Background

THE AAT'S POWER UNDER s.135TB(5) (FORMERLY s.145) - A QUESTION OF FLEXIBILITY

In any complex administrative program, such as Australia's social security scheme, it is inevitable that some people will fail to claim their entitlements in time or that they will not claim the right benefit. The large number of 'backdating' cases taken to the AAT is testimony to this problem.

Section 135TB(5) (formerly s.145) of the *Social Security Act* sets up a process for dealing with some of these problems. The Secretary to the DSS has a discretion to treat an application for one pension, benefit or pension as an application for another pension, benefit or allowance (which 'is similar in character'). For the sake of simplicity, this note refers to the old provision, s.145. It should be noted that there are some differences between s.145, now repealed, and its replacement, s.135TB(5); but these differences do not affect the arguments raised in this note.

It seems that this discretion could be critical when fixing the date from which a pension, benefit or allowance can be paid. In *Giurgis* (1985) 28 *SSR* 351, the applicant had applied for sickness benefit in November 1979, and this benefit was paid for some months. When the DSS decided that he had been overpaid, because he had been receiving other income, Giurgis argued before the AAT that he should have been granted an invalid pension (rather than sickness benefit) in 1979, which would have reduced the amount of the overpayment because of the more generous income test used for invalid pension. The retrospective 'conversion' of his sickness benefit to an invalid pension would have required an exercise of the discretion in s.145.

The AAT decided that it had no jurisdiction to exercise the s.145 discretion because the question of that discretion had not been raised in the SSAT appeal. The AAT pointed out that its jurisdiction depended on s.15A of the *Social Security Act*, which conferred -

> 'jurisdiction only where the decision of the Secretary has been previously reviewed by a Social Security Appeals Tribunal. Jurisdiction is defined in those terms and, in my view, such an intermediate review is mandatory to the exercise of that jurisdiction. Without it, the matter cannot be dealt with by this Tribunal.'

This restrictive view of the AAT's power is supported by the earlier decision in *Te Velde* (1981) 3 *SSR* 23. The AAT was reviewing a refusal to pay unemployment benefit and was asked to grant special benefit as the 'more appropriate benefit'. The AAT said that it had no jurisdiction to do this because the legislation giving jurisdiction to the AAT required that the SSAT review and the Director-General (now the Secretary) reconsider 'the relevant decision of which review is sought': Reasons, para.72.

The review role of the AAT: This limited view of the AAT's jurisdiction depends on a narrow reading of s.15A of the *Social Security Act*:

> '1) Where the Secretary has . . . made a decision affirming, varying or annulling a determination, direction, decision or approval of an officer, being a determination, direction or approval that has been reviewed by a Social Security Appeals Tribunal, then . . . an application may be made to the Administrative Appeals Tribunal for review of the decision of the Secretary.'

An important question is whether the 'decision' which the AAT is empowered to review encompasses the broad issue of the applicant's entitlements under the *Social Security Act* (including any alternative pension *etc.* under s.145); or whether the 'decision' refers only to the decision on eligibility for the pension *etc.* originally claimed by the applicant and reviewed by the SSAT.

The first of these meanings is more likely to advance the purposes of the social security review system built around the AAT. When an applicant first seeks income support from the DSS, the category of that support is not of critical concern to the applicant - the various categories of pension *etc.* are imposed on applicants by the complex structure of the legislation. The decision made by the DSS on that application should be seen as one relating to the question of eligibility for income support in general. To describe it as a decision on eligibility for this pension or that benefit is a legal construction which only facilitates a narrow reading of the *Social Security Act*.

The more flexible approach coincides with views expressed by the Federal Court on the meaning of 'decision' in the *AAT Act*. In *Hales* (1982) 47 ALR 281, Lockhart J. cited Deane J. in *Chaney* (1980) 31 ALR 571 at 591:

> 'The provisions of s.3(3) would seem more apposite to define a reference to the substantive "decision" of the original decision maker than to confine the scope of a reference to a "decision" of the Tribunal upon review. Subject to that qualification, the specific activities mentioned in the definition in s.3(3), which are in the nature of effective action rather than intermediate "decision" on the path to such action, provide some indication that a reference to "decision" in the Act is *prima facie*, a reference to the ultimate or operative determination of issues arising in the course of making such an ultimate or operative determination.'

In the light of those comments, Lockhart J. went on to argue against a 'narrow or pedantic approach . . . in determining whether a decision falls within the scope of review by the AAT'; and for 'a liberal approach to the definition of the word "decision"': 47 ALR at 305-6.

It seems that the Federal Court has been reluctant to define 'decision' too narrowly where this would deprive the AAT of jurisdiction to review some matter. The underlying concern is to avoid depriving the AAT of the opportunity of making a new (correct or preferable) decision.

The correct or preferable decision

The same point emerged in *Gee* (1981) 2 *SSR* 11, where it was argued that the AAT did not have jurisdiction because there had not been an SSAT review of the Director-General's decision. The AAT found that the decision had been effectively reviewed by an SSAT and that it therefore had jurisdiction. But the AAT went on to observe that its role was to review the original DSS decision and not the Director-General's later decision (after SSAT review) to affirm, vary or annul the original decision). The AAT said:

> '[T]he essence of the review in relation to decisions made under the *Social Security Act* is the same as it is in other jurisdictions conferred upon the AAT, namely, whether the decision which has affected the rights of the applicant was the correct or preferable decision, not whether a decision which reconsidered such a decision was the correct or preferable one.'

The essence of the review is that the AAT 'steps into the shoes' of the original decision maker: see Hall, 'Administrative review before the AAT - a fresh approach to dispute resolution?' (1981) 12 *Federal Law Review* 71 at 78; Kirby, 'Administrative review on the merits: the right or preferable decision' (1980) 6 *Monash Law Review* 171. If this is the role of the AAT, then all the powers of the original decision-maker should be available to the AAT. And this would include the s.145 power.

Conclusion

The AAT's decision in *Giurgis* is unnecessarily narrow in its approach to the AAT's jurisdiction to make full use of the *Social Security Act*. Surely, the failure of a party to raise some issue prior to the AAT hearing should not prevent that party from raising the issue before the AAT.

It might be argued that a s.145 argument is of a different order - because it opens up whole new areas of eligibility. But, having regard to the purpose of s.145, if the AAT is to come to the correct or preferable decision, how can it ignore the section?

B.S.

A NEW STRUCTURE FOR SSATS?

We noted in August last year that the Administrative Review Council had put forward a series of recommendations on the structure of social security appeals: 20 *SSR* 226.

The Minister for Social Security, Brian Howe, has now indicated his position on some of the Council's recommendations. In a speech to the national meeting of SSAT members on 9 November 1985, Howe indicated that SSATs were not likely to be given full decision-making (rather that recommending) power. Although he agreed 'in principle' with the Council's recommendation for this full power, he said that the role of the tribunals could 'be significantly enhanced without making any fundamental changes in their power.' On the other hand, Howe accepted the Council's recommenda-

tion that a DSS officer remain on each tribunal. And he foreshadowed the following innovations:

• The appointment of State and Territory presidents, responsible for general administrative matters and the quality of SSAT reports. Some of these presidents would hold full-time positions.

• The imposition of time limits on SSATs, so that a claimant will have a decision in most cases within 2 months of appealing.

Howe told the meeting that the review officer system is 'being re-evaluated to see if it has proved the best "first chance" review of Department decisions'; and announced a 'trial in one regional office of having a full-time Review Officer.'

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* The index to numbers 1-22 appears at 22 *SSR* 263.