

## Review of cancellation: AAT's powers

**FREEMAN v SECRETARY TO DSS**

(Federal Court of Australia)

**Decided:** 18 August 1988 by Davies J.

This was an appeal from the AAT's decision in *Freeman* (1988) 42 SSR 537, where the Tribunal had affirmed a DSS decision cancelling Freeman's widow's pension as from May 1987.

The AAT had upheld the DSS decision that Freeman was, at the time of the cancellation, living in a *de facto* relationship with a man and was, therefore, excluded from the definition of 'widow' by s.43(1) of the *Social Security Act*. The AAT had also expressed the opinion that, since May 1987, Freeman had ceased living in this *de facto* relationship.

In this appeal, it was argued on behalf of Freeman that the AAT had made an error of law, because it had

failed to decide that Freeman's widow's pension should be reinstated from the date when she ceased to live in a *de facto* relationship.

### Claim must precede grant of pension

The Federal Court said that the AAT had not committed an error of law. The only question raised by the application for review to the AAT was whether Freeman's pension should have been cancelled. Once the AAT had affirmed that decision, there remained no other matter for the AAT to decide, as the question of Freeman's later eligibility for a pension could only arise following her making a claim for pension: this was clear from s.158(1) of the *Social Security Act*. However, the Court contrasted the jurisdiction of the AAT when reviewing a DSS decision to refuse a grant of pension with its jurisdiction when reviewing a DSS decision to cancel a pension. In the former case, it would be 'proper for the Tribunal to consider the entitlement to the pension not only as at the date of the application for the pension . . . or at the date of the decision refusing to grant it

but also up to the time of the Tribunal's decision': Judgment, p.6. The Court continued:

'The ambit of the jurisdiction of the AAT in relation to the review of a decision to cancel a pension or benefit is therefore less than would be the jurisdiction of the Tribunal in respect of a refusal to grant a pension or benefit or a decision suspending the payment of a pension or benefit. In the latter cases, there may well be an ongoing entitlement to a pension or benefit which the Tribunal should recognise when formulating its decision. However, if the Tribunal comes to the view that the decision to cancel was the correct or preferable decision, then no further matter remains for the Tribunal's consideration. Any entitlement of the applicant to a pension or benefit at a subsequent time must be the subject of a further claim which, having been made, would only become the subject of review within the Tribunal's jurisdiction once a decision with respect to it had been made by an officer of the DSS and that decision had been the subject of appeal and reconsideration in accordance with s.17.'

(Judgment, p.7)

### Formal decision

The Federal Court dismissed the appeal.

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## Background

### New structure for reviews and appeals

The *Social Security (Review of Decisions) Bill* 1988 received its first reading on 29 September. The Bill formalises the position of DSS review officers, gives the SSAT a legislative base and the power to make decisions, and makes a number of minor changes to the review powers of the AAT. (The Bill will also provide for the re-numbering of the current ss.172-188 of the Act.) The changes effected by the Bill are to commence on 1 November 1988.

Introducing the Bill, the Minister for Social Security said that it marked 'a new stage in social security administration [and was] a further plank to the Government's social justice priority of achieving equality of legal rights for all'. It was, the Minister said, 'an integral component of developing a more rational and

understandable system of decision-making in social security'.

The Minister noted that the SSAT had been operating since 1975 'under Ministerial direction' with no legislative foundation and no power to decide cases - characteristics which had been criticised by many observers. The Minister stressed that it was important that the SSAT 'retain its flexible structure and the informal procedures it has developed in the past 12 years. Otherwise there is a danger that this Tribunal will duplicate the style of hearing now conducted by the AAT. This is not a desirable aim for the first tier of external review'.

The provisions dealing with the SSAT will appear in Part XIX and Part XX of the *Social Security Act* - ss.172-236 in the amended Act. Amongst the more important provisions to be inserted into the *Social Security Act* are the following:

### Rights of review and appeal

Section 173 entitles a person to apply to the Secretary for review of a DSS decision; and that review will be

dealt with by 'an authorised review officer'.

Section 175 obliges the DSS, when it has exercised the review power, to notify the claimant of her or his appeal rights to the SSAT.

Section 176 directs the SSAT to 'pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick'.

Section 177 entitles a person to apply to the SSAT for review of a decision under the *Social Security Act* or under ss. 5A, 5B, 5C, 5D or 5E of the *Health Insurance Act* (these sections deal with fringe benefits).

However, s.178 prevents the SSAT from reviewing certain decisions under the *Social Security Act* - these are decisions under ss.159(1) (approval of forms by the Secretary), 163 (giving of notices of review by the Secretary and specification of compliance periods in some circumstances), 164 (power of Secretary to require persons to furnish information), 168A (continuation of payments pending the hearing of an appeal) and 184(2) (a decision to make

deductions from payments for income tax purposes).

**Section 179** provides that a person may apply to the SSAT for review in writing or orally (either in person or by telephone).

**Section 181** provides that the parties to a review are the Secretary, the applicant, and any other person joined as a party by the National Convener.

#### ■ SSAT's powers

**Section 182** provides that the SSAT, when reviewing a decision, may affirm or vary or set the decision aside. When it sets a decision aside, the SSAT may substitute a new decision or send the matter back for reconsideration in accordance with the SSAT's findings. **Section 182(4)** provides that, for the purposes of review, the SSAT may 'exercise all the powers and discretions that are conferred by this Act on the Secretary'; but this is subject to specified exceptions - the Tribunal cannot exercise the powers conferred by ss.159(1), 161, 162, 163, 164, 168A, 170 and 184(2).

**Section 183** allows the SSAT to specify the date from which its decision comes into operation. If the applicant has appealed to the SSAT within 3 months of the DSS decision, the date of effect of the Tribunal's decision will be the date from which the DSS decision under review took effect. However, if the applicant delays appealing to the SSAT beyond 3 months, the Tribunal's decision will take effect from the date of the appeal.

#### ■ SSAT procedures

Various provisions deal with a statement of reasons for the decision under review, furnished by the DSS; the furnishing by the DSS of the relevant documents to the SSAT; notice of hearing time and place; and notification to persons who may have an interest in the appeal.

**Section 188** provides that the applicant to the SSAT may make an oral

or written submission to the Tribunal; but that the DSS is confined to making a written submission. The same section provides that the applicant can be represented at the SSAT hearing by 'another person', and that an oral submission may be made by telephone or through an interpreter.

**Section 193** provides that the SSAT is not to be bound by technicalities, legal forms, or rules of evidence, and is to act speedily and to have regard to the objectives laid down by s.176. The section also provides that the SSAT 'may inform itself on any matter relevant to a review of a decision in any manner the Tribunal considers appropriate'.

**Section 194** says that the hearing of a review shall be in private and s.195 allows the National Convener to order that a person present at a hearing not disclose any information revealed during the hearing.

**Section 200** says that any question before the SSAT is to be decided according to the opinion of a majority of the Tribunal dealing with the matter.

**Section 201** says that where the SSAT is evenly divided, the question shall be decided according to the opinion of the Member presiding.

**Section 203** says that each party must bear her or his own expenses in connection with SSAT review, but the SSAT may order the Commonwealth to reimburse a person for certain travel, accommodation, and medical expenses.

#### ■ AAT review

**Section 205** provides that an applicant may apply to the AAT for review of an SSAT decision.

**Section 207** provides that the DSS may apply to the AAT for review of an SSAT decision varying or setting aside a DSS decision.

#### ■ SSAT structure

The structure of the SSAT will be dealt with by a series of sections,

ss.216-236. The Tribunal is to have a National Convener, Senior Members, and Members: s.216.

**Section 217** provides that the National Convener is responsible for the overall operation and administration of the SSAT. One of this person's responsibilities is to give directions under s.221 about the constitution of the SSAT for a particular review.

In general, the SSAT will consist of 3 or 4 Members, but in 'special circumstances' the National Convener may constitute the SSAT with 1 or 2 Members: s.222.

#### ■ Government policies

A new s.17 will allow the Minister to prepare 'a written statement of a policy of the Commonwealth Government in relation to the administration of this Act'. The statement is to be tabled in each House of Parliament; and an officer of the DSS, and the SSAT, will be obliged, when exercising powers under the Act, to 'have regard to' the statement of policy. The Explanatory Memorandum accompanying the Bill states 'the guidelines would not be binding'. In his Second Reading speech the Minister offered the following explanation of this provision:

'A feature of Australia's administrative review system is that Administrative Tribunals are called upon to apply Government policy on various matters. This occurs when the legislation that the Tribunal applies does not clearly dictate what decision should be arrived at in the particular case. In such cases administrative Tribunals have long held that they will have regard to Government policy in deciding the issue.

This Bill provides that where the Government desires to require the SSAT to take account of Government policy in this way it will be necessary to table the relevant policy in both Houses - guaranteeing full public accountability in the administration of Social Security.'

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