

This was based on the personal and financial situations of Dineen's sons.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that the

annual rate of pension payable to Dineen be reduced by \$40 an acre of the subject properties.

Assets test: financial hardship

LOWE and SECRETARY TO DSS
(No. N86/462)

Decided: 6 November 1987 by
J.O. Ballard.

Following the introduction of the assets test in March 1985, the DSS decided that Heather Lowe's age pension should be reduced because of the value of her property.

After an appeal to an SSAT, the DSS decided that the value of the property should be disregarded but that, because of 'deemed income' from the property, Lowe's pension should be reduced. She asked the AAT to review that decision.

The legislation

At the time of the decision under review, s.6AD(1) of the *Social Security Act* provided that a person's property should be excluded from the assets test, where it was not reasonable to expect the person to sell, realise or use the property as security for borrowing, and where the person would suffer 'severe financial hardship' if the value of the property were taken into account for the purposes of the assets test.

Section 6AD(3) provided that, where property was disregarded under s.6AD(1), the person's pension should be reduced by the income which could reasonably be expected to be derived from that property.

The evidence

Lowe had inherited the property in question, 'E', of 142 acres, in 1942. In 1978 her son, P, leased the farm from her. Initially, P paid Lowe a yearly rent of \$1000; but from 1981 the yearly rent was reduced to \$700, following a fire which affected one of two other properties, 'W' and 'C', being worked by P.

Lowe and P lived in Lowe's house in a small town near the farming property, which was in poor condition; and P was only able to operate it as a farm by taking seasonal off-farm work. P had never made a profit on

the three farming properties which he worked; and in the 1986 tax year he had made a loss of \$2653.

P said that he could not afford a commercial rent for Lowe's property, which had been assessed by a stock and station agent at \$2000. The same agent told the AAT that the three properties being worked by P were 'very marginal'; and that without Lowe's property the other two would not be viable.

Lowe told the AAT that she wanted to pass 'E' on to the next generation of her family; and she had made a will devising 'E' to her four children, including P.

Property to be disregarded

The Tribunal referred to the purpose of the assets test legislation, as stated in the Minister's Second Reading speech when introducing the legislation. The Minister had said:

'The majority of pensioners will be unaffected by the introduction of the assets test. Those who will be affected will be those who will be able to adequately support themselves without a pension.'

Taking that purpose into account, as allowed by s.15AB(2) of the *Acts Interpretation Act*, it would not be reasonable to require the applicant to sell or realise the property in question. Such a course of action could leave both Lowe and her son unable to support themselves.

The AAT also took the view that the property represented 'more than 50 years hard effort within the family'; and that Lowe had a responsibility to pass on the property to her children.

For these reasons, the AAT decided that the property should be disregarded under s.6AD(1) of the Act.

'Deemed income'

The AAT said that Lowe's son was making the most effective possible use of 'E'.

The AAT referred to *Allman* (1987) 38 SSR 474, where the AAT had said

that an applicant should not derive an unfair advantage by deliberately under-utilising 'a perfectly good exploitable asset':

'Where, however, a property is being efficiently farmed and as much profit is being derived as is possible, then in our view it is unrealistic to look at any other figure as being a reasonable annual rate of trading income capable of being derived from the property.'

In *Copping* (1987) 39 SSR 497, the Federal Court had said that 'personal and family considerations . . . could not be excluded from consideration' when deciding what income it was reasonable to expect an applicant to derive.

It was reasonable, the AAT said, to expect Lowe's son to continue to farm 'E' in conjunction with the two other properties and he was 'making the most effective use of the land he could'. It was also reasonable for him to continue to live with his mother. Accordingly, the AAT said, the income arising under the arrangement between Lowe and her son represented the annual rate of income which could reasonably be expected to be derived from the property.

Because the property appeared to be recovering from the effects of drought and fire, it would, the AAT said, be reasonable to revert to an annual rent of \$1000 from the date of this decision. But, up to the date of the decision, the rent of \$700 a year should be taken as the 'deemed income'.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with directions that the value of the property, 'E', should be disregarded; and that the annual rate of Lowe's pension should be reduced by \$700 up to the date of the AAT's decision and \$1000 from that date.

Mobility allowance

HASTINGS and SECRETARY TO DSS

(No. S86/276)

Decided: 28 October 1987 by
R.A. Layton, J.A. Kiosoglous and
B.C. Lock.

Roy Hastings, who was enrolled as a university student, applied for a mobility allowance. When the DSS re-

jected his application, he asked the AAT to review that decision.

The legislation

During the period under review (August 1985-September 1987), s.133RB(1) of the *Social Security Act* (renumbered s.146 from 1 July 1987) provided that a handicapped person was eligible for a mobility allowance, if -

(a) the person was, in the opinion of the Secretary, unable, by reason of physical or mental disability, to use public transport without substantial assistance; and

(b) the person was engaged (for at least 20 hours a week) in gainful employment or vocational training, which, in the opinion of the Secretary, would assist the person to find