v District Court; Ex parte White (1966) 116 CLR 644 at 654; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356.

- A finding of fact will not be an error of law because of lack of evidence as distinct from a complete absence of evidence – *Western Television Ltd v Australian Broadcasting Tribunal* (1986) 12 FCR 414 at 429.
- A finding of fact will be an error of law only if it is perverse, unsupported by probative evidence or not reasonably open to the Tribunal – *Australian Broadcasting Tribunal v Bond*, above at 359-60.

Failure to deal with submission

However, Beazley J accepted the argument that the AAT had committed an error of law by failing to consider a submission advanced on Kalwy's behalf.

Although it appeared, from a reading of the AAT's reasons as a whole, that the bulk of counsel's submissions had been considered, the AAT had not dealt with a submission relating to Kalwy's history of savings following the conclusion of the alleged conspiracy.

Counsel had pointed to the fact that Kalwy had continued to accumulate savings at a relatively fast rate after the period when, it was alleged, he had been receiving part of the payments from the DSS. The submission was that, if Kalwy had managed to save a substantial amount of money when he could not have been receiving illegally obtained payments, then his earlier accumulation of substantial savings could be explained by his ability to save rather than by his alleged receipt of part of the payments from the DSS.

That submission, Beazley J said, was important and might have influenced the AAT in its determination. But it was not necessary, Beazley J said, to demonstrate that consideration of that submission, and the material on which it was based, would have resulted in a different finding by the AAT. The failure of the Tribunal to consider that submission, being a submission worthy of consideration, was an error of law: *Dennis Wilcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267.

Remission to a different Tribunal

Having decided that the AAT's decision must be set aside, Beazley J directed that the matter now be heard by a differently constituted Tribunal.

No allegation of bias had been made, nor could it be made. But the same senior member had dealt with the matter on the two occasions that the AAT had decided against Kalwy, 'and might be perceived to have a preconceived idea about it, such that justice may not be seen to be done': Reasons for Judgment, p. 20.

Formal decision

The Federal Court allowed the appeal, and remitted the matter for re-determination by the AAT, constituted by different persons, according to law with or without further evidence.

[P.H.]

Income test: Italian pension

SECRETARY TO DSS v PELLONE

(Federal Court of Australia)

Decided: 26 November 1993 by Olney J.

This was an appeal, under s.44 of the *AAT Act*, from the AAT's decision in *Pellone* (1993) 75 *SSR* 1083. The AAT had decided that the rate of age pension payable to Pellone (an Australian resident) should be fixed without regard to an Italian pension payable to Pellone but which had not been paid to her by the Italian pension authorities.

In *Inguanti* (1988) 15 ALD 348; 44 *SSR* 568, the Federal Court had decided that such an unpaid pension was income 'derived' by the payee for the purpose of the Australian pension income test. But the AAT had used art. 16(4) of the Social Security Agreement between Australia and the Republic of Italy, set out in schedule 3 to the *Social Security Act* 1991, so as to allow the rate of Pellone's pension to be calculated without regard to her unpaid Italian pension.

The legislation

Section 8(1) of the *Social Security Act* defines 'income' of a person to mean 'an income amount earned derived or received by the person for the person's own use or benefit'.

Section 1208(1) of the Act reads as follows:

> 'The provisions of a scheduled international social security agreement have effect despite anything in this Act.'

Schedule 3 contains an agreement between Australia and Italy. Article 16 of the agreement, entitled 'Determination of Claims', provides in art. 16(4) that one of the contracting parties (Australia or Italy) may request the other party to pay any arrears of pension, owing by the other party to a pensioner, to the first party so as to allow the first party to recover from the arrears any overpayment of pension made by the first party to the pensioner.

Article 16(3) provides that the rate of benefit payable to a person by one of the contracting parties (Australia or Italy) can be assessed on the basis that the person is receiving a benefit from the other contracting party, if 'there are reasonable grounds for believing' that the person may be entitled to that other benefit.

Article 17 provides that any 'Italian supplement' included in an Italian pension received by an Australian pension shall not be included as income for the purpose of calculating the rate of the Australian pension.

Article 16(4) not relevant

In the Federal Court, Olney J said that art. 16(4) of the Agreement provided a system whereby the contracting parties could ensure that, in some circumstances, overpayments of benefits could be recouped in a manner that would avoid having to resort to collecting the same from the pensioner.

Olney J said that some aspects of the *Social Security Act* (for example, providing that pension was to be paid in a particular manner: ss. 61, 62; and that a pension could not be alienated: ss. 66, 67) were inconsistent with art. 16(4). By the operation of s.1208, the Agreement would displace the Act's provisions in those circumstances.

But there was nothing about art. 16(4) which justified the conclusion that it affected the operation of the Act in relation to the assessment of a person's pension entitlement in the light of the person's income. Olney J continued:

> 'To construe art. 16(4) in the manner adopted by the AAT would have a bizarre result. It would for example mean that a person who may have an as yet unsubstantiated claim for Italian pension can have that presumed benefit taken into account in the assessment of his Australian pension pursuant to art. 16(3), but a person who has been granted, but not as yet paid, an Italian pension would not have the Italian pension taken into account.
>
> Unlike art. 17 which specifically addresses the question of the Australian income test, art. 16 has nothing to do with that subject matter and cannot be construed in a manner that affects the definition of income in s.8(1). On the

other hand, art. 17 is an example of a provision in the Agreement which, in order to have any effect, must prevail against the statutory definition of 'income', and by virtue of s.1208 does so prevail.'

(Reasons, p. 12)

Formal decision

The Federal Court allowed the appeal, set aside the AAT's decision and affirmed the decision of the DSS review officer.

[P.H.]

Wife's pension: male to female transsexual

SECRETARY TO DSS v SRA

(Federal Court of Australia)

Decided: 1 December 1993 by Black CJ, Lockhart and Heerey JJ.

This was an appeal from the decision of the President of the AAT, O'Connor J, in *SRA* (1992) 69 *SSR* 991.

The AAT had decided that a pre-operative male-to-female transsexual could be treated as a woman for the purposes of qualifying for wife's pension under the *Social Security Act* 1947, because 'psychological sex [was] the most important factor in determining sex for the purposes of the *Social Security Act*'.

The legislation

Section 37 of the 1947 Act provided that a woman (who was not an age or invalid pensioner) and who was an Australian resident would qualify for wife pension if she was the wife of an age or invalid pensioner.

Section 3(1) defined 'wife' to mean a 'female married person'; and 'married person' was in turn defined to include a person living with a person of the opposite sex in a marriage-like relationship.

The facts

SRA was born as a male in 1965. At the age of 16 she realised that she was a transsexual and sought psychological counselling. She commenced hormone therapy in 1983 and started to present as a woman. In April 1984, SRA started to live with a man, B. There were some interruptions to this relationship; but SRA and B were living together at the time when the DSS decided that SRA did not qualify for wife pension – October 1990.

In 1989, a psychiatrist advised SRA that she was ready for sex reassignment surgery; but SRA did not proceed with surgery because of the cost. The AAT found that SRA regarded herself as a woman, although she was physically and biologically a man.

Physical characteristics decisive

Black CJ said that, in ordinary English usage, words such as 'male' and 'female', 'man' and 'woman' and the word 'sex' related to anatomical and physiological differences rather than to psychological ones.

Although the *Social Security Act* was concerned with social policy and was beneficial legislation, Black CJ said, ordinary words used in the Act should receive their ordinary meaning. It would be going well beyond the ordinary meaning of the words to conclude that a person with male external genitalia was a 'woman' for the purposes of the *Social Security Act* and could be a 'wife' under the Act.

Primacy could not be given to psychological factors to the virtual exclusion of anatomical factors. It had not been open to the AAT to conclude that SRA was eligible for wife's pension and it had erred in law in doing so: Reasons, pp. 6-7.

Black CJ said that this conclusion was consistent with the decision of the NSW Court of Appeal in *R v Harris & McGuinness* (1988) 17 NSWLR 158, where it had been held that a pre-operative male-to-female transsexual was, and a post-operative male-to-female transsexual was not, a 'male person' under s. 81A of the *Crimes Act* 1900 (NSW) which made it an offence for a male person to procure the commission of an act of indecency between male persons.

The Chief Justice observed that a post-operative male-to-female transsexual could be regarded as a woman for the purposes of the Act:

> 'Whatever may once have been the case, the English language does not now condemn male-to-female transsexuals to being described as being of the sex they profoundly believe they do not belong to and the external genitalia of which, as a result of irreversible surgery, they no longer have. Where through medical intervention a person born with the external genital features of a male has lost those features and has assumed, speaking generally, the external genital features of a woman and has the psychological sex of a woman, so that the genital features and the psychological sex are in harmony, that person may be said, according to ordinary English usage today, to have undergone a sex change.'

(Reasons, p. 9)

Black CJ said that there were limits on the capacity of surgery to change the physical characteristics of a person's sex: a person who had undergone a male-to-female operation could not conceive or bear children and would retain a male's chromosomes; but the expressions 'sex change' and 'sex change operation' were in common use and were clearly understood. Once a male-to-female transsexual had undergone a 'sex change operation', 'the person may properly be described by the word appropriate to the person's psychological sex and to external genital features which are now in conformity with the person's psychological sex': Reasons, p. 10.

In a separate judgment, **Lockhart J** reviewed the history of transsexualism, the distinctions between transsexuals, transvestites, homosexuals and intersexuals, and legislative and judicial developments in Australia, the UK, European countries, the USA, Canada, South Africa and New Zealand.

Lockhart J acknowledged that post-operative transsexuals should be recognised by the law as having changed their gender: 'Post-operative transsexuals should not be denied by society the inner peace of life which is their right': Reasons, p.46.

Lockhart J said he would follow *R v Harris & McGuinness* (above), an unreported Victorian decision, *R v Cogley* (20 February 1989) and a US decision, *Richards v US Tennis Association* 400 NYS 2d 267 (1977). Lockhart J declined to follow an English decision, *Corbett v Corbett* [1971] P 83; and two decisions of the European Court of Human Rights, *Rees v United Kingdom* (1986) 9 EHRR 56 and the *Cossey Case* (1991) EHRR 622; as well as a New Zealand decision, *Re T* [1975] 2 NZLR 449, and a South African decision, *W v W* [1976] 2 SALR 310.

But Lockhart J said that he could not pass beyond the point of treating as female a post-operative transsexual to the recognition of a pre-operative transsexual as being a member of the adopted sex for the purposes of the law:

> 'I recognize the force of the argument in the case of a male-to-female transsexual, that she has doubtless lived most of her life in a position of ambiguity, wanting to be a female but trapped in the body of a male, who later adopts the appearance of a woman, has hormonal treatment