

could not be eligible to receive handicapped child's allowance.

Section 105KA

The AAT also discussed the effect of s.105KA which for some of the period may have allowed the Secretary to pay the applicant the allowance even though she was not otherwise eligible. [This section was subsequently amended to remove this discretion in the Secretary. The Tribunal found that the new provision did not apply to alter the eligibility of the applicant.]

As the power no longer existed the Tribunal turned to the *Acts Interpretation Act 1901 (Cth)* which provided in section 8:

Where an Act repeals in whole or in part a former Act, then unless the contrary intention appears the repeal shall not -

...

(c) affect any right privilege obligation or liability acquired or incurred under any Act so repealed...

The AAT concluded that as there was only the possibility that the Secretary might have exercised the discretion favourably no right or privilege which could be preserved by virtue of the *Acts Interpretation Act* had accrued to the applicant under the old s.105KA. Thus the section could not be considered by the AAT as the repeal operated to remove it from consideration.

Formal decision

The decision under review was affirmed by the AAT.

Assets test: method of valuation

REYNOLDS and SECRETARY TO DSS

(No.S85/199)

Decided: 14 October 1986 by R.A.Layton, J.A.Kiosoglous and D.B.Williams

The applicant had applied to the AAT for review of a DSS decision to reduce his age pension after the introduction of the assets test. This hearing was on the preliminary issue of whether or not the value of the residue of his property after deducting the value of his home and associated 2 hectare curtilage was properly included within the value of his property for the purposes of that test.

The legislation

Section 6AA of the *Social Security Act* provides:

(1) In calculating the value of the property of a person for the purposes of this Act -

(a) there shall be disregarded -

...

(ii) if the person is a married person - the value of any right or interest of the person in relation to one residence that is the principal home of the person, of the person's spouse or of both of them (not being a right or interest of the kind referred to in sub-paragraph (iv));...

Section 6AA(3) provides:

(3) A reference in this section to the principal home of a person shall be read as including a reference to -

(a) in the case of a dwelling-house - the private land adjacent to the dwelling-house to the extent that that private land, together with the area of the ground floor of the dwelling-house, does not exceed 2 hectares;...

The property

The applicant owned a block of land of approximately 4.5 hectares on which his residence was situated. After the house and its 2 hectare curtilage

was deducted, 2.5 hectares of land valued at \$20,000 remained.

Net market value

The applicant submitted that the 'net market value' of the property should be applied to property to be assessed under the assets test. He also submitted that the 2.5 hectares of land in the residue of his property had no market value as the local council prohibited the subdivision of property in the area under 30 hectares.

The AAT accepted that the value of assets to be taken into account for the purposes of the assets test is the net market value. But the Tribunal did not accept that the property did not have any market value as no one would wish to purchase the residue property.

The process of valuation

The AAT preferred to accept the DSS submission on the valuation of the assets. This process did not require a separate valuation to be undertaken for the residue property. The AAT said:

The starting point for calculating the value of that property is to assess the market value of the whole property which, but for the exemptions contained in s.6AA, would be the value of the property to be taken into account for the purpose of calculating the rate of pension. Section 6AA then operates to allow the value of certain property to be disregarded, in particular, the principal home (sub-s.6AA(1)(i)(a)) and the associated curtilage of 2 hectares (sub-s.6AA(3)). Section 6AA therefore requires that a market value be attributed to the principal home and the curtilage. The value of the property to be taken into account is the balance which remains after deducting the market value of the house and curtilage from the market value of the property as a whole. A separate valuation is not required in

relation to the residue of the property. The Act does not require such a valuation to be made, quite apart from the fact that it would be a valuation nightmare to try and assess the value of the residue of property which may be in more than one portion and of peculiar shape, use and quality.

(Reasons, para.16)

As to the prohibition on the subdivision of land in the area, the AAT said that the market value is a notional market value, determined by a hypothetical not unwilling seller and a hypothetical desirous purchaser. Where the land has restrictions on its subdivision (as in the present case) the property is to be regarded as capable of such division to enable its market value to be determined.

The Tribunal pointed out one consequence of not taking this approach in the present case: the applicant's house and curtilage, being below the limit for subdivision, would have no market value on the reasoning of the applicant. Thus their value could not be disregarded under s.6AA of the Act (their having no value to disregard) and the market value of the whole of his property would be taken into account in assessing the rate of his pension.

Summary

The AAT determined that the manner of assessing the value of the property of the applicant should be in the following way. First, the market value of the whole of the property is to be ascertained assuming a hypothetical not unwilling seller and a hypothetical desirous purchaser. Second, to obtain the market value of the principal home and curtilage assuming a like seller and purchaser as above, as if the property were capable of subdivision. Third, to disregard the value of the home and curtilage by deducting its market value from the market value of the whole. The difference then becomes the amount to be taken into account in assessing the applicant's rate of pension.