hands, complaints which the Tribunal accepted.

The Toowooomba 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 disability 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 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

the practically accessible levels of disposable income (or liquid assets). Social security, whether modestly framed as poverty alleviation, or more ambitiously defined as redistribution, is centrally concerned with raising the existing base of disposable income to an acceptable (or optimal) level. The Federal Court ruling on the true meaning of the concept of 'income' in s.6(1) of the *Social Security Act*, in the case of *Haldane-Stevenson* (1985) 26 *SSR* 323, recognised this. There is a fundamental difference between the content and purpose of the tax and social security meanings of income. Real and accessible funds (net rather than gross) are the core meaning of 'income' in a social security context. Taxation prefers more abstract notions.

Exposing this fallacy has 2 implications for an assets test. First, there will be inevitable injustices and inequalities of treatment as between people in receipt of a social security pension governed by an assets test, and those in receipt of benefits to which it does not apply. This is, however, an inexorable by-product of the pursuit of redistributive ends.

The second implication has some quite fundamental ramifications. A welfare purpose, and redistributive object, dictates that there must be a welfare-infused concept of what constitutes an 'asset'. This is so in the case of 'income' , and it can be no less so in the case of capital. To use the metaphor of the 'fruit' (income) and the 'tree' (capital asset), it is inconsistent to have a system geared around a taxation-infused tree, working in conjunction with a welfare-infused fruit. Yet, colourful though the metaphor may be, this is what we now have. The concept of an 'asset' in ss.6(1) and 6AA - reflecting traditional commercially-oriented concepts of a 'proprietary interest' - incorporates this bias.

Discretion: the poor cousin in Australia's welfare system?

If the concepts employed in the legislation cannot be moulded in order to meet welfare objectives, then it is only through statutory discretions that flexibility can be injected into the assets test.

Neither the Department nor most lawyers fully understand that discretions have an important role to play in the design of a social security system. Flexibility and a diversity of factual circumstances cannot be provided for without discretions; and discretionary powers can be kept within bounds and rendered accountable. Moreover simple and precise rules of thumb *may* serve as a starting point for the proper exercise of a discretion.

In the design of an assets test, at least 3 sets of considerations call for the inclusion of discretion. The first role of discretion is to ensure that the test promotes welfare (needs-oriented) objectives, not only in its aggregate impact, but also at the micro, or individual case, level. The 'hardship' provision is an example of this fine tuning or ameliorative function which is to be found in the present legislation. The other 2 functions are not yet provided for, but there is a case for their inclusion in the legislation in the future. The home owner/non owner distinction is now so inflexible, as to suggest a need for a discretionary power (perhaps along the lines of the 'oversized curtilage' provision in s.6AA(4)). Finally, the range of discretions in the 'disposal of property' provision (s.6AC: replacing the old deprivation of income provision in s.47 of the Act) may be inadequate to prevent the shrewd tax evasion lawyers and accountants from geting around the assets test.

Conclusion

The assets component of the means test has returned in pretty much its historic form for Australia. And, as in the past, it has been applied to inject some degree of needs-orientation in the administration of pension payments.

The main argument is that the proprietary concepts and principles, as forged by property lawyers over many centuries, are too inflexible for welfare objectives. These characteristics lead inevitably to the result that any social security assets test, constructed principally on those concepts and principles, must lack flexibility, and be only a rough and ready approach to the achievement of the welfare goals of the system. For this, and other reasons, the second part of this paper has advanced the argument for the inclusion of adequate discretionary powers to enable the promotion of welfare objectives.

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