (at [11]):

Although the Commissioner assessed the Payment as ordinary income in accordance with the objection decision, the Commissioner’s primary submission before the Tribunal was that the Payment is an ETP. Because I have concluded that this submission is correct, it is not necessary for me to consider the Commissioner’s alternative submissions or Mr Stark’s submissions in response to those alternative submissions.

1. It was noted that this conclusion was favourable to Mr Stark because ETPs are taxed concessionally.
2. Nevertheless, the Tribunal acknowledged and considered Mr Stark’s submission that the $505,500 payment was not subject to taxation at all. It recognised that the “foundation” of his position was the contention that the payment was capital in nature, being “compensation for the destruction of his earning capacity and not for loss of earnings”, such that it fell within s 82-135(i) as a “capital payment for, or in respect of, personal injury”. It also recognised that he contended that the payment was part of a “genuine redundancy payment”, falling within s 82-135(e). If either of these contentions was made good, the payment would not meet the requirements for an ETP listed in s 82-130(1). Furthermore, the Tribunal acknowledged that Mr Stark had submitted that, on the premise that the $505,500 payment was of a capital nature and not an ETP, the gain was excluded from the CGT provisions of the *ITAA97* by s 118-37(1)(a)(i). It noted, in conjunction with these points, that Mr Stark had made various submissions about the mistakes in, and validity of, the Deed of Settlement.
3. After setting out the relevant statutory provisions, the Tribunal summarised the issues to be determined as follows (at [26]):

(a) Has Mr Stark discharged the burden of proving the Payment was not received by Mr Stark “*in consequence of the termination of [his] employment*”?

(b) If not, has Mr Stark discharged the burden of proving:

(i) the Payment is exempt as part of a genuine redundancy payment; or

(ii) the Payment is “*a capital payment for, or in respect of, personal injury to [Mr Stark]”*;and

(iii) the Payment is “*compensation or damages [Mr Stark] received for … any wrong or injury [he] suffer[ed] in his occupation*”.

1. The Tribunal made two remarks in relation to this summary of the issues (at [27] – [28]), which bear repeating, given their relevance to this appeal:

27. However, as already noted and for the reasons which follow, I have concluded that Mr Stark has failed to establish that the Payment is not an ETP. It is therefore not necessary for me to consider whether the Payment is excluded from the CGT provisions by s 118-37(a)(i) as compensation or damages for a wrong or injury Mr Stark suffered in his occupation.

28. For completeness, I note that Mr Stark challenged (by reference to date/timing issues it is not necessary to detail) whether the Commissioner had in fact made a determination under s 82-130(5). However, that could not assist Mr Stark as s 83-295 provides that a payment which would be an ETP but for s 82-130(1)(b) is nonetheless assessable income*.* Suffice to say, I am satisfied the determination was duly made - it appears in correspondence signed on behalf of the Commissioner.

1. By way of background, the Tribunal then extracted a number of relevant provisions of the Deed of Settlement and reviewed Mr Stark’s pleaded position in the proceedings in the Supreme Court of Queensland. In connection with the latter of these points, it summarised a number of allegations appearing in the final version of Mr Stark’s Further Amended Statement of Claim in those proceedings, as follows:

(a) Various conduct of the Employer, for the purposes of ss 51A and 53B the *Trade Practices Act 1974* (Cth), amounted to a representation as to a future matter and was liable to mislead Mr Stark (Clauses 13(c), 13(d)).

(b) The Employer represented that if the viability of a particular business unit of the Employer (“**the Business Unit**”) was not demonstrated within two years there would be an alternative position with the Employer for Mr Stark, utilising his experience in appraising proposals to acquire new businesses (Clause 12(c)).

(c) An employment agreement existed between the Employer and Mr Stark the terms of which included that the Employer would employ Mr Stark *“for an initial period of 2 years in the [Business Unit], and thereafter either in [the Business Unit] or elsewhere within [the Employer]*.” (Clause 14(c)).

(d) The Employer’s termination of Mr Stark’s employment was in breach of his employment agreement because the two-year period had not expired and because it “*denied [Mr Stark] further employment after the initial two year period*” (Clauses 17(a), 17(b).

(e) “*As a result of the termination of his employment, and/or the said breaches of the Trade Practices Act [Mr Stark] was prevented form (sic) working for [the Employer] at least until he was aged 65, and he has been handicapped from securing alternative employment as the skills that would have been utilised by the Company have become considered by alternate (sic) potential employers as out of date or too long ago, resulting in him suffering loss or damage”* (Clause 30).

(f) An attachment to the Further Amended Statement of Claim entitled “*EXPLANATION OF CLAIM As at 13 July 2007*” contains various calculations of alleged losses including alleged loss of income from the Company. One such calculation, entitled “*Alternative claim for loss of employment at [the Employer]*” sets out projected earnings of salary, bonuses and other payments and benefits that would have been payable by the Employer through to 2010.

1. Turning to the first of the issues that it had flagged as requiring determination, being whether the $505,500 payment was received “in consequence of the termination of [Mr Stark’s] employment”, the Tribunal drew immediate attention to the authority of *Le Grand v Commissioner of Taxation* (2002) 124 FCR 53 (*Le Grand*), with which Mr Stark’s case was said to have “close parallels”. As summarised by the Tribunal, that case also involved a taxpayer who had settled both a claim for breach of an employment contract and a claim for misleading or deceptive conduct. The settlement sum received by the taxpayer was found to have been received in consequence of the termination of the taxpayer’s employment. The Tribunal then considered Mr Stark’s argument that the two cases should be distinguished on the basis that, in *Le Grand*, the settlement sum was “calculated in relation to the employee’s earnings”, whereas his own case involved “9 increasing offers, each a rounded amount, and none related to my earnings”.
2. This argument was rejected for three alternative reasons.
3. First, the paragraph of the judgment delivered by Goldberg J in *Le Grand* upon which Mr Stark relied for his understanding that the settlement sum in that case was “calculated in relation to the employee’s earnings” (being 56 [10]) did not actually prove as much. According to the Tribunal, that paragraph merely recited “how the taxpayer’s lawyers arrived at their advice that he accept the offer”. It noted that, in both *Le Grand* and Mr Stark’s case, the settlement sum was paid in return for discontinuance of the entirety of the taxpayer’s claims, including “claims for wrongful termination and deceptive conduct”.
4. Secondly, it was difficult to see how the multiple offers made in Mr Stark’s case provided a relevant point of distinction since there was no basis for concluding that there were not, in fact, multiple offers made in the course of settling the proceedings in *Le Grand*.
5. Thirdly, and “more fundamentally”, the paragraph of *Le Grand* on which Mr Stark relied did not form part of the *ratio decidendi* of that case. The Tribunal noted that “the reasoning in *Le Grand* applies the principle established in earlier decisions that a payment will be ‘*in consequence of*’ termination of employment if it follows on from the termination, which need not be the dominant cause of the payment”.
6. The Tribunal then rejected Mr Stark’s attempt to distance himself from the terms of the Deed of Settlement, which were relevant to the proper characterisation of the litigation before the Supreme Court of Queensland and, therefore, to the question as to whether the $505,500 payment was made in consequence of the termination of his employment. Particular attention was devoted to the wording of cl 2.2(b) (as set out above), to the effect that the $505,500 amount was paid in respect of Mr Stark’s claim for “lost earnings”. The Tribunal found there to be no basis for Mr Stark’s contention that those words should be understood to refer to “lost earning capacity”. As a matter of construction, there was no reason to accept such a departure from the plain words of the Deed. The words appearing in the Deed seemingly reflected the fact that “Mr Stark claimed damages for both wrongful termination and deceptive conduct and the Deed settled all claims under the litigation including those two claims”.
7. The Tribunal also rejected Mr Stark’s submission that the Deed was signed under duress because he had insufficient time to consider it and was under pressure because of the looming resumption of the trial in the Supreme Court. That suggestion was contrary to the acknowledgments in the Deed (specifically, in cl 6, as set out above). No attempt had been made by Mr Stark in the 12 years since the Deed was executed to have it set aside or rectified. In any event, Mr Stark’s Further Amended Statement of Claim in the Supreme Court had expressly claimed damages for both wrongful dismissal and misleading or deceptive conduct and the settlement payment followed the discontinuance of the litigation as a whole. Accordingly, even if the Deed was disregarded, the payment would, in context, attract the same characterisation as having been made in consequence of the termination of Mr Stark’s employment.
8. The Tribunal similarly rejected Mr Stark’s claim that an allegedly incorrect reference in the Deed to the “*Workplace Relations Act*” meant that the Deed elsewhere did not reflect the intention of the parties. The Tribunal regarded that logic as involving “too much of a leap”. This minor error did not provide a basis for concluding that the Deed in its entirety did not reflect the parties’ intentions, given that it was acted upon by the payment of the settlement amount and the discontinuance of the litigation. Furthermore, again, even if the Deed was to be disregarded, it would still plainly be the case that the payment was received in settlement of the Supreme Court proceedings.
9. Mr Stark further submitted that the Deed was not duly witnessed and was not binding because the signature of the witness accompanying his own signature had been appended at some later time, since that witness was not present when he signed the Deed. That allegation was also found not to assist Mr Stark on the basis that, even if the Deed in this case did not amount to a binding deed, it would nevertheless be a valid written contract to the same effect. Regardless, once again, even without the Deed or any written agreement, it was possible to characterise the $505,500 payment as a payment made in consequence of the termination of Mr Stark’s employment on the basis that it had been made immediately prior to the discontinuance of the litigation in the Supreme Court, apparently by way of settlement of the claims made in that litigation.
10. The Tribunal then proceeded to deal with a further discrete submission advanced by Mr Stark, that, because he had already been paid for two years of his contract with IBA prior to the parties’ entry into the Deed, the $505,500 payment must have been for lost earning capacity. The unstated premise of this submission was that Mr Stark had been employed on a two-year contract, such that the initial payment to which he referred was to be understood as him being “paid out” under that contract, while the subsequent $505,500 payment was necessarily to be understood as something else — in Mr Stark’s submission, a payment for lost earning capacity. The Tribunal found that this submission did not survive scrutiny. The unstated premise explained above was contradicted by Mr Stark’s own claim in the Supreme Court proceedings that his employment contract was not limited to two years. His Further Amended Statement of Claim had contained a calculation of lost wages up to his expected retirement age of 65 — well beyond the expiry of any two-year contract.
11. Thereafter, the Tribunal considered a number of comments that had been made by judges of the Supreme Court in the course of the proceedings commenced by Mr Stark, which he said supported his submission that his case was about a loss of earning capacity. On its view of the transcripts and other relevant material, the Tribunal concluded that, while Mr Stark may have emphasised his claim for misleading or deceptive conduct, he did not abandon or withdraw his claim relating to termination of employment. Even if he had, this would not prevent the $505,500 payment from being characterised as having been received in consequence of the termination of his employment.
12. Ultimately, for these reasons, the Tribunal found that the $505,500 payment was received in consequence of the termination of Mr Stark’s employment. The first requirement for an ETP, as stated in s 82-130(1)(a)(i), was therefore met. It explained its conclusion as follows (at [67] – [68]):

67. I do not doubt that Mr Stark came to regard the litigation as primarily or even exclusively driven by his grievance that, by accepting the Employer’s [that is, IBA’s] employment offer, he gave up the opportunity at the Company [that is, GPO Online Ltd] and, by the time his employment at the Employer was terminated, he was unable to secure alternative employment. But damages for loss of earning capacity was not all he claimed. He also claimed damages for termination of his employment. The Payment settled all claims and on that basis is properly characterised as received by Mr Stark in consequence of termination of his employment.

68. In any case, even if the Payment were, as Mr Stark maintains, solely compensation for lost earning capacity, it would not follow that it was not made in consequence of termination of his employment. Mr Stark did not deny that the litigation would not have occurred if his employment had not been terminated. Although it agitated Mr Stark’s grievance about the alleged destruction of his earning capacity, the litigation followed as a consequence of the termination of Mr Stark’s employment and the Payment is directly linked to the discontinuance of the litigation. It followed from and is in consequence of the termination of Mr Stark’s employment. That is sufficient, on the authorities cited, to require the Tribunal to conclude that the Payment was made in consequence of termination of Mr Stark’s employment.

1. The Tribunal then turned to consider Mr Stark’s submission that the $505,500 payment was part of a genuine redundancy payment under s 82-135(e). Although this submission had not been raised by Mr Stark in his objection, the Tribunal considered it in the absence of any protest by the Commissioner.
2. It was nevertheless rejected for two reasons. First, there was nothing in evidence to suggest that the $505,500 payment was calculated or made because Mr Stark’s position was genuinely redundant. Instead, the payment was received because Mr Stark had sued IBA for damages for deceptive conduct and wrongful dismissal and had, in a mediation, agreed to discontinue that litigation. Secondly, the evidence did not establish that Mr Stark’s position was redundant. As found by the Tribunal (at [74]):

His employment continued for a period after the Employer decided his services were not required in the Business Unit. There is no evidence drawn to my attention by Mr Stark that the Payment was treated as a redundancy payment by the Employer. I am, accordingly, not persuaded Mr Stark has discharged the burden of proving the Payment was received because his position was genuinely redundant.

1. The Tribunal then rejected Mr Stark’s submission that the $505,500 payment was a capital payment for, or in respect of, personal injury under s 82-135(i). It described the expression “personal injury” as “well-known”, and noted that there was nothing in the statutory context to suggest that it should take anything other than its normal meaning, which did not extend to mere financial injury. Relevantly, there had been no claim for injury to Mr Stark’s person.
2. It also noted that the Deed of Settlement dissected the amount payable to Mr Stark into two categories: $50,000 for general damages and $505,500 for lost earnings. According to the Tribunal, the specific characterisation of the former amount as being for general damages suggested that the latter amount must be for another purpose, as stated in the Deed. For the reasons that it had already given, Mr Stark had not established any basis upon which the Tribunal ought to depart from the terms of the Deed. In any event, the payment “plainly settled all extant and future claims relating to Mr Stark’s employment” and there was “no basis on which to identify any part of this undissected sum as relating to personal injury”.
3. It noted in connection with this point that, even if the $505,500 payment was capital in nature, it would not accept that it was for or in respect of personal injury to Mr Stark.
4. In the result, the Tribunal concluded that the $505,500 payment received by Mr Stark under the Deed of Settlement was indeed an ETP. Accordingly, the payment ought to have been taxed concessionally and not as ordinary income. The matter was remitted to the Commissioner for re-assessment of Mr Stark’s income tax liability on this basis.

## The nature of an appeal under s 44 of the *AAT Act*

1. As indicated at the outset of these reasons, Mr Stark did not entirely appreciate the more restricted scope of an appeal from a decision of the Tribunal under s 44 of the *AAT Act*. This observation is not meant as a criticism. The dividing line between what can and cannot be argued on such an appeal is not always obvious — particularly to a self-represented litigant. Despite this difficulty, the point has some bearing on the outcome in this matter. For that reason, it is necessary to explain in a degree of detail the role properly to be taken by the Court in an appeal of this nature.
2. To begin with, s 44(1) of the *AAT Act* provides as follows:

*Appeal on question of law*

(1) A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.

1. The requirement that the appeal be brought “on a question of law” directs immediate attention to the distinction between questions of law, questions of fact and questions of mixed fact and law. It has been recognised on many occasions that this distinction is not one that is easily drawn: see, eg, *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 394; *Director of Public Prosecutions for the Commonwealth of Australia v JM* (2013) 250 CLR 135, 157 [39]. Nevertheless, in the context of s 44, the distinction assumes a great deal of importance.
2. In the first place, the Court’s ability to make findings of fact on an “appeal” of this kind (which, in actuality, involves an application made in the Court’s original jurisdiction: *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1013 [8], 1032 [116], 1057 [242], 1064 [283]) is constrained by s 44(7) and (8):

*Federal Court may make findings of fact*

(7) If a party to a proceeding before the Tribunal appeals to the Federal Court of Australia under subsection (1), the Court may make findings of fact if:

(a) the findings of fact are not inconsistent with findings of fact made by the Tribunal (other than findings made by the Tribunal as the result of an error of law); and

(b) it appears to the Court that it is convenient for the Court to make the findings of fact, having regard to:

(i) the extent (if any) to which it is necessary for facts to be found; and

(ii) the means by which those facts might be established; and

(iii) the expeditious and efficient resolution of the whole of the matter to which the proceeding before the Tribunal relates; and

(iv) the relative expense to the parties of the Court, rather than the Tribunal, making the findings of fact; and

(v) the relative delay to the parties of the Court, rather than the Tribunal, making the findings of fact; and

(vi) whether any of the parties considers that it is appropriate for the Court, rather than the Tribunal, to make the findings of fact; and

(vii) such other matters (if any) as the Court considers relevant.

(8) For the purposes of making findings of fact under subsection (7), the Federal Court of Australia may:

(a) have regard to the evidence given in the proceeding before the Tribunal; and

(b) receive further evidence.

1. These constraints serve to focus the proceeding on the question of law stated by the applicant. So much is the effect, too, of r 33.12(1) – (2) of the *Federal Court Rules 2011* (Cth), as follows:

**33.12 Starting an appeal—filing and service of notice of appeal**

(1) A person who wants to appeal to the Court under the AAT Act must file a notice of appeal, in accordance with Form 75.

(2) The notice of appeal must state:

(a) the part of the decision the applicant appeals from or contends should be varied; and

(b) the precise question or questions of law to be raised on the appeal; and

(c) any findings of fact that the Court is asked to make; and

(d) the relief sought instead of the decision appealed from, or the variation of the decision that is sought; and

(e) briefly but specifically, the grounds relied on in support of the relief or variation sought.

1. As explained by the Full Court in *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315 (*Haritos*) at 349 – 350 [91], the end sought to be achieved by that rule is “to have the question of law stated with sufficient precision”. Emphasis is placed on this characteristic of precision because, in cases where the jurisdiction conferred on the Court by s 44 is invoked, the question of law alone is the subject matter of the appeal and dictates the ambit of the appeal: see *Commissioner of Taxation v Brixius* (1987) 16 FCR 359, 363 – 364; *TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation* (1988) 82 ALR 175, 178; *Weeks v Commissioner of Taxation* (2012) 128 ALD 24, 28 – 29 [15]; *Haritos* at 348 – 349 [85] – [86]. While the right of appeal in s 44 may extend, in certain cases, to a mixed question of fact and law, it does not extend to a mere question of fact: *Haritos* at 383 [192]. In this way, the policy of the section is to ensure that the merits of the case are dealt with by the Tribunal, in the discharge of its fact-finding function, and not by the Court: *Repatriation Commission v O’Brien* (1985) 155 CLR 422, 430; *Harris v Director-General of Society Security* (1985) 59 ALJR 194, 198; *Osland v Secretary to the Department of Justice* (2010) 241 CLR 320, 332 [19] (*Osland*); *Haritos* at 383 – 384 [192], [194]; *Wills v Chief Executive Officer of the Australian Skills Quality Authority* [2022] FCAFC 10 [7]. The position was aptly summarised by Abraham J in *Onassys v Comcare* [2022] FCA 90 (*Onassys*) at [22], by reference to several prior authorities, as follows:

The role of the Court is not to conduct a merits review: *Kara v Comcare* [2011] FCA 951 at [31], citing *Attorney-General (New South Wales) v Quin* [1990] HCA 21; (1990) 170 CLR 1 at 35-36. The Court is not at liberty to find the facts on which a question of law might emerge, nor is it sufficient to merely assert that the Tribunal erred in law in making a particular finding: [*Palassis v Commissioner of Taxation* [2011] FCA 1305]at [30]. Even if the Tribunal erred in its conclusions on the facts, such error does not in itself constitute an error of law: *Australian Postal Corporation v Edwards* [2014] FCA 1348 at [39]. The decision as to what evidence is to be accepted is a matter for the Tribunal and it is not the function of this Court to review the Tribunal’s factual findings and to substitute its view of the facts for those of the Tribunal: *Comcare v Moon* [2003] FCA 569 at [33].

1. This is not to deny, of course, that the Court can evaluate the fact-finding process of the Tribunal in order to decide upon its legality: *Waterford v Commonwealth* (1987) 163 CLR 54, 77; *Haritos* at 384 [194]; *Nugawela v Commissioner of Taxation* [2022] FCA 1474 [5].
2. Not only will a question of law define the subject matter and ambit of the appeal, the existence of such a question is necessary to found the jurisdiction of the Court under s 44: *Ibarcena v Secretary, Department of Family and Community Services* [2003] FCA 1354 [4]; *Budd v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 961 [9]; *Berry v Commissioner of Taxation* (2015) 149 ALD 270, 276 [27]; *Jamal v Secretary, Department of Social Services* [2017] FCA 916 [15]; *Ahamed v Secretary, Department of Human Services* [2022] FCA 1207 [2]. It must be recalled, however, that the Court has jurisdiction to decide whether or not an appeal from the Tribunal is on a question of law, and that requirements of drafting precision concerning the form of the question of law go only to the exercise, not the existence, of jurisdiction: *Haritos* at 341 [62](3) – (5), 350 – 351 [97]; *Luck v Secretary, Department of Human Services* (2015) 233 FCR 494, 504 [47]. Accordingly, a failure to state the question of law, or a deficiency in its formulation, will not necessarily deprive the Court of jurisdiction: *Haritos* at 350 – 351 [97]; *Galpin trading as Australian Online Racing Accreditation v Australian Skills Quality Authority* [2021] FCA 697 [12].
3. Importantly, as recognised in *Haritos* at 341 [62](6), whether or not an appeal is on a question of law “is to be approached as a matter of substance rather than form”. In that same case, the Full Court set out a number of propositions relevant to the identification of a question of law in accordance with this overarching principle. These propositions may be summarised as follows:
4. merely to assert that the Tribunal erred in law in making a particular finding is not to state a question of law — “it simply begs the question of law to commence it with the words ‘whether the Tribunal erred in law’. If the question, *properly analysed*, is not a question of law no amount of formulary like ‘erred in law’ or ‘was open as a matter of law’ can make it into a question of law”: at 350 [92], quoting *Australian Telecommunications Corporation v Lambroglou* (1990) 12 AAR 515, 527;
5. there will be a deficiency in a notice of appeal if the asserted questions of law do no more than invite the Court to embark on a broad and hypothetical enquiry as to the construction and operation of statutory provisions: at 350 [93], citing *Screen Australia v EME Productions No 1 Pty Ltd* (2012) 200 FCR 282, 289 [24];
6. in cases of doubt, the Court should consider the notice of appeal, the alleged question or questions of law, the grounds raised, the statutory context, and the Tribunal’s reasons for its decision: at 350 [94];
7. although questions of law are not to be distilled from the grounds of appeal, this is a matter of practice and procedure rather than jurisdiction, and of degree, and should not be reduced to semantics at the expense of substance: at 350 [95], 354 [105], citing *Osland* at 333 [21]; and
8. where, as a matter of substance, a question of law exists, then there is a procedural discretion, to be exercised judicially and where it is in the interests of justice to do so, to direct its formal identification in an amended notice of appeal even where the question of law has not been identified before the primary judge: at 354 [107].
9. The Full Court also endorsed, at 353 [103], the following summary by Wigney J in *P v Child Support Registrar* (2013) 62 AAR 17 (*P v Child Support Registrar*) at 33 [53], which bears repeating in full:

A question which is inelegantly drafted may nonetheless be a question of law which attracts the jurisdiction of this Court if its purport is tolerably clear having regard to the context in which it appears: *Ergon Energy Corporation Ltd v Federal Commissioner of Taxation* (2006) 153 FCR 551 at [51]. In an appropriate case the Court itself may be “prepared to frame questions in order to found its jurisdiction”: *Secretary, Department of Education, Employment and Workplace Relations v Ergin* (2010) 54 AAR 60 at [11]; 119 ALD 155 at 159; *Rana* at [16]; *Goodricke v Comcare* (2011) 55 AAR 188 at [14]-[22]; 122 ALD 546 at 549-550. An appropriate case may arise where, as here, an applicant is unrepresented and where it is possible to discern a question which, if properly framed, could found the jurisdiction of the Court: *Hoe v Manningham City Council* [2011] VSC 37 at [6]-[7]; *Kolya v Tax Practitioners Board and Another* (2012) 87 ATR 474 … at [8].

1. The reference at the conclusion of this passage to the position of unrepresented litigants is important in the present context.
2. Self-represented litigants seeking to invoke the jurisdiction of the Court under s 44 of the *AAT Act* are not exempt from the requirement to state precisely a question of law: *Bornecrantz v Secretary, Department of Social Services* (2017) 169 ALD 453, 460 [25]. However, the Court may afford them some “allowance” or “latitude” in their endeavours to comply with that requirement: *Yao v Minister for Immigration and Border Protection* (2014) 140 ALD 21, 27 [36], citing *Kowalski v Chief Executive Officer of Medicare Australia* (2010) 185 FCR 42, 51 [38]; *Orfali v Chief Executive Officer, Services Australia* [2020] FCA 747 [30]; *Reeves v Nulis Nominees (Australia) Limited (Trustee)* [2022] FCA 627 [28]. In particular, as the passage from the judgment of Wigney J in *P v Child Support Registrar* suggests (with the support of the authorities cited therein), the Court has a power to pose questions of law of its own volition, in the interests of justice, if the underlying complaints are properly susceptible to reformulation in that manner: see also *Ascic v Secretary, Department of Social Services* [2016] FCA 1122 [21]; *Ellis v Secretary, Department of Social Services* [2016] FCA 1469 [5]. Care must nevertheless be taken not to “visit on a respondent party a judicially attractive question of law which the notice does not fairly raise”: *Rana v Repatriation Commission* (2011) 126 ALD 1, 5 [14]; *Onassys* [21]. The proper approach is that explained by Mortimer J in *Avetmiss Easy Pty Ltd v Australian Skills Qualifications Authority* [2014] FCA 314 at [77], as cited and approved on a number of subsequent occasions (including in *Haritos* at 353 [104]):

Recognising minds differ on such matters, in my opinion a requirement that a notice of appeal be read fairly, rather than generously or benevolently, is a preferable approach. It provides more consistency with the role of the Court. It involves neither overzealous scrutiny, nor technicality, nor the imposition of a standard which in the circumstances it would be unreasonable to expect a non-legally trained person to meet. Fairness allows for the reading of a notice of appeal in its context: that is, reading all of the notice rather than simply that nominated as the “question of law”.

1. The applicable principles have been set out in some detail here because, as the ensuing reasons will reveal, a number of the points raised in Mr Stark’s Notice of Appeal amounted to mere questions of fact, even when viewed fairly and as a matter of substance and not form. It is appropriate to turn now to that Notice of Appeal and the questions of law stated therein, as they have been framed by Mr Stark.

## The appeal to this Court

### Questions of law raised

1. As was correctly pointed out by Ms Chen on behalf of the Commissioner, there was little consistency between the questions of law identified in Mr Stark’s Notice of Appeal, the grounds upon which he relied in the Notice of Appeal, and his written and oral submissions. No doubt because Mr Stark was self-represented, Ms Chen appropriately accorded him great latitude in the manner in which he advanced his case on appeal. Subject to issues of jurisdiction under s 44(1) of the *AAT Act*, I propose to do the same. The critical difficulty is that, to a very large extent, Mr Stark’s submissions before this Court were the same as those that he made before the Tribunal — notwithstanding the fact that, for the reasons explained above, the scope of inquiry here must be substantially more limited.
2. The questions of law posed by Mr Stark in his Notice of Appeal were as follows:

1. Whether, on its proper construction, the effect of s 118-37(a)(i) of ITAA97 is to make the capital gain on compensation falling within s 118-37(a)(i) exempt from income tax, even if some part of the payment of such compensation would otherwise have been made assessable income as an employee termination payment by s 82-10 of ITAA97.

2. Whether a payment can be found to be received “in consequence of the termination of [the taxpayer’s] employment” within the meaning of s 82-130(1)(a)(i) of ITAA97 in circumstances where the only relevant connection identified between the payment and the termination is that the Termination was pleaded as material fact in the claim for damages which was settled by the making of the payment.

3. Whether s 83-175(1) of ITAA97 requires consideration of whether a given payment to a taxpayer is attributable to redundancy as opposed to whether the termination of the taxpayer’s employment is attributable to redundancy.

1. It might be observed that these questions do indeed have the appearance of questions of law, and Mr Stark acknowledged at the hearing that he had received some legal assistance in formulating them. Regrettably, however, the questions tend only to conceal the reality of the issues in dispute. As explained in the reasons that follow, they cannot even arise for determination in this case unless certain other questions — including questions of fact involving challenges to the Tribunal’s findings — are resolved beforehand.
2. Accompanying the three questions of law in the Notice of Appeal were four grounds of appeal, which were framed similarly. Grounds 1 to 3 corresponded with the three questions of law and were expressed as alternatives to one another. Gound 4 seemed to follow from the preceding grounds as a conclusion.
3. Before turning to consider these grounds, attention ought to be directed to certain other miscellaneous issues that attracted a considerable deal of attention in Mr Stark’s written and oral submissions without actually furthering his case at law. Explaining the irrelevance of these points at the outset assists in dealing efficiently with the grounds of appeal stated in the Notice of Appeal and the proper characterisation of the $505,500 payment.

### Miscellaneous issues

#### The legitimacy of the 14 October 2010 disallowance of Mr Stark’s objection

1. As explained above, in both its 30 June 2010 private ruling and its 14 October 2010 disallowance of Mr Stark’s objection to the private ruling, the ATO identified that the Commissioner had determined pursuant to s 82-130(5) of the *ITAA97* that the condition for an ETP in s 82-130(1)(b), that the payment be received “no later than 12 months after that termination”, should be waived. The 30 June 2010 private ruling was issued in respect of the wrong income year, but the 14 October 2010 disallowance of Mr Stark’s objection was not. Mr Stark nevertheless contended that no valid determination under s 82-130(5) was ever made because the letter dated 14 October 2010, by which the ATO’s disallowance decision was communicated to him, was illegitimate. It followed, in his submission, that the 12-month requirement in s 82-130(1)(b) could not be met, and the $505,500 payment could not be an ETP.
2. In attempting to make good his contention, Mr Stark levelled a number of very serious allegations. In his written submissions, he asserted as follows (the underlining appearing in the original):

[W]hile that second supposed determination does indeed apply to the correct tax year, 1 July 2008 to 30 June 2009, there must be doubt about the authenticity of this supposed second determination, because:

1 I do not believe it was delivered to my home address, or emailed to me.

2 14 October 2010 precedes the 23 December 2011 dismissal by Senior Member McCabe of my then AAT Application because of the date error.

3 Joyce Kot [an employee of the ATO who Mr Stark described as the officer responsible for his matter], not then or since has raised the existence of this supposed second determination.

4 The ATO’s 19 August 2011 RESPONDENT’S STATEMENT OF FACTS ISSUES AND 40 CONTENTIONS at clauses 43 to 45 contends that the Commissioner made a determination in his ruling of 30 June 2010 that was based on the incorrect year, but there is no mention of the supposed second determination made on 14 October 2010.

1. He later claimed that he had not seen the 14 October 2010 letter until several years later, and described it as a “false document”, a “fraud” and a “fraudulent falsehood”. His submissions proceeded to state that:

I ask the Federal Court to recognise that:

a) the above proves that there was no valid second determination,

b) that the ATO has fraudulently created a false back-dated document, and

c) that the AAT has ignored my witness statement submission and the ATO’s fraud.

1. He also asserted that, on 27 June 2018, an officer of the ATO had advised him in writing that the $505,500 payment “is not covered by a determination exempting it from the 12-month rule”. That correspondence did not seem to be before the Court, but Mr Stark relied on it as further evidence that the 14 October 2010 letter was “fraudulent” and “back-dated”.
2. The Tribunal dealt with these contentions at [28] of its reasons, extracted in full above. After noting that the issues were “not necessary to detail”, it found that the determination under s 82-130(5) was “duly made”. It referred, in a footnote, to the 30 June 2010 private ruling, which had become the document “T10” in that proceeding. As explained above, the private ruling identified that the s 82-130(5) determination had been made on the basis that the time between the termination and the payment was reasonable given that its duration was “a result of a legal dispute over the entitlement”. It is unnecessary to consider whether or not the s 82-130(5) determination addressed in the private ruling was valid in circumstances where that ruling was issued in respect of the wrong income year. That is because the 14 October 2010 letter, which was issued in respect of the correct income year, identified again that a determination had been made under s 82-130(5). It stated that:

The Commissioner can make a determination under subsection 82-130(5) of ITAA 1997 which waives the 12 month rule for an individual where it is consider that the time between the termination of employment and the payment is reasonable having regard to all the relevant circumstances including:

(a) the circumstances of the termination (including any dispute in relation to the termination);

(b) the circumstances of the payment; and

(c) the circumstances of the person making the payment.

It has been determined, after having regard to all the circumstances of the payment, that the delay in payment is reasonable given that it arose as a result of a legal dispute over the entitlement.

1. Mr Stark’s challenge to the legitimacy of that letter (and the s 82-130(5) determination to which it referred) is without substance. His contentions can be refuted by reference to one document before this Court on appeal: his own “Application for Review of Decision” dated 13 December 2010, by which he first brought to the Tribunal his complaints about the ATO’s treatment of the $505,500 payment. That document contains a field labelled “Decision” with a description stating “You do not have to answer this question if you can attach a copy of the decision. If you don’t have a copy, please describe the decision briefly”. In that field, Mr Stark has handwritten a response identifying the decisions to be reviewed as the “ATO RULING OF 30/6/10” and the “ATO DISALLOWANCE OF OBJECTION OF 14/10/10”, both of which are said to be attached. In the next field on the page, labelled “Date the decision was made”, he has handwritten the response “14/10/10”. In the next field, labelled “Decision reference”, he has handwritten the response “1011608131732”. That number is described as a “reference number” on the front page of the 14 October 2010 letter. In the next field, labelled “Date you received notice of the decision”, he has handwritten the response “ABOUT 18/10/10”. In this way, the Application for Review of Decision dated 13 December 2010, which Mr Stark authored himself, puts beyond doubt the fact that he received the 14 October 2010 letter by which the s 82-130(5) determination was communicated. Indeed, the 14 October 2010 letter was part of the basis of the first application for review that he made to the Tribunal. His assertions that the document was backdated and fraudulent are not remotely sustainable, and ought not to have been made. It is regrettable that he levelled such serious allegations without considering the contents of a key document, which should undoubtedly have been in his possession.
2. In the circumstances, it is obvious that a determination was made under s 82-130(5), such that the requirement in s 82-130(1)(b) was waived.

#### The validity of the Deed of Settlement

1. Mr Stark continued on appeal to agitate his claim that the Deed of Settlement was signed under duress, that there were errors in it, that it was improperly witnessed, and that it could not be relied upon to determine whether the $505,500 payment to him was an ETP. As set out above, those allegations were considered by the Tribunal in some detail. It concluded that they were unsustainable and that, even if they were made out, they could not make any difference to the outcome of the hearing. There was no appeal from those findings. Indeed, there scarcely could be, as they concerned predominantly factual issues.
2. It is worth emphasising one of the points made by the Tribunal. Although the Deed was entered into in 2009 — that is, now, 14 years ago — Mr Stark has never sought to have it set aside. That may well be because, were he to do so, he would be required to return the settlement amount paid under it. His action against IBA would be difficult to recommence, or potentially even be barred by the passage of time. There is, accordingly, some reason to believe that Mr Stark is attempting to approbate the Deed insofar as it supports his entitlement to be paid the settlement amount while simultaneously reprobating it insofar as its terms do not support his present claims. In the context of this appeal under s 44 of the *AAT Act*,the Deed should be accepted for what it appears to be. Ultimately, as the reasons below reveal, the issues concerning the Deed have no bearing on the outcome of the appeal.

### Ground 1

#### The ground of appeal

1. By his first ground of appeal, Mr Stark contended that:

The Tribunal erred in finding (at [11] and [27]) that its conclusion that the Payment was an employee termination payment meant that it was unnecessary to consider whether the Payment fell within s 118-37(a)(i), because, on its proper construction, the effect of s 118-37(a)(i) is to make the capital gain on compensation falling within s 118-37(a)(i) exempt from income tax, even if some part of the payment of such compensation would otherwise have been made assessable income as an employee termination payment by s 82-10.

1. As is apparent from its terms, this first ground of appeal captures the first question of law stated in the Notice of Appeal. Central to both that question of law and the first ground of appeal is s 118-37(1)(a)(i) of the *ITAA97* (noting that the question and the ground of appeal refer, erroneously, to “s 118-37(a)(i)”), which provides as follows:

**118-37 Compensation, damages etc.**

(1) A \*capital gain or \*capital loss you make from a \*CGT event relating directly to any of these is disregarded:

(a) compensation or damages you receive for:

(i) any wrong or injury you suffer in your occupation; …

1. The point immediately to be made is that the first question of law and first ground of appeal will be immaterial to the outcome of the case, and strictly unnecessary to consider, unless it is found that the $505,500 payment actually falls within s 118-37(1)(a)(i) as a capital gain made from a CGT event relating directly to compensation or damages Mr Stark received from “any wrong or injury” he suffered in his occupation. That threshold issue may involve both questions of fact and law, insofar as it is necessary to determine the ordinary meaning of the words used in the statute and then to determine whether the facts of this case necessarily fall within or outside the statutory description: see *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, 287; *Federal Commissioner of Taxation v Crown Insurance Services Ltd* (2012) 207 FCR 247, 256 [39].
2. As explained above, the Tribunal did not address these questions of fact and law because it found that the payment was an ETP and, therefore, could not fall within s 118-37(1)(a)(i). It did find, however, that:
3. there was no basis upon which to identify any part of the undissected $505,500 sum as relating to personal injury (at [78]); and
4. accordingly, even if Mr Stark was to establish that the sum was capital in nature, it “would not accept that it was for or in respect of personal injury to Mr Stark” (at [79]).
5. Whether it is appropriate for this Court to engage with the questions of fact that are relevant to this ground of appeal will depend upon the application of s 44(7) of the *AAT Act* — including, in particular, the requirement therein that any findings of fact made by the Court are “not inconsistent with findings of fact made by the Tribunal”. This requires some attention to be directed to the parties’ submissions, and whether they seek findings that will involve any such inconsistency.

#### Mr Stark’s submissions

1. Mr Stark’s position with respect to the application of s 118-37(1)(a)(i) could be discerned from various passages in his written submissions. Essentially, he contended that the $505,500 payment fell within that section because it was a payment made to compensate him for destruction of his earning capacity — that being, in his view, a “wrong” or an “injury”.
2. He seemed to explain the relevant “wrong” or “injury” in this way:

Justice Wilson [in the Supreme Court of Queensland] was satisfied at the end of day 3 of the trial that it was unlikely that a person of my age would be able to secure alternate employment. I had secured alternate employment with GPS, but IBA’s misleading and deceptive conduct took from me that last opportunity for employment until age 65 …

1. At various points, he submitted that “personal injury does not exclude financial injury” and, in a lengthier passage, he contended as follows (the emphasis and underlining appearing in the original):

The ATO has at times determined that “personal injury” has been considered to be limited to physical and mental injury, and that this narrow interpretation of “personal injury” is inconsistent with Section 118-71 [sic] exemption due to compensation for “any wrong or injury you suffer in your occupation”. I submit that the overly narrow interpretation of “personal injury” is due to misinterpreting the decision of Smith J in *Graham v. Robinson* [1992] 1 VR 279 wherein the judge ruled that “personal injury” does not extend beyond physical and mental injury to include emotional hurt. That judge was faced with the difficulty of determining whether emotional hurt could be “personal injury” and he determined that it could not, but rather that “personal injury **includes** (my emphasis) physical and mental injury”. The judge did **not** define “personal injury” to be **only** physical and mental injury. Accordingly, “personal injury” can include more than physical and mental injury. My dictionary (Macquarie) defines “personal” 10 ways, only one of which *“pertains to person, body, or bodily aspect”*, while it also defines it as “*Law. Denoting or pertaining to estate or property consisting of moveable chattels, money, securities and* ***choses in action****”* (my emphasis). This broader definition is consistent with the exemption due to compensation for “any wrong or injury you suffer in your occupation.” I respectfully suggest that the Parliament did not intend in 1997 to legislate S82-135 to be inconsistent with the exemption under S118-37(1)(a). If the Parliament meant *personal injury* to mean only *physical or mental injury* it would have used those words. Instead it elaborated on the meaning of *personal injury* by describing the effects of the injury as *“have an assessable and identifiable impact on the capacity of the taxpayer to earn income”.* My inability to secure work was fortnightly assessed by Centrelink, which did on one occasion only find three days temporary work for me in a factory sticking labels on products.

The ruling being objected to further asserts I am wrong to claim the capital gains tax exemption as such cannot apply when there is an overlap of ‘personal injury’ and ‘any wrong you suffer in your occupation’, relying on Senior Member Dwyer’s acceptance of Mr Gibbs submission. However, *AAT Case 11,722* 97 ATC 258 dealt with an action for wrongful dismissal, and your ruling overlooks that the settlement was **not** for a wrong I suffered in my employment by IBA, but rather from its destruction of my earning capacity, by its deceptive conduct before I commenced employment with it. Accordingly, the settlement payment is not caught by S27A(1), but is exempt under S118-37(1)(a).

1. Mr Stark’s written submissions also contained what was described as a “rebuttal” of the Tribunal’s decision, the subject of this appeal, in which Mr Stark cited particular paragraphs of the Tribunal’s reasons by number and advanced arguments directly against them. In response to the paragraphs of the decision relevant to the first ground of appeal, he said (again, with all underlining and emphasis appearing in the original):
2. as to [11]:

By his own admission, S.M. Olding’s [that is, the Tribunal’s] approach to this matter is to ignore or misunderstand evidence and submissions, because he did not consider them. In particular he did not fully considered my evidence and submissions that three ATO officers advised me the settlement payment was tax-exempt, detailed in my Applicant’s Witness Statement for consideration of the AAT – Part 1 page 11 lines 9-18 and 49-52, also Part 2 page 3 table of occurrences 29 April 2010.

1. as to [27] (the words in square brackets appearing in the original):

Even if S.M. Olding did give proper consideration to my evidence and submissions before concluding that the Settlement payment was an ETP, that does not relieve him of responsibility to properly consider my evidence and submissions regarding the applicability of s 118-37(1)(a) [not s118-37(a)(i) as explained above in **14**] – an exempt capital gain is *compensation or damages you receive for any wrong or injury you suffer in your occupation.* I here emphasise; my claim before Justice Wilson in the Supreme Court in 2009, before S.M. McCabe in the aborted AAT application in 2011, and before S.M. Olding have all been that I was wronged by IBA, and hence compensation for that wrong is tax-exempt as provided by s 118-37(1)(a).

1. as to [77] (as part of a longer passage):

“I further contend the settlement is a capital payment made to compensate me for destruction of my after tax earning capacity, and/or for a personal injury that destroyed my after tax earning capacity. The ATO have cited cases that have decided personal injury does not include emotional hurt or reputation damage, but does include pain and suffering related to physical or mental injury. These interpretations are irrelevant to my case as I am not contending I suffered emotional hurt, reputation damage or pain and suffering. The cases cited define what is not personal injury, they do not define what is personal injury.

“If the Parliament intended ‘personal injury’ to mean only physical injury or mental illness it would have legislated such. The ATO contend personal injury can relate to property injury, but then contradict this by asserting personal injury can only relate to physical injury or mental illness. I contend personal injury can create a chose in action, ie a property right enforceable by legal action, such as for damages for destruction of a person’s earning capacity, as this is comparable to the physical damage that renders a quadriplegic unable to earn. The test is not solely the nature of the injury, but may instead be the effect of the injury, as determined by the High Court when it ruled “compensation must be calculated by reference to the nature and extent of the injury **or** likely loss”.

1. as to [78] (as part of a longer passage):

The Decision assertion “There is no basis on which to identify any part of this undissected sum as relating to personal injury”, again demonstrates S.M. Olding’s refusal to recognise what I have explained above **77.** No part of the undissected sum is for personal injury/wrong done to me, because it is all compensation for injury/wrong done to me.

1. as to [79]:

The Decision in **79** to recognise that even if the settlement payment was compensation for lost earning capacity, it is not for injury, is to continue S.M. Olding’s non-appreciation of what I have explained above in **77** regarding s 118-37, which deals with any wrong or injury.

1. Similar arguments were raised by Mr Stark in his written submissions in reply, and in his oral submissions. For the most part, those arguments did not go any further than the points already set out above, though Mr Stark did clarify in his oral submissions that part of his case was that, once the $505,500 payment was found to fall within s 118-37(1)(a)(i), it was “tax exempt” — that is, in his words, “disregarded as a capital gain and as an ETP and as ordinary income”.

#### The Commissioner’s submissions

1. The Commissioner’s written submissions in respect of the first ground of appeal picked up on the findings made by the Tribunal at [78] – [79]. It was submitted that the Tribunal did not err for three reasons. First, because the Tribunal correctly identified that the payment was income pursuant to s 82-10 of the *ITAA97*, as an ETP. Secondly, because the Tribunal correctly identified that, even if portions of the payment were capital gains, “none of the payment could be considered a capital gain” as the payment was an undissected amount. Thirdly, because, even if a portion of the payment could be dissected, s 118-37(1)(a)(i) did not apply as the payment was “not for a personal injury, but rather for either damages for misleading and deceptive conduct or wrongful dismissal”.
2. With respect, these submissions are insufficient to answer this ground of appeal.
3. The first submission fails to engage with the fact that this ground of appeal is *already* run on the assumption that the $505,500 payment has been characterised as an ETP. The ground of appeal effectively asserts that, even though the payment is susceptible to that characterisation, it should fall within s 118-37(1)(a)(i) and therefore be tax exempt.
4. The second submission seems to suggest that, where a single undissected amount exists, it should be characterised first, and in its entirety, as an ETP even if some part of it is capital in nature. One is led naturally to ask *why* this is the case, but the submission does not provide an answer to that question.
5. The third submission merely focuses on the “injury” limb of s 118-37(1)(a)(i), but does not engage with the “wrong” limb. As set out above, Mr Stark seems to rely in some ways on both limbs. Accordingly, the submission does not answer the whole of his argument. In the same way, the Tribunal’s reasons at [78] – [79], as set out above, only deal with the concept of “injury” and not “wrong”.

#### Determination

1. There are several questions that could conceivably arise in determining whether the $505,500 payment falls within s 118-37(1)(a)(i) of the *ITAA97*, many of which are flagged in Mr Stark’s submissions. It could be asked, for instance:
2. whether the payment in this case is an undissected sum;
3. if the payment isan undissected sum, whether it is in the nature of income or capital;
4. if the payment is in the nature of capital, whether it is “compensation or damages … for any wrong or injury [Mr Stark] suffer[ed] in [his] occupation” (on the proper construction of that phrase), such that it falls within s 118-37(1)(a)(i); and
5. if the payment does fall within s 118-37(1)(a)(i), whether that precludes it from being characterised and taxed as an ETP.
6. In order to succeed, Mr Stark must establish that the payment is an undissected sum, that the payment is in the nature of capital, that the payment falls within s 118-37(1)(a)(i), properly construed, and that this precludes it from being taxed as an ETP. The first of these points seems to fall in his favour: both parties submitted, and the Tribunal found (at [78]), that the $505,500 payment is an undissected sum — and there is nothing in the Deed of Settlement to suggest otherwise. However, even if the second point is assumed in his favour (without any finding being made to that effect), he cannot succeed on the third point. This makes the fourth point — which reflects the first question of law posed in the Notice of Appeal — unnecessary to consider. In these circumstances, it seems to be permissible for the Court to engage with the issues thrown up by the parties’ submissions, notwithstanding its more limited jurisdiction under s 44 of the *AAT Act*. There does not seem to be any risk that findings necessary to resolve the first ground of appeal will come into conflict with the existing findings of the Tribunal.
7. As to the third point, it is apparent that the $505,500 amount paid under the Deed of Settlement was not compensation or damages that Mr Stark received “for” any wrong or injury. This conclusion can be drawn by reference to the judgment of the Full Court in *Dibb v Commissioner of Taxation* (2004) 136 FCR 388 (*Dibb*), to which both the Tribunal and the Commissioner referred. In that case, Mr Dibb’s employment with AVCO Financial Services Ltd (AVCO) was terminated. He commenced proceedings against AVCO in the Federal Court, making allegations that were “wide-ranging and serious”, and claiming amounts owing under his contract as well as damages. His claim was settled at mediation by AVCO’s payment of $788,544 “less tax calculated on the said sum as an eligible termination payment”. The terms of the deed of release executed by the parties stated that the payment was made without any admission of liability on the part of AVCO. Mr Dibb sought and obtained a private ruling concerning his tax liability arising out of the settlement payment. He objected to that ruling, but it was affirmed with only slight amendments. Relevantly, in the ruling and the objection decision, the following question was asked and answered:

3. Is any part of the payment excluded from being an ETP under paragraph (n) of the definition as consideration for personal injury? No.

1. For context, it can be noted that this question refers to the definition of an “eligible termination payment” in s 27A(1) of the *Income Tax Assessment Act 1936* (Cth) (*ITAA36*) (as it existed at the time), which provided relevantly as follows:

“eligible termination payment” in relation to a taxpayer, means:

(a) any payment made in respect of the taxpayer in consequence of the termination of any employment of the taxpayer, other than a payment:

…

(iv) of an amount to which section 26AC or 26AD applies;

…

but does not include:

…

(n) consideration of a capital nature for, or in respect of, personal injury to the taxpayer, to the extent to which the amount or value of the consideration is, in the opinion of the Commissioner, reasonable having regard to the nature of the personal injury and its likely effect on the capacity of the taxpayer to derive income from personal exertion …

1. Most importantly for the present purposes, the Full Court dealt with the question as to the applicability of s 27A(1)(n) of the *ITAA36* to the payment received by Mr Dibb at 406 [46], as follows:

… The occasion for apportionment pursuant to s 27A(1)(n) only arises if there can be said to be “consideration of a capital nature for, or in respect of, personal injury to the taxpayer …”. Here, it is impossible to say whether there was or was not personal injury. AVCO denied it. The section does not provide for “consideration … of, or in respect of, allegations of personal injury”. As can be seen from the description of the allegations in the Federal Court proceedings and the terms of the deed, there was no agreement between the parties that Mr Dibb had suffered personal injury. It was submitted on his behalf (as it had to be) that the respondent was obliged to sit, in effect, as a tribunal to decide whether he suffered personal injury and if so, the amount of a reasonable payment therefore. We disagree. The respondent was correct, as was his Honour, in concluding that it was impossible to identify any part of the total sum of $788,544 as consideration for, or in respect of personal injury.

1. The key principle to be drawn from this paragraph is that, where a payment is made by way of settlement without any admission of liability or any acknowledgement or finding of injury, there will be no more than an *allegation* that an injury has been suffered, which is not enough to satisfy s 27A(1)(n). There is no material distinction between s 27A(1)(n) of the *ITAA36* and s 118-37(1)(a)(i) of the *ITAA97*, and nothing about the additional concept of a “wrong” in the latter provision, that renders this principle incapable of application in the present case. Accordingly, by analogy, it can be said in the present circumstances that there has been nothing more than an *allegation* of a wrong or an injury (however Mr Stark might wish to characterise it). That is not enough to satisfy s 118-37(1)(a)(i). In both this case and *Dibb*, there has been no finding by a Court or Tribunal, or any express concession or agreement, that a wrong or injury has actually been suffered.
2. Pursuant to cls 2.1(a), 2.2 and 2.3 of the Deed of Settlement, as set out above, the $505,500 payment was made to Mr Stark by way of consideration for the release of IBA “from all Claims arising out of or in any way connected with the Employment, its Termination, the Complaints and the Proceedings or any one or more of them” (as those terms were defined in the Deed). It is true that cl 2.2(b) identified the $505,500 payment as being made “in respect of the claim by Mr Stark for lost earnings”, and in that way connected it to some extent to the concept of “lost earnings”. However, the point to be emphasised is that it was paid in respect of the “*claim*” only. As the Deed makes explicit, the settlement amount was paid for the wide release that Mr Stark granted. IBA made no admission of liability. In these circumstances, the $505,500 payment cannot be characterised as compensation or damages “for” any wrong or injury. There was only an *alleged* wrong or injury.
3. Mr Stark sought to distinguish *Dibb* in his written submissions. However, none of the points that he raised allows him to escape the effect of the principle drawn from [46] of the Full Court’s reasons, as explained above. Many of his points, which need not be extracted here in full, involved factual distinctions that were logically disconnected from the conclusion drawn in that paragraph. They do not prevent that conclusion from applying to the present case by reason of the analogy between s 27A(1)(n) of the *ITAA36* and s 118-37(1)(a)(i) of the *ITAA97*. In respect of [46], he stated specifically as follows (the underlining appearing in the original):

No part of the IBA settlement related to personal physical injuries, because all of the settlement was for the wrong (financial injury) I suffered by destruction of my earning capacity – see my explanation of Todorovic v Wheeler and Jetson v Hankin – in my Application for a Private Ruling and in my Objection to Deputy Commissioner Olesen.

1. This seems to focus on only the very last sentence of [46], which does not bear on the legal principle identified above. It raises no material point of distinction.
2. For completeness, it should be noted that Mr Stark’s “explanation of Todorovic v Wheeler and Jetson v Hankin” is, with respect, irrelevant. As set out in his written material, it comprised three quotes beneath the heading “*Todorovic V Waller* and *Jetson V Hankin*” — the first of which was attributed to Mason J, and the second and third of which were attributed to Aickin J. The first quote is actually of Mason CJ in a different case, *Johnson v Perez* (1988) 166 CLR 351. The first sentence of the quote states the general rule that damages for torts or breach of contract are assessed as at the date of the breach or when the cause of action arises. Mr Stark has emphasised the next sentence, in which it is said that this general rule “must give way in particular cases to solutions best adapted to giving an injured plaintiff that amount in damages which will most fairly compensate him for the wrong he has suffered”. The second and third quotes are from *Todorovic v Waller* (1981) 150 CLR 402 (which was decided together with *Jetson v Hankin*), but are properly to be attributed to Brennan J, not Aickin J. The second quote states the well-known principle of damages that “the injured party should receive compensation in a sum which, so far as money can do, will put him in the same position as he would have been in if the contract had been performed or the tort had not been committed”. The third states a more specific rule that “a calculation of the present value of lost future net earnings is an appropriate measure of damages for diminution of earning capacity”.
3. Those quotes do not assist Mr Stark in proving what it is that he needs to prove at this juncture — that is, that the $505,500 payment falls within s 118-37(1)(a)(i) of the *ITAA97*, properly construed. They contain statements of general principle that pertain to the calculation of damages in tort and contract (including, in particular, for loss of earning capacity), but not to the interpretation of a specific statutory provision or to the characterisation of a certain set of facts for the purpose of assessing the applicability of that provision.
4. It follows that the payment was not one that fell within the scope of s 118-37(1)(a) of the *ITAA97*. The first ground of appeal can accordingly have no effect on the outcome of this case, and the first question of law is unnecessary to resolve. The ground of appeal must fail.

### Ground 2

#### The ground of appeal

1. By his second ground of appeal, Mr Stark alleged that the Tribunal erred in finding that the payment was an ETP because it “misdirected itself in applying, or otherwise misconstrued, s 82-130(1)(a)(i)”. The ground further stated that:

a. the only relevant connection between the Payment and the Termination relied upon by the Tribunal in reaching its conclusion was that the Termination was pleaded as a material fact in a claim for damages which was settled by the Payment;

b. on the proper construction of s 82-130(1)(a)(i), such a connection is not capable of satisfying the test which requires the Payment to be ‘in consequence of’ the Termination;

c. the Tribunal should have found that the Payment was not an employee termination payment.

1. Point (b) reflects the second question of law stated in the Notice of Appeal — being, essentially, whether s 82-130(1)(a)(i) applies to the factual circumstances identified in point (a).
2. There are problems with accepting this question of law as arising for determination in the context of this appeal under s 44 of the *AAT Act*.
3. In the first place, although the question of law is framed in the language of statutory construction, the point turns in substance on an analysis of the factual circumstances in which the $505,500 payment was made. It is arguably a question of fact as to whether those circumstances establish an adequate connection between the payment and the termination, such that the payment can be said to have been made “in consequence of” the termination.
4. In any event, the question proceeds on the premise that “the only relevant connection identified between the payment and the termination is that the Termination was pleaded as material fact in the claim for damages which was settled by the making of the payment”. That premise is unsound. As is apparent from the Tribunal’s reasons, summarised above, the fact that the termination was pleaded as a material fact by Mr Stark in the Supreme Court proceedings was not the “only” connection identified between the termination and the $505,500 payment. It would therefore be necessary to dismantle the other connections identified by the Tribunal — that is, effectively, to overturn certain of the Tribunal’s findings of fact — in order for the question of law even to arise. There is no sufficient reason to do so in the context of this appeal. This is enough to dispose of this ground of appeal.
5. Despite raising the latter of these points, the Commissioner did not submit that this second ground of appeal was unnecessary to consider because it involved only issues of fact. Accordingly, it will be dealt with below as if it was a valid ground of appeal.

#### Determination

1. Whether a payment is an ETP is to be determined by the application of s 82-130 of the *ITAA97*. The relevant parts of that section are set out above, but sub-s (1) can be repeated here for convenience, as follows:

**82-130 What is an *employment termination payment*?**

(1) A payment is an ***employment termination payment*** if:

(a) it is received by you:

(i) in consequence of the termination of your employment; or

(ii) after another person’s death, in consequence of the termination of the other person’s employment; and

(b) it is received no later than 12 months after that termination (but see subsection (4)); and

(c) it is *not* a payment mentioned in section 82-135.

1. In determining whether the $505,500 payment in this case was received “in consequence of” the termination of Mr Stark’s employment, the Tribunal relied upon the decision of Goldberg J in *Le Grand*, as explained above. The Commissioner also relied on that decision in refuting the second ground of appeal. Given the reliance placed on it, it is useful to address that case in some detail here.
2. *Le Grand* concerned the application of s 8 of the *Termination Payments Tax (Assessment and Collection) Act 1997* (Cth), which provided that termination payments surcharge was payable on any termination payment made to a taxpayer. The term “termination payment” was defined in s 7(2) of that Act by reference to the concept of an “eligible termination payment” under the *ITAA36*. Section 27A(1) of the *ITAA36* defined “eligible termination payment” to mean, relevantly, “any payment made in respect of the taxpayer in consequence of the termination of any employment of the taxpayer”. This statutory language is, on its face, similar to that now appearing in s 82-130(1)(a)(i) of the *ITAA97*.
3. Mr Le Grand accepted an offer of compromise of $547,959.54 in respect of claims brought by him against his former employer, Business Computers of Australia Pty Ltd (BCA), and its chairman, in relation to the termination of his employment. The question before the Court was whether the amount received by Mr Le Grand was, either in whole or in part, an “eligible termination payment” under the applicable legislation.
4. Mr Le Grand claimed that his employment, which was to be for a minimum period of two years, had wrongly been terminated. He claimed a large sum in damages, comprising base remuneration, a share in profits due to him under his employment agreement with BCA, and compensation for distress, humiliation and loss of reputation. He commenced proceedings in the Supreme Court of Victoria, where he raised a further cause of action to the effect that he had been induced to cease his prior employment and enter into the employment agreement with BCA and not pursue the opportunity for alternative employment on the basis of representations made by the chairman of BCA, which were untrue. In connection with these matters, he sought damages for misleading or deceptive conduct pursuant to s 52 of the *Trade Practices Act 1974* (Cth) or s 11 of the *Fair Trading Act 1985* (Vic). He alleged that he had suffered loss and damage as a result of such conduct, comprising the loss of the benefit of his employment with BCA or, alternatively, the loss of expected earnings from continued employment with his former employer, or the loss of expected earnings from the alternative employment which he had not pursued.
5. After filing their defence, the defendants made an offer of compromise to Mr Le Grand — being $547,959.54 inclusive of interest plus costs. The offer did not indicate how the amount was calculated. Mr Le Grand subsequently accepted the offer, and the amount of $547,959.54 was paid to him on 8 July 1998. In his income tax return for the year ended 30 June 1999, he disclosed the payment (rounded to the nearest whole dollar, $547,960) as income on the basis that $105,588 was an eligible termination payment and the remaining $442,372 was an “excessive component”. On 15 August 2000, the Commissioner issued a termination payments tax assessment notice in which he assessed termination payments of $82,194, calculated at a rate of 15 percent on $547,960. Mr Le Grand accepted that he was liable to pay income tax on the excessive component of $442,372, but lodged a notice of objection against the notice of assessment of termination payments tax. The objection contended that the amount of $442,372 did not meet the definition of a termination payment liable to surcharge and that the $547,960 payment was not made in consequence of the termination of his employment and was not an eligible termination payment.
6. The central issue before Goldberg J was whether the $547,960 payment was made “in consequence of the termination of” Mr Le Grand’s employment either in whole or in part.
7. In considering that issue, his Honour referred to the decision of the High Court in *Reseck v Commissioner of Taxation (Cth)* (1975) 133 CLR 45 (*Reseck*), which concerned the application of s 26(d) of the *ITAA36*. That section, as it was at the time, relevantly read:

26. The assessable income of a taxpayer shall include—

…

(d) five per centum of the capital amount of any allowance, gratuity or compensation where that amount is paid in a lump sum in consequence of retirement from, or the termination of, any office or employment, and whether so paid voluntarily, by agreement or by compulsion of law …

1. In construing this provision, Gibbs J (with whom Stephen J agreed in separate reasons) observed (at 51) that “a sum is paid in consequence of the termination of employment when the payment follows as an effect or result of the termination”. His Honour further observed that it is not necessary that the termination of the taxpayer’s services should be the dominant cause of the payment. Accordingly, if a payment was made in consequence of a number of circumstances, only one of which was the termination of the taxpayer’s employment, then it would nonetheless fall within the scope of the section. The reasons of Jacobs J were generally to the same effect, except that his Honour also stated (at 56) that “[a] consequence in this context is not the same as a result” because a consequence “does not import causation but rather a ‘following on’”.
2. Justice Goldberg then examined the judgments delivered by the members of the Full Court in *McIntosh v Federal Commissioner of Taxation* (1979) 25 ALR 557 (*McIntosh*), which concerned whether payments made from a provident fund established by a bank for the payment of benefits to its officers upon their retirement were termination payments. The relevant statutory provision was once again s 26(d) of the *ITAA36*. Justice Brennan commenced his substantive reasons by discussing the judgment of Gibbs J in *Reseck*. After setting out a passage from that judgment, he said (at 560) that “[t]o say that a payment ‘follows as an effect or result of the termination’ imports causation as the relevant nexus between the termination and the payment, but it is clear that termination need not be the dominant cause of the payment”. He then set out a passage from the judgment of Jacobs J in the same case and said:

His Honour denies the necessity to show that retirement is the dominant cause, but he does not allow a temporal sequence alone to suffice as the nexus. Though the language of causation often contains the seeds of confusion, I apprehend his Honour to hold the required nexus to be (at least) that the payment would not have been made but for the retirement.

1. Justice Toohey also considered the judgments of Gibbs and Jacobs JJ in *Reseck*. His Honour found (at 564) that, in the case before him, the connection between the taxpayer’s retirement and the payment from the provident fund was “not simply temporal”. Instead, “retirement was a prerequisite to payment and in that sense there was a ‘following on’” in accordance with the reasons of Jacobs J.
2. Finally, Lockhart J explained that the judgments of Gibbs and Jacobs JJ did not involve different constructions of the phrase “in consequence of”. His Honour stated (at 571) that he did not understand Gibbs J to be saying that the phrase necessarily spoke only of causation, but instead:

… his Honour was saying that the phrase includes the case where retirement or termination is a cause of the payment in question; but he was not excluding from the ambit of the phrase, payments which, although not following as a matter of causation from the termination of employment, nevertheless followed on the termination of employment and had connection therewith.

1. Likewise, in respect of the judgment of Jacobs J, he said:

In my opinion his Honour did not use the words “following on” as referring merely to a temporal progression of events. Rather his Honour had in mind a connection between the retirement from or the termination of employment and the payment in question as well as a temporal progression of events. I do not read the words of his Honour as excluding a connection that is causal in character; rather his Honour enunciated a wider test than one merely of causation and expressed it as a “following on”; a concept that may in an appropriate case include a relevant causal connection.

1. After reviewing these authorities, Goldberg J turned to consider Mr Le Grand’s submission that the $547,960 payment was not made in consequence of the termination of his employment, but instead to compromise the proceeding brought against BCA and its chairman. His Honour rejected the approach suggested by this submission, observing (at 63 [33]) that the issue was not to be determined simply by identifying the “occasion” for the payment. The upshot of the judgments in *Reseck* and *McIntosh* was that a payment would be made “in consequence” of a particular circumstance when it followed on from, and was an effect or result, in a causal sense, of that circumstance. His Honour added (at 63 – 64 [35] – [36]):

35. I am satisfied that there is a sufficient connection between the termination of the applicant’s employment and the payment to warrant the finding that the payment was made “in consequence of the termination” of the applicant’s employment. I am satisfied that the payment was an effect or result of that termination in the sense that there was a sequence of events following the termination of the employment which had a relationship and connection which ultimately led to the payment. True it is that the payment was made not only to settle the applicant’s claim for common law damages for breach of the employment agreement but also for statutory damages pursuant to the provisions of the *Trade Practices Act* and the *Fair Trading Act* in respect of the claims for misleading and deceptive conduct. But, as is pointed out in the judgments to which I have referred, it is not necessary for the termination of the employment to be the dominant cause of the payment.

36. Although the claims in the proceeding for misleading and deceptive conduct related to representations which had occurred prior to the termination of the employment and, indeed, prior to the making of the employment agreement and are conceptually separate causes of action, the claim that the representations were untrue was, in part, based upon the fact that the applicant’s employment was terminated on 23 February 1998 and that by reason of that termination he was unable to receive his remuneration package and had suffered loss and damage. Thus the fact of the termination of the applicant’s employment was interwoven, and intertwined, with the claims for misleading and deceptive conduct. I do not consider that the claims for misleading and deceptive conduct and the settlement of those claims insofar as they were settled by the acceptance of the offer of compromise broke the causal relationship which existed between the termination of the applicant’s employment and the payment of the offer of the compromised amount. The fact that the offer was made by both defendants in the proceeding and not just the employer does not detract from the characterisation of the payment that it was related to, and was an effect or follow on from, the termination of the applicant’s employment.

1. Thereafter, his Honour indicated (at 64 [38]) his satisfaction that the $547,960 payment made as a consequence of the acceptance of the offer of compromise was a payment made “in consequence of” the termination of Mr Le Grand’s employment and was therefore an eligible termination payment.
2. Parts of the paragraphs from *Le Grand* quoted above were referred to and adopted by the primary judge in *Dibb v Federal Commissioner of Taxation* (2003) 53 ATR 290 at 295 – 296 [22] – [23]. Those passages of the primary judgment were, in turn, approved by the Full Court in *Dibb* at 397 [16]. The approach in *Le Grand* can accordingly be said to have received the imprimatur of the Full Court. It has otherwise been cited and applied on multiple occasions in subsequent decisions of this Court: see, eg, *Commissioner of Taxation v Pitcher* (2005) 146 FCR 344, 356 – 357 [40] – [45]; *Romanin v Federal Commissioner of Taxation* (2008) 73 ATR 760, 768 [43]; *Bond v Federal Commissioner of Taxation* (2015) 101 ATR 85, 95 – 96 [36] – [37].
3. A similar approach must necessarily be taken here, such that the $505,500 payment received by Mr Stark is properly described as “following on” from, and representing an effect or result of, the termination of his employment with IBA. As the Tribunal recognised, there are several factors that justify this conclusion.
4. First, Mr Stark commenced proceedings in the Supreme Court of Queensland seeking relief for, *inter alia*, breach of the terms of his employment agreement. It is evident that he claimed that his contract was for longer than an initial period of two years, and part of his relief was founded upon the allegation that his employment was wrongfully terminated before the expiration of two years, such that he had lost the benefit of the further indefinite employment. The $505,500 payment was made under the Deed for the purpose of (amongst other things) resolving that claim, which arose as an immediate result of the termination of his employment. It follows that the payment was made “in consequence of” the termination of his employment. The authorities make abundantly clear that the termination of his employment need not be the dominant cause of the payment.
5. Secondly, the claim for damages for misleading or deceptive conduct also arose as a consequence of the termination of Mr Stark’s employment. But for the termination, Mr Stark would not have sustained any damage as a result of the allegedly deceptive statements, and no statutory claim would have arisen. In this way, the termination was the reason for the crystallisation of the claim. Indeed, the termination could be said to be interwoven with the claim insofar as it represented a fundamental reason for which the representations in question could even be described as misleading or deceptive. It follows that this part of Mr Stark’s claim also arose “in consequence of” the termination of his employment: without the termination, the claim would not have arisen and, in that sense, the payment “followed on” from the termination.
6. There is no factual feature of this case that renders inapplicable the reasoning of Goldberg J in *Le Grand*, the Full Court in *McIntosh*, and the High Court in *Reseck*. Necessarily, the conclusions reached in those cases are pertinent to the present.
7. Mr Stark nevertheless sought to escape the effect of *Le Grand*, and the applicability of s 82-130(1)(a)(i), in a number of ways.
8. First, he repeated the submission that he had made before the Tribunal, to the effect that his case was distinguishable from *Le Grand* because, there, “the only settlement offer was calculated in relation to the employee’s earnings” whereas, here, there had been “9 increasing offers, each a rounded amount, none of which related to [his] earnings”. That submission was rejected by the Tribunal on multiple grounds, as set out above, and no good reason has been offered to doubt the correctness of the Tribunal’s conclusion. The fact that the offers in this case were rounded amounts, without any discernible mathematical relationship to Mr Stark’s earnings, is strictly irrelevant. What matters is that:
9. Mr Stark commenced proceedings in the Supreme Court of Queensland, wherein he made a number of claims that he could not have made but for the termination of his employment with IBA;
10. those claims were released by the Deed of Settlement, which was executed at the conclusion of the mediation between Mr Stark and IBA, in exchange for the payment of $505,500 (as part of a larger settlement amount);
11. in that way, there was a discernible link between the termination of his employment, his claims, the settlement of his claims, and the payment of $505,500; and
12. that link was sufficiently clear as to permit it now to be said that the payment of $505,500 “followed on” from the termination.
13. Secondly, Mr Stark contended in his written submissions that another point of distinction was that he “might have sued IBA even if there was no offer from GPS”. With respect, this does not make a great deal of sense, but it may be that Mr Stark has made an error in the phrasing of this contention. He elaborated upon it in another part of his written submissions as follows:

If after accepting IBA’s 11 October 2000 offer of employment, and my 11 October 2000 consequential withdrawal from GPS’s offer of employment, if IBA then withdrew its offer of employment before I started working for it, I would not have been employed by IBA, but would still have suffered destruction of my earning capacity, proved by me not being able to secure other employment before I was nearly 72 years old. IBA would still have been sued for the personal injury it caused me, despite not being employed by IBA. Under that hypothesis there would be no nexus to my employment by IBA, and the proceeds of such a claim against IBA would have still been tax-exempt under s.118-37(1)(a).

1. The point that he seemed to be making here is that there was no nexus between the termination of his employment and the $505,500 payment because he would have brought the misleading or deceptive conduct claim, and, presumably, received the same payment, even if IBA had withdrawn its offer of employment. In other words, because he could hypothetically have received the payment without his employment having been terminated, the payment was not made in consequence of the termination. If that is a fair summary of the submission, then it cannot be sustained. It improperly ignores the reality of the situation. The application of s 82-130(1)(a)(i) is not to be decided by hypotheticals of this nature; it operates, here, on the reality that Mr Stark’s employment *was* terminated, his claims in the Supreme Court followed on from that termination, those claims were released in exchange for payment, and so that payment can be said to have been made “in consequence of” the termination.
2. Thirdly, Mr Stark contended that:

Starting at paragraph 28 Goldberg J quotes other judgements and concludes that “*retirement was a prerequisite to payment*” for the payment to be an ETP. In my case I did not retire, but rather my employment was terminated before conclusion of the initial two years …

1. The quote in this passage is from the judgment of Toohey J in *McIntosh*, which was extracted in the reasons of Goldberg J in *Le Grand*. It may be recalled that Toohey J was, in *McIntosh*, dealing with s 26(d) of the *ITAA36*, which operates where an amount is paid “in consequence of retirement from, or the termination of, any office or employment”. It is for that reason that his Honour mentioned the concept of retirement. When the relevant part of *Le Grand* is read in context, it is clear that Goldberg J was not drawing from the judgment of Toohey J any proposition that a payment would only be an ETP if it resulted from retirement. The point raised by Mr Stark proceeds from a misreading of the relevant passage.
2. Finally, Mr Stark focused on the fact that his claim for misleading or deceptive conduct sought the money that he would have earned had he not been deceived. He also repeated the submission that he had made before the Tribunal, to the effect that he had already been “paid out” under his employment contract, such that the $505,500 payment could only be, in his own words, “to cause [him] to end my prosecution of IBA for its misleading and deceptive conduct”. Those submissions do not detract from the conclusion that it was the termination of his employment that crystallised his cause of action for misleading or deceptive conduct — thereby establishing a causal nexus between the termination and the $505,500 payment. Quite simply, were it not for the fact that IBA terminated his employment, his claim would not have arisen and the payment would not have been made.
3. For the foregoing reasons, it is sufficiently clear that the $505,500 payment was made in consequence of the termination of his employment. The payment accordingly falls within the scope of s 82-130(1)(a)(i), and the Tribunal was correct so to conclude. The second ground of Mr Stark’s appeal must fail. As previously stated, the second question of law appearing in the Notice of Appeal proceeds on an incorrect premise. It is unnecessary to answer.
4. As explained above, the requirement in s 82-130(1)(b) was waived by reason of the Commissioner’s determination under s 82-130(5). Accordingly, the only requirement left to be satisfied in order for the payment to be characterised as an ETP is that appearing in s 82-130(1)(c). This final requirement is the subject of the third ground of appeal, addressed below.

### Ground 3

#### The ground of appeal

1. The third ground of appeal advanced by Mr Stark was that the Tribunal erred in concluding that the payment was not a “genuine redundancy payment” within the meaning of s 82-135(e) of the *ITAA97* because the Tribunal misdirected itself in applying, or otherwise misconstrued, s 83-175(1) in that:

a. the Tribunal considered whether the Payment was attributable to redundancy (at [73]-[74]) whereas, properly construed, s 83-175(1) required consideration of whether the termination was attributable to redundancy (*Dibb v Commissioner of Taxation* (2004) 136 FCR 388 at [22]);

b. the Tribunal should have found that:

i. the termination occurred because the applicant’s position was genuinely redundant;

ii. the amount that could reasonably be expected to be received by the applicant in consequence of the voluntary termination of his employment at the time of the Termination was nil; and

iii. the whole of the Payment was a genuine redundancy payment and thus not an employee termination payment.

1. The question of law posed in connection with this ground of appeal is whether s 83-175(1) “requires consideration of whether a given payment to a taxpayer is attributable to redundancy as opposed to whether the termination of the taxpayer’s employment is attributable to redundancy”.
2. The immediate problem with this question of law, and the third ground of appeal more broadly, is that it proceeds on an apparent misreading of the Tribunal’s reasons. The whole premise of the question and the ground of appeal is that the Tribunal considered whether the *payment* was attributable to redundancy instead of considering whether the *termination* was attributable to redundancy. But at [74] of its reasons, to which Mr Stark himself has referred, the Tribunal found that “the evidence does not establish that Mr Stark’s position was redundant”. Quite clearly, the Tribunal didconsider whether the termination of Mr Stark’s employment was attributable to redundancy and found that it was not.
3. Mr Stark would have to challenge that factual finding in order to succeed. However, he raised no valid basis upon which to do so in the context of this appeal under s 44 of the *AAT Act*. The ground of appeal ought to be rejected for this reason alone.
4. The Commissioner, in his written submissions, pointed out this issue with the third question of law posed by Mr Stark, but nevertheless proceeded to deal with the ground of appeal in substance. I propose to do the same.

#### Determination

1. Section 82-130(1)(c) of the *ITAA97* requires, as a precondition to a payment being characterised as an ETP, that the payment “is *not* a payment mentioned in section 82-135”. That latter section relevantly provides as follows:

**82-135 Payments that are not employment termination payments**

The following payments that you receive are *not* ***employment termination payments***:

…

(e) the part of a \*genuine redundancy payment or an \*early retirement scheme payment worked out under section 83‑170 (see Subdivision 83-C);

1. The expression “genuine redundancy payment” is defined in s 83-175(1) – (2) in the following terms (putting aside certain exceptions, which are presently irrelevant):

**83-175 What is a *genuine redundancy payment*?**

(1) A ***genuine redundancy payment*** is so much of a payment received by an employee who is dismissed from employment because the employee’s position is genuinely redundant as exceeds the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of the dismissal.

(2) A ***genuine redundancy payment*** must satisfy the following conditions:

(a)  the employee is dismissed before the earlier of the following:

(i)  the day the employee reached \*pension age;

(ii)  if the employee’s employment would have terminated when he or she reached a particular age or completed a particular period of service—the day he or she would reach the age or complete the period of service (as the case may be);

(b)  if the dismissal was not at \*arm’s length—the payment does not exceed the amount that could reasonably be expected to be made if the dismissal were at arm’s length;

(c)  at the time of the dismissal, there was no \*arrangement between the employee and the employer, or between the employer and another person, to employ the employee after the dismissal.

1. Section 83-170(2) provides that so much of a genuine redundancy payment as does not exceed the amount worked out in accordance with the formula in s 83-170(3) is not assessable income and is not exempt income. The integers to the formula are a “base amount” and a “service amount”, each specified in s 83-170(3), and the employee’s years of service.
2. Against this statutory background, the reference in [74] of the Tribunal’s reasons (as extracted above) to Mr Stark’s employment continuing after his services were no longer required in IBCS is important. That factual finding alone provides a sufficient basis upon which to conclude that Mr Stark’s termination was not attributable to genuine redundancy. So much follows from the observations of the Full Court in *Dibb* at 404 – 405 [43]:

We consider that it is more accurate to say that an employee becomes redundant when his or her job (described by reference to the duties attached to it) is no longer to be performed by any employee of the employer, though this may not be the only circumstance where it could be said that the employee becomes redundant. Reallocation of duties within an organisation will often lead the employer to consider whether an employee, previously employed to perform specific functions assigned to a particular “job”, will be able to perform any available “job” existing after such reallocation. Even if the employee’s job, defined by reference to its duties, has disappeared, he or she may be able to perform some other available job to the satisfaction of the employer. In that case, no question of redundancy arises. …

1. Those observations have application in the present case, given the evidence available to this Court and the finding of fact already made by the Tribunal. As matters stand, Mr Stark’s original job with IBCS “disappeared”, but he was able to perform some other available job through an arrangement with his employer. According to *Dibb*, “no question of redundancy arises”.
2. There is little reason to favour the contrary conclusion, that Mr Stark’s employment was terminated because his position became genuinely redundant. In his written submissions in reply, he stated as follows (the emphasis and underlining appearing in the original):

Senior Member Olding’s conclusion that my position was not redundant, ignores that my employment ceased coincidentally with the closure of the IBA Brisbane office.

At clause 74 of Olding’s Decision is the statement: *His employment continued for a period after the Employer decided his services were not required in the Business Unit.* The context of this statement needs to be appreciated. After it became very apparent how the IBA Brisbane Manager had deceived me, and that closure of the branch was likely, my working relationship with him deteriorated so much that he requested I work from home, and not *in the Business Unit.*

The investigator appointed to investigate the complaint I made to the Minister advised me that the branch office had closed. When I then went to collect some personal items from the Brisbane office, I found it abandoned.

…

Clearly my position was made redundant, (as were the positions of the other 3 branch employees) but the IBA Settlement Payment was not a redundancy payment …

As for the Respondent’s reference to Dibb’s case, I was not offered alternative employment.

1. It is not clear whether any evidence was put before the Tribunal in support of these allegations. For the reasons explained below, there is good reason to believe that it was not. However, even putting that to one side for the moment, it is not apparent that the matters to which Mr Stark has referred in this passage are sufficient to distinguish this case from the scenario explained in *Dibb* at [43]. Mr Stark seems to be saying that he was asked to work from home for IBA, but not for IBCS, shortly before IBCS was closed. Assuming his account to be truthful (without deciding that point), it might again be said that his original job “disappeared”, but he remained able to perform another available job within the organisation through an arrangement with his employer. That is precisely the scenario contemplated in *Dibb*. It is unclear how the fact that Mr Stark was not “offered alternative employment” provides a material point of distinction. Indeed, the analogy between this case and the scenario described in *Dibb* is strengthened by Mr Stark’s own submission as follows:

When asked to work from home I did, until my employment was terminated, developing a Risk Management procedure for IBA, which the Canberra based Deputy General Manager of IBA did not like, because it referred to the requirement to identify Objectives and what might prevent achievement of these objectives.

He wanted me to remove the reference to any risk of failing to achieve Objectives as this could interpreted IBA not being successful. I explained that I could not remove this as this was the basis of the Australian and New Zealand *Risk Management Standard* – which subsequently was adopted world-wide. My refusal to remove this resulted in my employment termination.

1. On Mr Stark’s own account, he continued to work from home after the closure of IBCS, by agreement with his employer, until his employment was terminated due to a disagreement with the Deputy General Manager of IBA. His employment was not terminated because his position became genuinely redundant, but for a different reason entirely. It follows that the $505,500 payment cannot fall within the s 83-175 definition of a genuine redundancy payment. Section 83-175(2)(c), in particular, would seem to preclude that result.
2. Even if this conclusion is assumed to be incorrect, the more fundamental point is that, in the circumstances of this matter, Mr Stark ought not to be able to raise this ground of appeal. As explained above, the Tribunal recognised that he had not raised in his objection the issue as to whether the $505,500 payment constituted a genuine redundancy payment. It stated as follows at [71]:

Taxpayers are confined by s 14ZZK of the *Taxation Administration Act 1953* (Cth) to their grounds of objection unless the Tribunal grants leave to extend those grounds. No application for leave was made in this matter. Nor was the issue included in any Statement of Facts, Issues and Contentions filed by Mr Stark.

1. Mr Stark did not seem to cavil with this conclusion, except to say that mention was made of the genuine redundancy argument in a passage in a document that he described as his “31 March 2021 APPLICANT’S WITNESS STATEMENT PART 1 OF 2”. This document was before the Court on appeal. The relevant passage provided as follows:

To enable me to start obtaining the Newstart Allowance I was required to obtain and submit a statement from IBA as to the reason for the end of my employment, which IBA certified (maybe under the guidance of the ATO’s Mr Ballans) was for “end of contract”. This may have been done to mask that my employment termination was really a genuine redundancy as IBA closed IBCS immediately after my employment was terminated. Redundancy also renders a termination payment not an ETP under s82-135.

1. With respect, this is a mere assertion, made in passing, that the termination was attributable to genuine redundancy — albeit with an accompanying mention of s 82-135. Having been addressed briefly only in a “witness statement”, the point was not properly raised for determination by the Tribunal. No doubt, if the issue had been flagged earlier, via the appropriate channels, Mr Stark could have been prompted to put on more evidence in support of his position. The Commissioner, at the same time, could have had an opportunity to put on evidence in response. As it transpired, neither of these things occurred in the course of the proceeding before the Tribunal. On appeal, Mr Stark only multiplied the number of assertions that he made in respect of the alleged redundancy of his position at IBA. For the reasons explained above, an appeal under s 44 of the *AAT Act* is an inapt context in which to place reliance on assertions of this nature, which are concerned squarely with matters of fact. While Mr Stark, in his written submissions in reply, attributed the deficiency in his material before the Tribunal to the fact that he was self-represented, this cannot solve the problem that he faces. This Court may be prepared to afford some latitude to self-represented litigants in the context of an appeal under s 44 of the *AAT Act*, but it cannot permit a case to be run on bare assertions as to matters of fact that were not properly raised before the Tribunal.
2. Ultimately, there was no true issue of law in this case concerning the application of ss 82-135(e) and 83-175 of the *ITAA97*. The real issue was whether, as a matter of fact, Mr Stark’s position was genuinely redundant. That issue cannot be resolved in the context of an appeal under s 44 of the *AAT Act*, particularly when it was not properly raised before the Tribunal. Even if it was open to the Court to consider the issue in substance, the point would not be resolved in Mr Stark’s favour. The third ground of appeal must accordingly fail.

### Ground 4

#### The ground of appeal

1. By his final ground of appeal, Mr Stark contended that:

4. Further to paragraphs 1, 2, and 3 above, the Tribunal should have found that:

a. the Payment was a capital receipt and thus not assessable as ordinary income; and

b. the capital gain on the Payment was to be disregarded by reason of s 118-37(a)(i) of the *Income Tax Assessment Act 1997* (Cth) because the Payment was compensation or damages the applicant received for a wrong or injury he suffered in his occupation.

1. As mentioned previously, this ground of appeal seemed to follow from the preceding grounds as a conclusion. In other words, on Mr Stark’s view, if those other grounds were made out, then the $505,500 payment would be capital in nature and would fall to be dealt with under s 118-37(1)(a)(i).
2. If that understanding of the fourth ground of appeal is correct, then the ground can straightforwardly be dealt with. All of the preceding grounds having been rejected for the reasons set out above. Accordingly, this fourth ground is left without a foundation and should also be rejected. The $505,500 payment is not a capital receipt. As concluded in the context of the first ground of appeal, it does not fall within s 118-37(1)(a)(i).
3. However, perhaps discerning more substance in this ground of appeal than was truly there, the Commissioner addressed it as raising an argument in relation to the applicability of s 82-135(i) of the *ITAA97*, which provides as follows:

**82-135 Payments that are not employment termination payments**

The following payments that you receive are *not* ***employment termination payments***:

…

(i)  a capital payment for, or in respect of, personal injury to you so far as the payment is reasonable having regard to the nature of the personal injury and its likely effect on your capacity to \*derive income from personal exertion (within the meaning of the definition of ***income derived from personal exertion*** in subsection 6(1) of the *Income Tax Assessment Act 1936*);

1. A finding that the $505,500 payment was “a capital payment for, or in respect of, personal injury” under this sub-section would preclude it from being an ETP, by reason of s 82-130(1)(c).
2. Mr Stark’s written submissions did contain some references to s 82-135(i), and he was prepared to engage with that provision and the concepts within it at the hearing of the appeal. Accordingly, in fairness to him, it is appropriate to consider the applicability of the provision in the context of this ground of appeal.

#### Determination

1. Unfortunately for Mr Stark, any claim that the $505,500 payment falls within s 82-135(i) faces insurmountable difficulties. The sum was not paid for, or in respect of, any personal injury. The claims made by Mr Stark against IBA in the Supreme Court of Queensland were for breach of his employment agreement and for misleading or deceptive conduct — that is, they were claims for economic loss under contract and statute. The payment was made for a release of those claims.
2. In his written submissions, Mr Stark devoted a great deal of attention to the interpretation of the phrase “personal injury”. He described the personal injury that he had suffered as “destruction of [his] earning capacity”, and asserted that “personal injury does not exclude financial injury”. He also contended that “the term ‘injury’ is not limited to physical injury, but can reflect limitation of earning capacity, even of an inanimate corporation”. He referred in this connection to (amongst other cases) *Federal Commissioner of Taxation v Sydney Refractive Surgery Centre Pty* *Ltd* (2008) 172 FCR 557 (*Sydney Refractive Surgery Centre*), where the Full Court considered whether compensatory damages for defamation received by a corporation were “income according to ordinary concepts” and assessable under s 6-5 of the *ITAA97*, if calculated solely by reference to lost profits attributable to the defamatory publications. In a unanimous joint judgment, the Court found that such damages were not income in that sense, stating as follows at 560 – 561 [10] – [13]:

10. [T]he proper test was and remains to look at the character of the payment in the hands of the taxpayer … For an award of damages, that in turn requires an examination of the nature of the claim or cause of action in respect of which the payment was made. It is settled that an award of damages for personal injuries is not taxable …

11. The question therefore is whether defamation constitutes a claim for personal injury. The Commissioner accepted that, with respect to a person, this could be so because natural persons can and do suffer injury to their personal reputations by way of hurt feelings and loss of standing in the community, among other things. On the other hand, it was not disputed that the nature of a corporation’s claim for defamation is for a financial hurt only — injury to business reputation — because corporations have no feelings and can be injured only in their pockets. The Commissioner therefore submitted that where that injury is measured solely by reference to lost profits or income, defamation must be considered a claim for professional (ie non-personal) injury and therefore any award of damages in respect of that injury constitutes assessable income.

12. We do not accept the Commissioner’s proposed distinction because it fails to give sufficient, or even any, proper consideration to the injury for which compensation is being paid. Instead, we agree with the learned trial judge that an award of damages in a defamation claim “is, in point of principle, for impairment of the plaintiff’s earning capacity and not for loss of income as such” …

13. A corporation’s reputation is part of what enables it to earn money; an injury to that reputation diminishes its capacity to earn because it reduces the corporation’s ability to induce others to do business with it … An award of damages for that injury is therefore no different from an award for the loss of an arm or any other injury impairing earning capacity.

1. In a lengthier passage of his written submissions, Mr Stark contended as follows (the underlining appearing in the original):

I further contend the settlement is a capital payment made to compensate me for destruction of my after tax earning capacity, and/or for a personal injury that destroyed my after tax earning capacity. The ATO have cited cases that have decided personal injury does not include emotional hurt or reputation damage, but does include pain and suffering related to physical or mental injury. These interpretations are irrelevant to my case as I am not contending I suffered emotional hurt, reputation damage or pain and suffering. The cases cited define what is not personal injury, they do not define what is personal injury.

“If the Parliament intended ‘personal injury’ to mean only physical injury or mental illness it would have legislated such. The ATO contend personal injury can relate to property injury, but then contradict this by asserting personal injury can only relate to physical injury or mental illness. I contend personal injury can create a chose in action, ie a property right enforceable by legal action, such as for damages for destruction of a person’s earning capacity, as this is comparable to the physical damage that renders a quadriplegic unable to earn. The test is not solely the nature of the injury, but may instead be the effect of the injury, as determined by the High Court when it ruled “compensation must be calculated by reference to the nature and extent of the injury or likely loss”.

1. The questions raised in Mr Stark’s submissions as to the ambit of the phrase “personal injury” could perhaps be debated. The phrase has received relatively limited consideration in the present statutory context. In *Federal Commissioner of Taxation v Scully* (2000) 201 CLR 148 (*Scully*), the sole question for determination was whether a payment from a superannuation fund for the termination of employment on grounds of total and permanent disablement constituted an “eligible termination payment” within the meaning of s 27A(1) of the *ITAA36* (as extracted above in these reasons). The answer to that question depended, in turn, on whether the payment was “consideration of a capital nature for, or in respect of, personal injury to the taxpayer”, such that it fell within an exclusion contained in paragraph (n) of the definition of “eligible termination payment”. Self-evidently, that exception is closely analogous to the present s 82-135(i) of the *ITAA97*. In relation to the phrase “personal injury”, the joint majority of the High Court stated as follows at 167 [28] (with footnotes omitted):

We see no reason to think that “personal injury” in par (n) excludes disease, illness or infirmity … Nor does there seem to us any reason in principle or policy why “personal injury” should be so limited. If the injury is such that it can ground an action in negligence or under workers’ compensation legislation, there is no reason for thinking that it is outside the ambit of par (n). It is beyond doubt that many diseases contracted in the course of employment or otherwise may properly be the subject of such an action.

1. It can be taken from this passage that the phrase extends to physical ailments. So much was recognised in the first-instance decision of *Dibb v Federal Commissioner of Taxation* (2003) 53 ATR 290, where the above passage from *Scully* was cited by Heerey J at 297 [35] for the following statement of principle (which was not disturbed on appeal):

“Personal injury” encompasses injury or disease of a physical or psychological nature. However it would not extend to anguish, distress or embarrassment of the kind traditionally taken into account in assessing damages for defamation …

1. Also cited there was the case of *Graham v Robinson* [1992] 1 VR 279, where, in a different statutory context, Smith J stated as follows at 281:

In the absence of express authority, I have come to the conclusion that the expression “personal injury” does not extend beyond physical injury and mental illness to include emotional hurt. I am encouraged to this view by the fact that the law has rejected grief or sorrow as a form of injury which can be relied on to mount a claim in negligence …

1. Clearly enough, these cases do not provide a complete definition of what does and does not constitute “personal injury”. At best, they give a rough impression as to where the line might be drawn. Exactly how the statements of Heerey J and Smith J are to be reconciled with what was said by the Full Court in *Sydney Refractive Surgery Centre* is perhaps a question requiring more detailed consideration. This is not the occasion to undertake that analysis. That is because, for multiple alternative reasons, the interpretation of “personal injury” cannot affect the outcome in this case.
2. In the first place, it is not clear that Mr Stark actually suffered the “personal injury” of which he has complained. As noted above, Mr Stark submitted that the relevant personal injury was the destruction of his earning capacity. He explained in his written submissions and in his oral address that this was evidenced by 549 unsuccessful applications for employment that he had made since being terminated from IBA. These matters were raised before the Tribunal (see [16] of its decision), but no finding was ever made that Mr Stark had, in fact, suffered a loss of earning capacity. It is inappropriate to make such a finding now on appeal. That is especially so since the finding does not appear to be open on the material. The thrust of Mr Stark’s case for loss of earning capacity seemed to be that he was unable to obtain alternative employment after his termination from IBA because, by that time, he was already somewhat advanced in age and his professional skills had become outdated. No authority has been brought to the Court’s attention in support of the proposition that a person can be regarded as having lost his or her earning capacity merely by attaining a certain age, or by having outdated professional skills, or by making a certain number of applications for employment without success. It might also be noted that Mr Stark did not actually demonstrate that his 549 alleged applications were unsuccessful because of any particular trait that he possessed, such that it could be said that he was left inherently without the capacity to earn. The reason that each application proved unsuccessful was not identified. For these reasons, even if Mr Stark’s submissions as to the breadth of the phrase “personal injury” were upheld, his ability to bring his case within s 82-135(i) would be doubtful.
3. Further, and in any event, as explained above in connection with the first ground of appeal, the proper characterisation of the present circumstances in the light of *Dibb* is that the $505,500 payment has been made in respect of no more than an *allegation* of personal injury. Mr Stark received the payment as a result of his entry into the Deed of Settlement, by which he released IBA from all claims. IBA did not admit liability. There was accordingly no proven or agreed injury. This Court cannot now determine whether or not there was an injury. Even putting to one side the jurisdictional impediments that it would face, it simply does not have the evidence before it to do so.
4. It follows that any attempt to rely upon s 82-135(i) of the *ITAA97* in this case must fail. The first limb of the fourth ground of appeal, to the extent that it can be understood as involving such an attempt, cannot succeed. It follows that the $505,500 payment was not a payment mentioned in s 82-135 of the *ITAA97*, and the final requirement for an ETP, as listed in s 82-130(1)(c), is therefore satisfied. The Tribunal was correct to conclude that the payment was an ETP.
5. The second limb of this ground of appeal, involving s 118-37(1)(a)(i) of the *ITAA97*, is already addressed above in the context of the first ground of appeal. For the reasons set out there, the $505,500 payment was not “compensation or damages … for any wrong or injury” that Mr Stark suffered in his occupation. He cannot rely on that provision.
6. For these reasons, the fourth ground of appeal also fails.

## Conclusion

1. For the foregoing reasons, none of the grounds of appeal relied upon by Mr Stark has any merit. The questions of law that he has posed, when viewed in context as a matter of substance, do not fall to be answered.
2. The appeal should be dismissed, and Mr Stark should pay the Commissioner’s costs of the appeal.

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| I certify that the preceding one hundred and ninety-two (192) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington. |

Associate:

Dated: 19 December 2023