**Failure to advise applicant**

The AAT also rejected an argument that there had been some form of onus on the DSS to inform Fry of her rights to claim a widow's pension at the time when she had claimed her age pension in 1982:

> 'Whilst one would expect that the Department would and does make every endeavour to explain to would-be applicants, when appropriate, their right to apply for the many and various social welfare benefits administered by the Department, there is no legal obligation upon the Department or its officers to do so. Failure to do so does not thereby override statutory requirements to entitlements.'

(Reasons, para. 11)

**Formal decision**

The AAT set aside the decision of the SSAT and decided that arrears of widow's pension were not payable to Fry for the period from 21 June 1987 to 14 September 1988.

[P.H.]

# Family allowance: whether payable prior to lodgment of claim

**SECRETARY TO DSS and PERKINS (No. 5693)**

**Decided:** 10 May 1990 by R.K. Todd.

The DSS asked the AAT to review a decision of the SSAT that arrears of family allowance were payable for the period November 1987 to May 1989.

**The facts**

Perkins and his wife separated in July 1984. From that time, the 3 children of the marriage remained in his care and control. Family allowance continued to be paid in the name of Mrs Perkins into a joint account. Mr Perkins paid little attention to the allowance and during the period July 1985 to August 1986, when he and his children were in Washington.

Family allowance was cancelled from October 1987 after Mrs Perkins failed to respond to correspondence.

Mr Perkins lodged a claim for the allowance on 7 May 1989. His claim was granted from 2 May 1989, but he was advised that no arrears would be paid. He then sought review and the SSAT set aside that decision, and granted payment from November 1987.

**The legislation**

Prior to 29 December 1988, s.88 of the *Social Security Act* provided that a family allowance should be payable either from the first day of the family allowance period during which the claim was lodged or from the commencement of the next family allowance period after lodgment.

At all relevant times, s.158(1) provided (and still provides) that the grant or payment of (inter alia) a family allowance, 'shall not be made except upon the making of a claim for that . . . allowance'.

Sections 87 and 88 were repealed from 29 December 1988 and replaced with a new s.87 and s.159(4A), (4B) and (4D).

Section 87 now provides that 'a family allowance is payable . . . on each family allowance pay-day on which the person . . . is qualified to receive family allowance in respect of the child'.

Section 159(4A) deems a claim to have been lodged on the date of a child's birth, if it was lodged within 4 weeks of the birth, in effect, providing for arrears of up to 4 weeks in the case of a claim for a newborn child.

Section 168(3) gives the Secretary a power to determine that a claim should be granted, a payment should be made or a rate increased 'having regard to any matter that affects the granting of a claim for, or the payment of, a pension benefit or allowance . . . '

Section 168(4) deals with the date of a determination under s.168(3).

**The SSAT decision**

The SSAT granted the claim for arrears by deciding that, as Perkins was qualified for family allowance from July 1984, s.87 provides for payment of family allowance 'on each family allowance pay-day on which a person is qualified to receive' it. The SSAT further decided that nothing in ss.82, 87, 158 or 159(4A) evinced a clear intention that family allowance was not payable prior to the lodgment of a claim.

**The DSS case**

The DSS conceded that Perkins was qualified from July 1984; but argued that there was no power under the Act to backdate payment of family allowance prior to lodgment of a claim.

The main submission was that, under s.158(1), a person does not qualify for payment until a claim is lodged.

As for the suggestion that s.87 authorises payment where a person is 'qualified', the DSS maintained that s.87 could not be read in isolation: an allowance is only payable if a person has a vested right to payment, having regard to s.158(1). Moreover, if arrears were payable without the lodgment of a claim, no purpose would be served by ss.159(4A-4D), inserted from 29 December 1988.

It was also argued that s.159(4C) and (4D) indicated that Parliament intended that a claim for family allowance must have been made before family allowance is payable.

In conclusion, the DSS case was that, apart from the limited exceptions contained in s.159(4A) and (4B) (which deals with children in institutional care), family allowance was not payable in respect of any pay-day prior to claim.

**The respondent's case**

In addition to relying on the SSAT decision, Perkins claimed that DSS had mishandled the matter, first, by failing to inform him of his need to lodge a claim and, secondly, through its own administrative procedures. These included a letter which indicated that if, after cancellation for failure to provide income information, that information was supplied within 3 months, payment could be restored.

Perkins also relied on an analogy with taxation: if a taxpayer could be required to pay tax once liability was established, DSS should be required to pay family allowance once qualification was established. He also argued that an interpretation of the Act allowing for payment of arrears was warranted by the presumption that welfare legislation should be interpreted beneficially.

**The cases**

After noting that there were no decisions on this issue, the AAT considered a number of other cases involving related issues of arrears, including *Tiknaz* (1981) 5 *SSR* 45; *Gray* (1984) 22 *SSR* 250; *Waterford* (1981) 1 *SSR* 1 and *Turner* (1983) 17 *SSR* 174.

These were contrasted with *Hurrell* (1984) 23 *SSR* 236, where the AAT had held that the benefit there had been suspended, rather than cancelled and hence, since there was a subsisting claim, it was not a bar to payment of unemployment benefit that Hurrell had not lodged his fortnightly income statements.

The AAT decided that the decision in *Hurrell* did not assist Perkins since, even if it could be maintained that the original claim subsisted (which the AAT did not accept), that claim was a claim by Mrs Perkins, not by the respondent.

The AAT noted that 'there is no provision conferring on the Secretary a

general discretion to grant arrears of family allowance. Accordingly, backpayment to the respondent is not possible': Reasons, para.20.

**The DSS letter and s.168**

As noted above, Perkins had received a letter indicating that backpayment was possible, even after cancellation of an allowance. The DSS conceded that the appropriate term in such a case was suspension, rather than cancellation. However, this led the AAT to consider the effect of s.168(3) and s.168(4), even though these provisions were not raised at the hearing of the matter.

After receiving further written submissions on the effect of s.168, the AAT suggested that, if a broad view of s.168(3) were taken (that it is not confined to peripheral matters arising from the suspension, cancellation or variation of a pension etc), then s.168(4)(ca), the relevant provision relating to the date from which a determination under s.168(3) comes into effect, could also be broadly interpreted so as to allow the Secretary (and the Tribunal on review) to set any earlier date as the starting date.

However, The AAT noted that 'this would be inconsistent with the whole tenor of the other provisions in the Act', in particular, ss.158 and 159 which 'exemplify the underlying policy that claimants need to make timely claims for benefits, allowances and pensions. Arrears are generally not available and the exceptions are very specific and conditional.'

The AAT concluded that despite the apparent breadth of s.168(3) and (4), they should not be given an overly broad construction.

The AAT further rejected the respondent's other arguments (the taxation analogy and the argument that a beneficial construction should be placed on welfare legislation), on the basis that the legislation simply did not provide the Secretary with a discretion (and further doubted, whether, if there were such a discretion, it would be exercised in this case).

**The decision**

For the reasons set out above, the tribunal set aside the decision of the SSAT and decided that Perkins was not entitled to arrears of family allowance for the period November 1987 to May 1989.

**[R.G.]**

**SECRETARY TO DSS and CHATZIKOSMIDIS**
**(No. 5965)**

**Decided:** 13 June 1990 by R.A. Balmford.

The DSS asked the AAT to review an SSAT decision that Mrs Chatzikosmidis was eligible for family allowance from 29 December 1988 rather than from 18 May 1989.

**The facts**

Payment of family allowance to Chatzikosmidis had been cancelled from 15 October 1987 because she had not returned the information necessary for payment to continue after the introduction of the means test in 1987.

Chatzikosmidis lodged a further claim on 23 August 1988 which had been rejected because of her income. However, her situation changed as of 15 December 1988, from which time she satisfied the income test. She had continued to be otherwise qualified in respect of her son Louis.

Chatzikosmidis did not lodge a further claim until 12 May 1989 and that claim was granted from 18 May 1989. She then sought arrears and the SSAT decided that she was eligible from 29 December 1988.

**The legislation**

Prior to 29 December 1988, s.88 of the *Social Security Act* had provided that a family allowance should be payable either from the first day of the family allowance period during which the claim was lodged or from the commencement of the next family allowance period after lodgment.

At all relevant times, s.158(1) provided that the grant or payment of (inter alia) a family allowance, 'shall not be made except upon the making of a claim for that ... allowance'.

Section 87 and 88 were repealed from 29 December 1988 and replaced with a new s.87 and ss.159(4A), (4C) and (4D). Section 87 now provides that 'a family allowance is payable ... on each family allowance pay-day on which the person ... is qualified to receive family allowance in respect of the child'. Section 159(4A) deems a claim to have been lodged on the date of a child's birth, if it was lodged within 4 weeks of the birth.

**The AAT's decision**

After setting out the terms of the legislation, the AAT referred to the recent decision of Deputy President Todd in *Perkins* [noted in this issue of the *Reporter*] and adopted the reasoning in that case, on the basis that the issue, namely whether there was any power in the Act to backdate payment of family allowance to a date when the claimant was qualified to receive it, but had failed to lodge a claim, was the same in both cases.

**Formal decision**

The AAT set aside the SSAT decision and substituted for it a decision that Chatzikosmidis was entitled to payment of family allowance from 18 May 1989.

**[R.G.]**

# Married person treated as unmarried

**LOBB and REPATRIATION COMMISSION**
**(No. 5764)**

**Decided:** 13 March 1990 by J.R. Gibson, J. Hooper and J.M. Maher.

Lobb asked the AAT to review a decision assessing his rate of service pension on the basis that he was a married person.

**The legislation**

Under s.35(6)(f)(i) of the *Veterans' Entitlements Act* 1986, a reference to a married person does not include a legally married person who is 'living separately and apart from [their spouse] on a permanent basis'. [The *Social Security Act* 1947, s.3(1) contains an equivalent provision in paragraph (a) of the definition of 'married person', which is now read in conjunction with s.3A on 'marriage-like relationships'.]

There is a discretion 'for any special reason' to not treat a married person as being married: *Veterans' Entitlements Act* 1986, s.35(7). [A similar discretion is found in paragraph (b) of the definition of 'married person' in s.3(1) of the *Social Security Act* 'for any special reason in any particular case'.]

A married veteran can also be treated as unmarried where the Commission is satisfied that the veteran's living expenses are likely to be greater by reason that he and his spouse are unable to live together in a matrimonial home as a result of the illness of either or both of them and that inability is likely to continue indefinitely: *Veterans' Entitlements Act* 1986, s.47(2). [Equivalent provisions are found in ss.33(2) and 118(1A) of the *Social Security Act*.]

**The facts**

Lobb married in 1974 in Australia. At the time of the AAT hearing he was aged 76 years and his wife was 89. They were