

*Australian Association of Former International Civil Servants
(AAFICS)*

Dear AAFICS members and friends,

On 9 October the case of Andrew Macoun, former World Bank official against the Commissioner of Taxation, Australian Tax Office, was heard before the Full High Court: Chief Justice French, and Justices Nettle, Bell, Gageler and Gordon. Those of you who have visited the High Court in Canberra will be aware of the soaring architecture of the High Court building, and the respect in which Australia's highest court is held. The case ran from 10 until 3.30 pm. Lorraine Corner, AAFICS Coordinator for the ACT, Kelvin Widdows, formerly of the legal services of the UN Pension Fund and the ILO and other AAFICS members were present, including me.

In our discussions during the earlier stages of the case with Andrew Macoun and Jo Martins of the WB 1818 Society (the equivalent of AAFICS), we reached the conclusion that the similarities between the WB pension scheme and the United Nations Joint Staff Pension Fund scheme were such that the outcome of the Macoun case would apply to the UN retirees in Australia. We therefore accepted the proposal to contribute to the legal costs.

The ATO considered this a test case and has recently stated it will reimburse some of the Macoun case legal costs. Therefore UN retirees who contributed to the Macoun "fighting fund" may in due course receive back a part of their contributions, when all legal costs have been settled.

Background:

The World Bank Staff Retirement Plan is a defined benefits scheme, very similar to the United Nations Joint Staff Pension Fund. Like UN retirees in Australia Andrew Macoun received monthly pension payments, which the ATO included in his assessable income on which income tax is to be paid.

Mr Macoun believed his WB pension payments should be exempt from income tax, under the terms of the Convention on the Privileges and Immunities of the Specialized Agencies. This Convention is implemented in Australia under the International Organisation (Privileges and Immunities) Act 1963 which at a certain point of its text refers to an exemption from taxation of "salaries and emoluments" received from international organisations.

Mr Macoun lodged an objection with the ATO to paying tax on the WB pension payments he received in 2009 and 2010. The Commissioner of Taxation disallowed his objections. Mr Macoun appealed to the **Administrative Appeals Tribunal** in March 2014. The AAT found in Mr Macoun's favour on the basis that the WB pension payments were exempt from tax because they were "emoluments" under the IO(P&I)Act. According to the AAT decision, the entitlements to the emoluments arose from Mr Macoun's employment with the WB and continued after he retired.

The Commissioner of Taxation appealed the AAT decision. **The Full Federal Court** in December 2014 affirmed the Commissioner of Taxation's position. The Full Federal Court found that there was no basis for treating a person holding office with

the WB on the same basis as a person who had left employment. The privilege of exemption from taxation could not apply to Mr Macoun because he no longer worked for the WB. However, one of the Federal Court judges, Justice Perram noted the IO(P&I)Act differed from the position under public international law where “emoluments” exempted from tax due to the UN Convention included pensions similar to those paid by the WB to Mr Macoun. Nevertheless, the Federal Court decided the ATO was correct in charging tax on WB pensions.

Mr Macoun appealed the Federal Court decision and **the High Court of Australia** granted his legal team leave to appeal. This is the case that was heard on 9 October in Canberra. Only about 10 per cent of requests to appeal are taken up by the High Court.

Andrew Macoun’s case in all three courts has been led by the well-known barrister, Bob Ellicot who had been Federal Attorney General in the Fraser Government, supported by Michelle Hirschhorn. At the High Court the Solicitor-General of the Commonwealth of Australia, J. Gleeson, led the charge, supported by J. Hmelnitsky.

The High Court case

The transcript of the case is available; it can be read on *High Court of Australia transcript 257 October 2015. Macoun v Commissioner of Taxation (S100/2015)*

Below I highlight some of the arguments in case not all of you want to read the full transcript. Please forgive the defects of a partial and personal summary.

Mr Ellicot for Andrew Macoun spoke first; followed by Mr Gleeson for the ATO , with the judges asking questions and referring to a very large set of papers. The barristers made few digressions and wasted neither time nor words. Mr Ellicot was invited to speak again towards the end of the session.

Mr Ellicot, acting on behalf of Andrew Macoun, put forward a wide viewpoint of the reasons for not taxing the International Organisations and their officials. He illustrated the historical progression of the various agreements and the IO(P&I)Act, in which it would have been possible for the Australian Government to say that pensions shall not be regarded as emoluments, and to take back the beneficial construction that is given to the particular privileges and immunities. Australia accepts the “functional necessity” for the privileges and immunities – the funds going to the International Organisations are from member states; the fiscal laws of member states should not apply to the IO’s and their officials; no one state should obtain financial advantage by imposing charges; certain facilities and immunities are necessary for the IOs and their officials to carry out their lawful business without hindrance. The pension is part of a package to ensure that the highest quality of official can be employed. Essentially the pension is not a salary but it is an emolument because it arises out of an office held.

Chief Justice French early in the hearing said “the question ultimately that we are focusing on is whether or not the exemption from taxation applicable to serving officials will cover a pension received by that official after he or she ceases to be an officer of the agency”. Later he invited Mr Ellicot to provide a careful distinction between a person who holds office and a person who has held office.

Mr Gleeson, Solicitor General acting on behalf of the ATO, gave a narrower view of the meaning of “emolument” and pointed out that the WB structures its pension fund

on the basis there is likely to be domestic taxation, because pensions are likely to be taxed around the world. [The UNJSPF also factors in the likelihood of UN retirees paying tax in their country of retirement]. He also argued that Mr Ellicot's argument of "functional necessity" is greatly diminished after retirement when privileges are no longer needed for the effective performance of office. He also mentioned that WB and UN retirees are not taxed on that part of the pension which reflects the return of their contributions to the pension schemes. [The Undeducted Purchase Price tax offset].

On the issue of examples from other countries, the question of international law, Mr Gleeson contended the Federal Court did not have sufficient critical material before it and that gave rise to Justice Perram's viewpoint, favourable to Macoun's case. He acknowledged this as a weakness in the ATO's preparation of their submission to the AAT and the Federal Court. He went in depth into the preparatory work on the UN Convention in 1948 (the "travaux") to demonstrate that there was never the intention to grant exemption from taxation on pensions and that domestic obligations were to be favoured over international assumed obligations. He mentioned an arbitration between UNESCO and the French Government which concluded that "officials" does not include "former officials"; and as a final case he used the decision of the Supreme Court of the Netherlands of 16 January 2009, concerning the salaries, allowances and compensation of the International Court of Justice, the outcome of which was that tax exemption did not extend to pensions and that the independence of the ICJ is not affected by retirees from the ICJ paying tax in their country of residence once they leave office. He also noted the "paucity of reasoning" in the Spanish and Indian cases, neither of which has an analysis of the question of international law.

We are now waiting the outcome.

The decision of the High Court of Australia will be handed down at a later date, perhaps in November and should appear on the High Court website.

AAFICS members will appreciate the courage and dedication of Andrew Macoun and Jo Martins in bringing the case before the various courts. One way or the other, the long contentious issue of the Australian Government's taxation of United Nations retirees in Australia is now being decided.

With best wishes,

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