resident. Section 1208 provides that a scheduled international agreement will override provisions of the Act.

Section 1215(2) provides:

'Subject to subsection (3), if a woman:

(a) has never been an Australian resident: and

(b) was in receipt of:

(i) wife pension; or . . .

under the *Social Security Act 1947* before 1 July 1991; and

(c) is in a specified foreign country on 1 July 1991;

she is not disqualified from that pension from 1 July 1991.'

The AAT also referred to Article 7 of the Agreement Between Australia and The Republic of Italy Providing for Reciprocity in Matters Relating to Social Security.

Eligibility

The issue was whether Cimino was eligible to continue to receive an Australian wife's pension even though she had never resided in Australia and did not qualify for the pension under the current legislation.

The AAT noted that Cimino stated in a departmental questionnaire that she had not been in Australia and concluded that 'under ordinary conditions, this would disqualify Cimino for a wife's pension': Reasons, para 10.

As Cimino claimed the pension under the provisions of the international agreement between Australia and Italy, the AAT went on to consider the relevant sections of the Act and the Agreement. The AAT concluded that, although Cimino satisfied s.1215(1)(a) and (b), no foreign country had been specified at the date of decision and consequently she could not satisfy s.1215(1)(c). She therefore did not qualify for continued payment under that section. Similarly, as she had never resided in the country she did not satisfy the requirements of one year minimum Australian residence for payment of an Australian pension under Article 7 of the international agreement.

Formal decision

The AAT affirmed the decision of the SSAT to cancel the wife pension.

[M.A.N.]

[Note: The question of whether a person has accrued rights under an amended or repealed Act is not determined by looking to see whether the rights are provided for in the current Act. They survive by virtue of s.8 of the *Acts Interpretation Act 1901* unless a contrary intention appears in the amending or repealing Act.]

Additional family payment: cancellation after absence from Australia

McGRATH and SECRETARY TO DSS
(No. 9370)
Decided: 16 March 1994 by D.J.Grimes.

At the time of the hearing Mr McGrath was residing in Fiji and the matter was determined by the AAT without a hearing.

Background

McGrath was in receipt of disability support pension. On 11 September 1992 he obtained a pre-departure certificate, notifying the DSS of an intended absence overseas. In a letter dated 21 September 1992 the DSS advised McGrath that he would be paid a fortnightly rate, consisting of his disability support pension and additional child pension from 24 September 1992 while he was overseas. On 7 January 1993, he and his son left Australia for Fiji. Evidence to the SSAT indicated that McGrath had intended to leave Australia earlier than 7 January 1993 but he was prevented from doing so. On 15 January 1993 McGrath returned to Australia to care for his parents and his son remained in Fiji. He obtained a further departure certificate for himself on 26 February 1993 and returned to Fiji on 3 March 1993.

In a letter dated 16 April 1993 the DSS notified McGrath that he had failed to advise of his departure and his additional family payments would be stopped if he did not attend his departmental office within 14 days. McGrath's entitlement to additional family payment was cancelled from 3 March 1993.

Prior to 1 January 1993, additional child pension was portable. On 1 January 1993, additional child pension ceased to exist and was replaced by additional family payment which is not payable in respect of a child who is outside of Australia: *Social Security (Family Payment) Amendment Act 1992 (No.69 of 1992)*.

The legislation

Section 1069-D2 specifies the requirements for qualification for additional family payment. It provides:

'Subject to the points 1069-D5, 1069-D6, 1069-D7, 1069-D9 and 1069-D11, a person is qualified for additional family payment for a dependent child of the person (an "AFP child") if:

(a) the person and the child are present in Australia and:

(b) the person:

(i) is receiving family payment in respect of the child; or

(ii) . . . and

c) the value of the person's assets does not exceed $363,000.'

The AAT noted two exceptions to the requirement of presence in Australia. The first was that 'if the person leaving Australia with their child/children after 1 January 1993, are paid a pension under an international agreement, then they will continue to receive additional family payment whilst outside Australia': Reasons, para. 12. The other exception is contained in the so-called 'savings provisions' of the Act. 'Schedule 1A.5A allows for additional family payment to be received by persons absent from Australia on 1 January 1993 until such time as they return to Australia': Reasons, para. 13.

Is additional family payment payable?

The AAT found that once McGrath left Australia on 7 January 1993, he 'failed to satisfy the mandatory requirement of presence in Australia embodied in s.1069-D2(a)': Reasons, para. 14. Accordingly he was not eligible for additional family payment. Further, his circumstances did not come within the exceptions to this section. No evidence was before the AAT that McGrath was paid his pension pursuant to an international agreement and as he and his son were present in Australia on 1 January 1993, he did not come within the savings provisions.

The AAT agreed that there was cause for McGrath's confusion and belief that the payment had been unjustly cancelled, 'given the contradictory nature of the advice from the department' Reasons, para 16. The AAT found that McGrath had been incorrectly advised on two occasions about the reasons for cancellation of additional family payments. However,

the AAT concluded that it had no discretion to remedy McGrath's situation and it had 'no choice but to find that the applicant's additional family payment entitlements were correctly cancelled on 3 March 1993 and that he remains ineligible for such until he and his son return to Australia': Reasons, para. 19.

Formal decision
The AAT affirmed the decision under review.

[M.A.N.]

Newstart allowance: activity agreement

BARTLETT and SECRETARY TO DSS
(No. 9428)
Decided: 18 April 1994 by A.M. Blow.

Bartlett asked the AAT to review a decision by an officer of the Commonwealth Employment Service to cancel his newstart allowance. The decision had been affirmed by the SSAT.

Bartlett had entered into his second Newstart Activity Agreement with the CES on 13 October 1992. That agreement provided that it would be reviewed in April 1993 if he still required newstart allowance. In May 1993 an officer of the CES wrote to him and asked him to attend an interview at the Launceston office. At the interview, Bartlett was unable to reach agreement with the officer as to the terms of a fresh Newstart Activity Agreement. A second interview was held and again, they were unable to reach agreement as to the terms. The CES wanted to include a term to the effect that Bartlett would produce copies of his job applications for inspection at the CES office, but he did not agree with this. At the end of the discussion, Bartlett was advised that his newstart allowance would be cancelled, and the delegate then arranged for that decision to be reviewed by an authorised review officer (ARO), who affirmed the decision.

The legislation
Section 593(1) provides in part as follows:

> 'A person is qualified for a newstart allowance in respect of a period if:
>
> . . .
>
> (d) at all times during the period when the person is a party to a Newstart Activity Agreement, the person is prepared to enter into another such agreement instead of the existing agreement; and
>
> (e) when the person is required by the Secretary to enter into a Newstart Activity Agreement in relation to the period, the person enters into that agreement.'

Did Bartlett fail to enter a Newstart Activity Agreement?
Section 605 of the Act confers a power on the Secretary to require a party to a Newstart Activity Agreement to enter into a fresh one, and s.606(1) provides for the sorts of terms that can be included in a Newstart Activity Agreement. Section 607 makes provision as to the consequences of a failure to negotiate a Newstart Activity Agreement, and s.660I of the Act provides a general power to the Secretary to cancel or suspend an allowance if the Secretary is satisfied that the allowance is being, or has been paid to a person to whom it is not or was not payable under the Act.

The DSS argued that in failing to agree to the inclusion of a term requiring him to produce copies of his job applications for inspection, Bartlett had failed to agree to terms proposed by the CES, thereby indicating that he was unreasonably delaying entering into the agreement, and that he therefore was to be taken to have failed to enter into an agreement pursuant to paragraph 607(1)(c). It followed in this argument that he did not enter into a Newstart Activity Agreement when required (see para. 503(1)(e)), and his newstart allowance was therefore correctly cancelled under s.660I.

The AAT did not accept these arguments for a number of reasons. First, Bartlett was never required by the Secretary or any delegate to enter into a fresh Newstart Activity Agreement. The fact that a review in April 1993 was mentioned in the October 1992 agreement did not impose a requirement to enter into a fresh agreement at any future time. As the AAT pointed out, reviewing an agreement does not necessarily imply superseding it with a fresh agreement. Neither of the letters sent to Bartlett imposed a requirement to enter into a fresh Newstart Activity Agreement. Both required him to attend interviews.

Nor did the DSS argue that any other communication to him constituted a requirement to enter into a fresh Newstart Activity Agreement. It follows, therefore, that Bartlett was never given notice under s.605(3) of a requirement to enter into one. Therefore, paragraph 607(1)(a) was not satisfied, and the Secretary lacked the power to give Bartlett a notice under paragraph 607(1)(c) that he was being taken to have failed to enter the agreement. On that basis, the AAT decided that it would have to consider Bartlett's eligibility for newstart allowance without recourse to s.607.

As for the argument that Bartlett had unreasonably delayed entering into an agreement, the AAT stated that an individual's newstart allowance can be cancelled on that ground only where the Secretary, or the Secretary's delegate, decides that a person, owing to the person's failure to agree to certain proposed terms, is unreasonably delaying in entering into the agreement. If that is the case, the Secretary or the delegate must give the person a written notice indicating that they are being taken to have failed to enter into an agreement and provide reasons for the decision, including a statement of rights for review. Those reasons must be based on para. 607(1)(b). After that has been done, it is open to the Secretary or the delegate to cancel the allowance pursuant to s.660I.

The AAT pointed out that that sequence of events did not occur here. The decision to cancel was made in Bartlett's presence at the conclusion of the interview on 24 June 1993. Although he was given an Administrative Breach Report, the AAT did not consider that that could constitute a notice indicating that he was being taken to have failed to enter a Newstart Activity Agreement. Nor did that report expressly state that he was being taken to have failed to enter a Newstart Activity Agreement, or specify that the decision was made under any particular part of s.607(1)(b). Finally, it did not indicate to him his right to apply for review.

The AAT then considered the letter of 28 June 1993 which informed him that his newstart allowance had been cancelled and asserted that he had failed to enter into a newstart agreement. However, the AAT noted that there is a subtle though important difference between having failed to do so, and being taken to have failed to do so. No reasons were given in that letter as to why he was being taken to have failed to enter the agreement as required by para. 607(2)(b). Nor was