again in 1993, and his first wife was granted custody of David. The marriage was dissolved in 1994 and in December 1995 Boscolo was granted custody of David by the Family Court. One of the terms of the custody order was that David remain a permanent resident of Sydney. After Boscolo married Rodrigo in 1996 the family returned to live in Western Australia. Boscolo received legal advice that he could return to Western Australia and David could be temporarily absent from Sydney. In Western Australia Boscolo commenced proceedings to allow David to remain permanently in Western Australia. He was forced to return to Sydney by the Family Court in June 1996, and in November 1996 the Family Court made further orders that David could reside in Western Australia with his father.

Whilst Boscolo was in Sydney his second wife remained in their home in Western Australia. Rodrigo had recently migrated to Australia and her friends and her support network were in Western Australia. She was actively seeking work in Western Australia and receiving newstart allowance. She was enrolled in English language courses in Western Australia and had obtained part-time work there. Rodrigo was also awaiting the arrival of her son from overseas.

In February 1997 Boscolo returned to Sydney to attend Family Court proceedings and in August 1997 he returned to Western Australia permanently with David. During the periods when he and his second wife were apart, Boscolo applied for them both to be paid their benefits at the single rate.

The law

Section 24(1) of the *Social Security Act* 1991 provides:

> '24.(1) Where:
>
> (a) a person is legally married to another person; and
>
> (b) the person is not living separately and apart from the other person on a permanent or indefinite basis; and
>
> (c) the Secretary is satisfied that the person should, for a special reason in the particular case, not be treated as a member of a couple;
>
> the Secretary may determine, in writing, that the person is not to be treated as a member of a couple for the purposes of this Act.'

Special reason

The AAT had accepted that Boscolo took David away from Sydney for good reasons and that when ordered by the Family Court to return to Sydney there were also very good reasons for Boscolo to return. The AAT decided that Boscolo and Rodrigo were aware when they chose to live separately that this would increase their expenses. The Tribunal found Rodrigo's reasons for wanting to stay in Western Australia were not special. Other arrangements could have been made.

The Court looked to the meaning of the words '*special reason*' and found that it is generally futile to search for a meaning for these words in terms of other words. The Court referred to *Beadle v Director General of Social Security* (1985) 60 ALR 225; (1985) 26 *SSR* 321 noting that the meaning of '*special*' comes from the context in which it is used. Circumstances or reasons may still be special even though they fall within a class that is widely defined, or because they can be foreseen before they arise.

> 'The core of the requirement for "special circumstances" or "special reasons" is that there be something unusual or different to take the matter the subject of the discretion out of the ordinary course.'

(Reasons, para. 18)

Section 24

French J decided that the decision making process under s.24 was in two stages. The first stage is to assess whether there is a special reason for treating the person as not being a member of a couple; the second stage is to make the determination that the person not be treated as a member of a couple. In making this assessment it is important that the decision-maker focus on the person and not the couple to assess whether the person should be treated as not being a member of the couple. The AAT erred in considering the circumstances of both Boscolo and Rodrigo. The Act requires the circumstances of the person who is claiming to be paid at the single rate to be considered. The issue was whether Boscolo should be treated as not being a member of a couple. It was then open to the AAT to decide that Boscolo had no choice but to go to Sydney to resolve the custody of his son David. This could well be a special reason. The Court concluded that the AAT had not applied the appropriate test in this case, which was to consider whether Boscolo should be treated as not being a member of a couple. When considering whether there was a special reason the AAT took into account the joint decision of Boscolo and Rodrigo to live separately, rather than Boscolo's decision alone.

Formal decision

The Federal Court allowed the appeal and remitted the matter to the Tribunal to determine according to law.

[C. H.]

Disability support pension: transitional provisions in 1991 Act

SECRETARY TO THE DSS v COSMANO
(Federal Court of Australia)

Decided: 23 December 1998 by Heerey J.

This was an appeal by the DSS against an AAT decision that Cosmano was entitled to be paid disability support pension from 28 July 1989. The DSS agreed that Cosmano was entitled to be paid the disability support pension, but from 28 July 1994.

Background

Cosmano lived in Australia from 1963 to 1983. In 1989 he claimed the invalid pension, and for some unknown reason the DSS did not make a decision on his claim until 24 April 1994. The claim was rejected. During the review process the DSS considered the medical evidence again and granted Cosmano disability support pension from 29 December 1994.

The AAT decision

The AAT decided that an invalid pension can be granted prior to 1 July 1991 pursuant to the transitional provisions in Schedule 1A of the *Social Security Act 1991* (the 1991 Act). The AAT found on the evidence that Cosmano was unfit for work as early as 4 January 1990, and thus it accepted that Cosmano had been unable to work from the date of his original claim in July 1989.

The transitional provisions

The Court considered the transitional provisions set out in Schedule 1A of the 1991 Act, and s.8 of the *Acts Administration Act 1901*. When Cosmano applied for the invalid pension the *Social Security Act 1947* (the 1947 Act) was in operation. However the DSS made its decision under the 1991 Act. Section 5(1)(a) of Schedule 1A provided that a claim lodged under the 1947 Act but not determined before 1 July 1991 had effect as if it were a claim under the 1991 Act. Therefore Cosmano's claim of July 1989 could be treated as a claim under the 1991 Act. The date of effect of any favourable decision on that claim could be before 1 July 1991, but Cosmano no longer had any rights under the 1947 Act. Section 8

of the *Acts Interpretations Act* had no operation because the transitional provisions of the 1991 Act had expressed a contrary intention.

In November 1991 an amendment to the 1991 Act abolished the invalid pension and replaced it with the disability support pension. There were no transitional provisions and so s.8 of the *Acts interpretations Act* applied. According to s.8 the amendment repealing the invalid pension did not affect any right under the Act which was repealed. Therefore Cosmano continued to be entitled to be assessed as to his eligibility for an invalid pension under the 1991 Act. The AAT had decided that Cosmano was entitled to a disability support pension from 1989. This was an error as there was no preservation of a right that did not exist prior to the disability support pension coming into effect.

Medical evidence

The Federal Court declined to make any finding as to Cosmano's medical disability as these were factual questions. However Heerey J noted that the AAT failed to make any precise finding as to the degree of Cosmano's incapacity. It simply found that Cosmano was unable to undertake his normal occupation or any other occupation because of his medical conditions. The Court also found it difficult to decide under which piece of legislation the AAT had granted the disability support pension given that the eligibility requirements are different under the 1947 Act to the 1991 Act.

Formal decision

The Federal Court remitted the matter back to the AAT to be determined according to law.

[C.H.]

SSAT Decisions

Youth allowance: transitional provisions

CR
Decided: 21 September 1996

CR was receiving newstart allowance until 21 June 1998. On 22 June 1998 she went overseas and returned to Australia on 9 July 1998. On 20 July 1998 she lodged a claim for newstart allowance which was rejected. Because of CR's age, if she claimed youth allowance she would be subject to the parental income test. This would preclude her from receiving any payment.

According to the transitional provisions relating to the introduction of youth allowance, a person who was receiving newstart allowance prior to 17 June 1997 (when the change to the youth allowance was announced), and was under the age of 21 could continue to receive newstart allowance following the introduction of youth allowance on 1 July 1998 (see s.115(1) of the transitional provisions). That provision also requires that the person did not cease to be and was immediately before 1 July 1998 a recipient of newstart allowance. The problem for CR was that she was not receiving newstart allowance immediately before 1 July 1998. The SSAT considered the term 'receiving a benefit' in s.23(4) of the *Social Security Act 1991* (the Act), which provides that the person continues to receive a payment until the last day it is payable. CR continued to receive her payment until she failed to lodge a fortnightly form. Payments ceased to be payable from the first day in that period. CR did not return a form on 18 June 1998 so her payment ceased to be payable from that date. The SSAT also considered whether the short break should be ignored pursuant to s.38B of the Act, which provides for a notional continuous period of receipt of income support payments, where the break in payment does not exceed 6 weeks.

To decide whether s.38B overrode clause 115 the SSAT referred to the explanatory memorandum. It explained that newstart allowance could continue to be paid 'providing they are still receiving newstart allowance at 1 July 1998'. The Tribunal decided that it was mandatory that CR be receiving newstart allowance immediately prior to 1 July 1998.

Re-establishment grant: 'effective control' of farming enterprise

DL
Decided: 25 September 1998

The decision under review was to reject a claim for payment of a re-establishment grant under the Restart Re-establishment Grant Scheme 1997. DL's claim was rejected because it was decided he was not effectively in control of his farm enterprise from 4 September 1997 when he entered into a contract to sell the farm. First the SSAT had to decide whether it had jurisdiction to hear the matter. The relevant legislation was the *Farm Household Support Act 1992* and in particular s.8B and s.8C setting out the qualifications. The farm family restart scheme was introduced on 1 December 1997 to assist farmers wishing to leave the industry to qualify for a grant of up to $45,000. The farmer must satisfy the qualifying conditions for restart income support under s.8B of the *Farm Household Support Act*. Section 8C requires the person to be effectively in control of the farm that relates to the claim.

DL's evidence was that he was still trading and thus in control of the farm after 4 September 1997 until settlement date at the end of January 1998. DL decided to sell the farm when he could not get any further finance. DL described his activities following signing the contract of sale as including all the activities associated with running a farm. The SSAT noted that one of the conditions of sale was that DL retained ownership of all growing crops on the property, and that he did not sell his stock, crops or equipment associated with his farming operations.

With respect to jurisdiction the SSAT noted that the Restart Re-establishment Grant Scheme states that Chapter 6 of the *Social Security Act 1991* applies to decisions made under the Scheme. This gave the SSAT jurisdiction. The Scheme states that a person is qualified if they were eligible for restart income support. A person is not qualified for restart income support if the Secretary determines that the person is not effectively in control of their farm enterprise. The SSAT considered the term 'effective control', noting that it had not been defined under the Act. However the *Bankruptcy Act 1966* used the same term, and the Federal Court had said the term should be given its ordinary meaning and not be restricted by a requirement to show a traditional legal or equitable interest in the property. Dictionary definitions refer to exercising restraint or direction over a project or undertaking. Whilst noting that the purchaser of a property obtains an equitable interest once the contract becomes unconditional, the SSAT found that DL retained the legal interest, title and possession to the property. The pur-