# Assets test: deemed income

**SHEPHARD and REPATRIATION COMMISSION**
**(No. 5427)**
**Decided:** 13 October 1989 by M.D. Allen.

Athol Shephard had been granted a service pension in March 1982. Following the introduction of the assets test his service pension was cancelled in May 1985. In February 1986, the Repatriation Commission decided that the financial hardship provisions of the assets test should be applied to Shephard and restored his service pension but at a reduced rate.

Shephard asked the AAT to review that decision.

## The legislation

Section 53 of the *Veterans' Entitlements Act* 1986 is in substantially the same terms as s.7 of the *Social Security Act*.

Section 53 provides that the value of a property may be disregarded for the purposes of the assets test, where it would be unreasonable to expect the pensioner to sell or realise on the property, and where the pensioner is suffering 'severe financial hardship'.

Where property is disregarded, s.53(3) provided that the annual rate of pension payable to the person is to be reduced by the lesser of the following amounts:

> '(i) 2.5% of the value of the property;
> (ii) the annual amount "that could reasonably be expected to be obtained from a purely commercial application of that property".'

Section 7(4) of the *Social Security Act* is in the same terms.

## The evidence

Shephard and his brother, C, were the tenants in common (each holding an undivided half share) of a property of 234 hectares.

The property, which was described as marginal farming land, was being worked by C's son, P.

The farming of the property did not generate sufficient income to enable the payment of rent and P found it necessary to work off the farm in order to support himself.

## Reasonable rental

The AAT accepted that the 'highest and best use' of the property in question would be to lease it to an adjoining land owner. However, the AAT also accepted that Shephard's nephew, P, could not reasonably be expected to pay any rent for his use of the property and that Shephard's brother, C, would not be prepared to join with Shephard in leasing the property to a stranger.

The Tribunal referred to some observations made by Jenkinson J in *Secretary to DSS v Copping* (1987) 39 *SSR* 497, to the effect that —

> 'a hypothetical prospective tenant could be expected to pay scant rent for a lease... while [a third party] maintained his own right to possession of the whole'.

(Reasons, para.30)

Applying those remarks, the AAT said, the lease of Shephard's interest in the subject land —

> 'would not be commercially viable, that is to say the amount to be obtained from a purely commercial application of his interests is nil.'

(Reasons, para.31)

Because s.53(3) of the *Veterans' Entitlements Act* required the lesser of two amounts to be taken into account in fixing the rate of pension payable, it was not necessary to consider what was the appropriate valuation of Shephard's interest in the subject land. However, the AAT said that it appeared that the real value of Shephard's interest would be less than 50% of the whole value of the land, because Shephard's co-owner was in possession of the land through his son, P. However, it was unnecessary to pursue this question because whatever was the value of Shephard's interest, it would be greater than nil.

## Formal decision

The AAT set aside the decision under review and remitted the matter to the Repatriation Commission with a direction that no deduction was to be made from his service pension on account of deemed income from the subject property.

[P.H.]

# Assets test: 'principal home'

**DICKESON and SECRETARY TO DSS**
**(No. 5312)**
**Decided:** 16 August 1989 by J. Handley.

Robert Dickeson, an 87-year-old single pensioner, sought review of a DSS decision to reduce his rate of age pension under the assets test by treating him as a homeowner. This had the effect of reducing the allowable assets for means testing purposes.

## The facts

At the time of the decision, Dickeson was living in a disused grain shed on a property owned by him. The DSS determined that this was his principal home.

Dickeson had lived on the farm all of his life. He had initially lived with his parents in the original homestead but it had burnt down, as had a replacement house. He had lived in the grain shed with his brother until his brother's death and now lived there alone.

The shed had no heating or cooling appliances, no washing facilities, no space for cooking, no running water and no toilet. The AAT stated:

> 'Photographs of the inside of the shed revealed premises which can at best be described as putrid and squalid. A bed is constituted by a filthy mattress without any bed linen at all, and blankets appeared to be old hessian bags and a woollen jacket or overcoat.'

## The legislation

Section 4(1)(a)(i) of the *Social Security Act* provides that, in calculating the value of a person's property, the value of that person's 'principal home' is to be disregarded.

Section 8 specifies the 'pension reduction amount' wwhich will operate to reduce a person's pension under the assets test. That amount will be greater in the case of a person covered by s.4(1)(a)(i) than in the case of a person to whom that sub-paragraph does not apply.

## Principal home

The AAT pointed out that the words 'principal home' were not defined in the Act. Nor were the words 'principal' or 'home'. It was acknowledged that the word 'principal' was generally used to refer to a situation of ownership or occupation of more than one place of residence so as to ascertain the place where a person resides most frequently.

However for these purposes, because Dickeson resided in only one place of residence, the reference to 'principal' was not relevant.

The AAT went on to suggest that, in the absence of any precise definition of 'home' or 'principal home' within the Act, external aids might be relied upon to assist in construction of the meaning of the relevant part of the Act, s.4(1)(a)(i).

After reference to ss.15AA and 15AB of the *Acts Interpretation Act*, and the Second Reading Speech of the Minister introducing the assets tests in 1984, the AAT referred to Dickeson's argument that to treat him as a home owner was in unfair and unjust and placed an absurd or ridiculous interpretation on the word 'home', having regard to the circumstances peculiar to Dickeson.

The DSS, on the other hand, suggested that the concept of the home had an emotional element to it and Dickeson should be deemed to be a home owner because he had made his home in the place where he lived despite its lacking the usual and commonly accepted indicia of a home.

The DSS argued that Dickeson lived in a home which was his own home and which was located upon land owned by him.

**The AAT's decision**

The Tribunal stated:

> 'The words "home", "house", "residence" and "domicile" have all been extensively considered by the Courts, but derive their meaning only by reference to a particular subject whether it be Taxation, Family Law, Tenancy, Customs, Probate, or Social Welfare.'

In assessing the criteria of what constituted a 'home', the AAT noted that a substantial degree of occupation was persuasive and concluded that a —

> 'home is likely to be a place where persons ordinarily eat, morning and night, and where they sleep, and in the case of adults have the characteristics of permanency (*Todd v Nichol* [1957] 1 SASR 72).'

Further, a home 'is the place where the centre of gravity of one's domestic life is to be found' (*Geothermal Energy NZ Ltd v Commissioner of Inland Revenue* [1979] 2 NZLR 324). A home need not be a structure of 4 walls and a roof, but may be constituted by a caravan or a campervan (see *Buchanan*, noted in this *Reporter*).

The AAT concluded that the structure in which Dickeson lived had all the elements which the AAT found constituted a home:

> 'Dickeson sleeps nightly at these premises and prepares and consumes most meals at these premises. It is fitted and furnished, however modest [*sic*], for his needs and comfort. It is the place that he regards as his home'.

Dickeson had not given any evidence at the hearing and the Tribunal commented that it was unable to discern from the evidence available any indication that the accommodation was in any way temporary nor any indication as to the reasons why Dickeson was living in the shed.

**Formal decision**

The Tribunal affirmed the decision that the premises in which Dickeson resided constituted his principal home for the purposes of the assets test.

# Assets test: 'home owners'

**BUCHANAN and REPATRIATION COMMISSION**

**(No. 5235)**

**Decided:** 14 July 1989 by BG Gibbs.

James Buchanan sought review of a decision of the delegate of the Repatriation Commission that Buchanan and his wife were 'home owners' for the purposes of the assets test, while residing in their 'mobile home'.

**The facts**

Buchanan and his wife had been receiving service pension from December 1984. At that time, they had owned their own home. In June 1987, Buchanan advised that the home had been sold, that they had purchased a Nissan vehicle for $24 000, and were now proposing to tour the country.

Mr and Mrs Buchanan's pensions were reassessed from 18 June 1987, treating them as non-home owners. On 1 June 1988 a delegate of the Repatriation Commission determined that Buchanan and his wife should be treated as home owners and accordingly their pensions were reassessed as from 16 June 1988. However, shortly prior to that time, Mr and Mrs Buchanan had ceased touring and were living in rental accommodation so they were subsequently reassessed as non-home owners from 16 June 1988.

Buchanan sought review of that decision and on 24 October 1988 a delegate of the Repatriation Commission affirmed the decision that they should be treated as home owners while they were living in their mobile home. Buchanan then sought review by the AAT.

**The legislation**

Section 50(1)(a)(2)(ii) of the *Veterans' Entitlements Act* 1986 provides that for the purpose of calculating the value of a person's assets, 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 ...'

The AAT noted that the Act did not define the words 'principal home'.

The Repatriation Commission submitted that the decision was correct in accordance with its policy, in particular, part 5.27 of the General Orders Service Pension issued by the Department of Veterans' Affairs, which states that, if a pensioner resides in a caravan or boat, the caravan or boat can be regarded as the principal home of the person and the value of that caravan or boat can be disregarded under s 50(1)(a)(i) or (ii). The person can also be regarded as a home owner for the purposes of the assets test. However, Buchanan contended that a campervan was not to be compared with a caravan.

The Tribunal noted that the van in which Buchanan and his wife were touring Australia had been converted by cutting out a piece of the top and inserting in its place a fibreglass top which lifted by about 2 feet. The van also contained a refrigerator, stove, table, sink, watertank and lighting powered by batteries, but had no toilet facility.

Buchanan gave evidence that he and his wife were continually on the move while on tour and rarely stayed more than 2 days at any one place. On 2 occasions, they had paid rent to caravan park owners.

During the time they were on tour, Buchanan and his wife were registered on the electoral role as 'itinerant voters'. They had originally planned to be on tour for some 2 to 3 years. Buchanan stated that he and his wife did not consider the campervan as a home but merely as a vehicle for touring the country.

The Commission relied upon a decision of *Helsham and the Repatriation Commission* (2 June