

a transfer. However, Ball did not execute a form of transfer until December 1985.

Following the introduction of the assets test in March 1985, the DSS included the value of the property in question in Ball's assets and reduced his age pension accordingly. He asked the AAT to review that decision.

The legislation

Section 28(2)(b) of the *Social Security Act* provides for the reduction of a person's age pension by reference to the value of that person's assets.

Section 6AC(1) provides that, where a person disposes a property on or after 1 June 1984, the value of that property is to be included in the per-

son's assets during the current pension year.

According to s.6AC(3) the value of any property taken into account under s.6AC(1) is also to be taken into account in subsequent pension years, subject to an annual reduction of 10%.

Imperfect gift

The AAT identified the critical question as whether Ball had managed to dispose of the property in question before 1 June 1984 - that is, whether the handing of the certificate of title to his youngest son in March 1984 was enough to dispose of the property.

In order to effect a transfer of real property in South Australia, the AAT

said, it was necessary for the owner to complete a registrable transfer and to hand the certificate of title and the transfer to the transferee. Such a transfer had not been completed until December 1985. Accordingly, there had not been sufficient to perfect a gift of the South Australian property to the sons before 1 June 1984 and the land in question had to be treated as part of Ball's property, subject to the annual discounting of 10% of the property's value.

Formal decision

The AAT affirmed the decision under review.

Invalid pension: permanent incapacity

HAMDAN and SECRETARY TO DSS (No.N82/534)

Decided: 20 December 1985 by B.J. McMahon, M.S. McLelland and P.R. Henke.

The AAT *set aside* a DSS decision to cancel the applicant's invalid pension. Merhi Hamdan was granted an invalid pension in March 1979, after a back injury at work. It was cancelled in December 1982, after a Commonwealth Medical Officer decided he was only 'materially incapacitated' (that is, to the extent of 50-70%).

The AAT was faced with conflicting medical evidence. The DSS doctors' reports suggested Hamdan was malingering, while Hamdan's doctors (GPs and specialists) unanimously supported his claim. None of the doctors gave oral evidence and the AAT preferred the evidence of Hamdan's doctors:

'Not only are these doctors familiar with the applicant's medical history over a long period, they are, in addition, able to communicate with the applicant in his own language'.

The Tribunal noted in particular the report of an Arabic health worker from a community health centre, who pointed out that Hamdan was dependent on his father to carry out maintenance work around the house and his wife to assist him with dressing, driving etc.:

'In Lebanese culture a man's duty is to support his parents, and be the strength of the household'.

The fact that Hamdan was so dependent, given his cultural background, indicated to the Tribunal, with X-ray and other medical evidence, that Hamdan was not malingering. They followed the approach in *Frendo* (1985) 27 SSR 335 and said:

'It would be one thing to attempt to fabricate symptoms to a doctor in a one-off situation, but quite another to suffer loss of status and self esteem on a continuing basis among one's family and community in order to maintain that fabrication'.

(Reasons, p.9).

The Tribunal's view was strengthened by the delay in hearing the claim: Hamdan had been before an SSAT in 1981, which had found him permanently

incapacitated for work and nothing had occurred in the meantime to increase the likelihood of his return to work.

FAURE and SECRETARY TO DSS (No.V85/55)

Decided: 16 December 1985 by H.E. Hallowes.

The AAT *affirmed* a DSS decision to refuse an invalid pension to a 61-year-old man. That decision had been based on the ground that Faure had not become permanently incapacitated while in Australia.

Faure migrated to Australia in 1981, and intended to establish a business, based on his daughter's hairdressing qualifications. Until his departure for Australia, he had previously worked in the family stationery business in Argentina, serving customers and keeping the records. He had suffered a heart attack in 1975, but had taken no time off work.

He also suffered from pain in his legs and had visited a medical centre in January 1982, where he was found to have arthritis in his hips and knees. The medical evidence established that he was suffering from osteoarthritis of both hips before January 1982.

The Tribunal concluded:

'The total picture of Mr Faure upon arrival in Australia is that of a man with no capacity to attract an employer. Because of his medical problems with both his heart and his hips, together with his age, there was never any prospect that he would be able to obtain a labouring position. His osteoarthritis, together with his age and inability to communicate in the English language, excluded the possibility of employment in light production work or in the catering industry ... On the medical evidence before me, I find that the applicant was suffering from these medical conditions upon arrival in Australia, and accordingly he was upon arrival permanently incapacitated for work ...'

(Reasons, para.21)

CORTINA and SECRETARY TO DSS (No.N84/409)

Decided: 20 December 1985 by B.J. McMahon, C.J.Stevens, P.R.Henke.

The Tribunal *affirmed* the decision of the DSS to refuse an invalid pension to Juan Cortina.

Although Cortina was present at the hearing, he declined to give evidence. The Tribunal felt it was thereby restricted to the s.37 documents lodged by the DSS and additional reports tendered by the DSS.

Cortina had suffered a back injury in 1977, and an arm injury in 1980. The medical reports indicated that he was able to carry out many kinds of work, as long as he avoided excessive bending and lifting. Cortina had said that he drank 30 schooners of beer a day: no medical evidence of this level of drinking was found and, consequently, the AAT did not believe this claim.

The AAT said that '[i]t is not the function of this Tribunal to seek evidence from any person to support the applicant's case': Reasons, p.6; and that various avenues of assistance in presenting a case were available to the applicant. In the absence of any evidence that Cortina was permanently incapacitated, the AAT affirmed the DSS decision.

LINCOLN and SECRETARY TO DSS (No.Q85/60)

Decided: 27 November 1985 by J.R.

Dwyer, W.A. De Maria and H.M. Pavlin. The AAT *set aside* a DSS decision to refuse an invalid pension to a 51-year-old former truck driver and mechanic.

The AAT found that Lincoln had degenerative changes to his spine which precluded him from heavy work or work requiring repeated bending and lifting. He also suffered from a gastric ulcer, pain in his right costal margin, an alcohol problem (though Lincoln stated he had stopped drinking because of his ulcers), a skin complaint, a thyroid condition and, possibly, obstructive airways disease or emphysema (though he did not complain of these conditions). He did complain of pain in his calves, ankles, knees and chest, and cramp in his

hands, complaints which the Tribunal accepted.

The Toowoomba Rehabilitation Unit reported that Lincoln had little prospect of finding work. It was suggested that he might be able to repair small motors (eg, 2-stroke motors) if they were placed at bench height, but Lincoln had no experience with such motors and there was no evidence to suggest such work was available.

The Tribunal noted the similarity between Lincoln's situation and that of the applicant in the Federal Court decision of *McBay* (1985) 24 SSR 296. There the Federal Court had stressed the difficulties of a 52-year-old mechanic finding 'tailor-made' working conditions, providing bench-height mechanic's work or cashier's work at a service station, with the opportunity to

move around when he wished, and had found that *McBay* was 85% permanently incapacitated for work.

The majority of the AAT, *Dwyer and Pavlin*, reached a similar conclusion in Lincoln's case. Although Lincoln ran a small hobby business repairing cars, the DSS did not allege that this demonstrated a capacity for work; and the AAT found, given that Lincoln had abandoned this 'business' a number of times in the past to undertake full-time employment, that it was only a hobby. Because of the difficulties of finding 'tailor-made' employment, the majority concluded that Lincoln was 85% permanently incapacitated for work.

One AAT member, *De Maria*, disagreed. He referred to the decision in *Sheely* (1982) 9 SSR 86: 'In my view it is not sufficient that the medical dis-

ability be a material factor in the incapacity, it must be of such significance that the incapacity can be said to arise or result from the medical condition.' He noted that -

'the evidence isolates a number of factors that are pertinent to Mr Lincoln's long unemployment: his age, his low skill level, his health and the absence of an expansionist economy that he could capitalize on ... For him to be eligible for the invalid pension, one condition must take primacy over the rest, his medical condition.'

(Reasons, pp.3-4)

He concluded that his medical condition did not make him incapacitated for work.

Background

W(h)ither The Assets Test?

The reintroduction of an assets test, after its absence from 1976 to 1984, restored an element to our social security arrangements which had been built-in since the age pension was introduced in 1908-10. As *McCallum* has pointed out, even the much criticized exemption of the pensioner's home simply carried forward a similar exemption, grafted on to the original test as far back as 1912 (*McCallum*, 1984: 220). Despite all the indecision on the form of test to be introduced (*McCallum*, 1984:), the net effect has, from a policy point of view, been a return to the *status quo ante*.

In her analysis of what she terms the 'politics of means testing' *Shaver* makes 2 main points. First, that the 'history of the age pension has in large part been generated by a conflict between contradictory elements ... [namely] a welfare objective deriving from conceptions of human need and a political objective flowing from arguments about social rights.'

(*Shaver*, 1984: 300).

(We shall return to this theme and ask whether the assets test is any more than a staging post along the track towards a universal, integrated or national, superannuation scheme.

The second and more fundamental of the 2 main points made by *Shaver* questions of the appropriateness of the present social security framework as a response to the dramatic changes in the economic (and political) environment over the last decade or so. *Shaver* observes that

'[t]he appeal to selectivism expresses a quite reasonable concern to mend the (social security) safety net where it is most vital ... But it is an essentially passive response to the demise of full employment and the crisis of the welfare state. It

contributes nothing positive towards the reconstruction of a new relation between social rights and the structure of economic inequality.'

(*Shaver*, 1984: 305)

The implications of this critique provide an added reason for viewing the current assets test as a holding operation. But for the present exercise the important issue is the policy implications of means testing.

The Policy Implications of a Means or Assets Test

The *Henderson Report* accepted that a reconciliation was needed between *Shaver's* competing perspectives of 'welfare' and citizenship, though the limits on the funds for welfare influenced their thinking (*Henderson*, 1975: 57). The Report expressed a clear preference for maintaining, and then boosting, the real value of pensions and benefits, ahead of any (of the then politically popular) moves to ease the means test. However, the Inquiry did support 3 reforms, 2 of which - the expanding of the zone of 'free-of-income-test' income, and the avoidance of overlapping means tests (with consequent 'poverty traps') - remain relatively uncontroversial.

With the benefit of hindsight, the third of these measures - the conversion from a means test to an income test - looks a trifle naive, the more so because it is built on very superficial reasoning. After noting that the then means test took an arbitrary 10% notional return on assets, the Report suggested that it was

'a relic of far less generous days [when] ... the expectation was that pensions would have to run down their assets ... before becoming eligible for pension.'

(*id.* 58)

In justification of the move towards an income test alone, the Inquiry simply contended that retention of the

means test 'merely [stood] in the way of rational integration of the pension means test with other income-tested benefits and with the income tax': *ibid.*

But macro-economic issues were not looked. Because an assets test encourages people to put their assets to their most productive use rather than waiting for capital gains to accrue, it called for social security to define income in the same way as the taxation system. Capital gains, 'when large in amount', should be classified as income. With respect this is not tenable. Taxation policy and social security policy may have similar goals - of equity, efficiency and redistribution. But they do not use similar means of reaching those goals, except in the radical/utopian model of a fully integrated negative income tax, or GMI scheme. While revenue collection remains divided from welfare spending, quite different concepts and principles will need to be adopted by the 2 arms of the system..

The structural explanation for this is well put in the *Tax White Paper*. The Australian tax collection arrangements were (and remain) redistributively neutral. Tax policy serves the equity and efficiency goals; redistributive objectives are served principally through the social security system. Consequently, there is no place in the social security system for the taxation concept of 'assessable income' - essentially all notional entitlements less allowable deductions. Such a definition is tailored to the policy objectives (such as economic efficiency) on the 'wealth generating' side of the equation.

The taxation version of the concept of income is an abstraction from the social reality which is the focus of the cash transfer objectives of the social security system - namely determining