Shiel's argument

Shiel argued that s.1296 of the Act obliged the Secretary to the DSS when administering the Act to make available to the public, advice and information services on income support, and the delivery of services in a fair, courteous, prompt and cost efficient manner. Section 1304 of the Act allowed the Secretary to gather information from people if the Secretary considered that information relevant to the rate of a social security payment. Shiel argued that the Secretary had a continuing duty to obtain information from a person about any change in that person's circumstances which could lead to an increase in the rate of payment. According to Shiel, if the Secretary had complied with his obligation he would become aware in July 1996 that Shiel was renting premises. Shiel argued that the Secretary had breached a duty to him by not collecting that information.

Date of effect of an increased rate

Katz J stated that any decision under s.660G would increase a rate of payment prospectively. In certain circumstances the rate may be increased retrospectively, but only if it was also to operate prospectively. For example if a person advised the Secretary of a change in circumstances but the determination to increase the rate did not take place at that time but at a later date. The date of effect would be from the date of the advice and retrospective to the date of the determination.

In relation to Shiel's three claims for retrospective grants of rent assistance, only the third claim in June 1997 involved the prospective increase in the rate of newstart allowance. So it was only in relation to the third claim that there could be any possibility of getting a retrospective payment. The Court found that s.660K(5) applied in this case, and Shiel had first advised the DSS of a change in his circumstances in June 1997, the day when he made his claim. This was also the day when his claim was granted. Therefore, there was no retrospective payment and no legal error in the AAT's decision.

With respect to the first and second claims, the AAT had decided that under s.660G, there should be a notional increase in the rate of Shiel's newstart allowance to include rent assistance. It then considered whether this notional increase should take effect retrospectively. The AAT applied s.660K(5) and decided that there should be no retrospective grant of rent assistance. The Federal Court found this approach to be in error. Because there was no prospective grant of rent assistance arising from the first two claims there could be no retrospective payment.

Katz J rejected Shiel's argument regarding ss.1296 and 1304, stating that s.1296 only imposed a duty on the Secretary to administer the Act in such a way that it was desirable to achieve the results set out in the section. This did not impose any new or substantive duty, and it was not owed to any member of the public. The Court followed the High Court in *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 where the High Court found that a similar provision was not just a 'pious admonition' because a breach of such a provision could lead to disciplinary proceedings. Katz J found that this reasoning would also apply to s.1296.

In relation to s.1304, Katz J noted that for Shiel to succeed, he would have to show that the section imposed an implied duty on the Secretary to obtain the information from him. The Court found two difficulties with that construction of the section.

> Parliament's purpose in including the provision was to confer a power capable of being used in aid of the prevention or the recovery of unjustified payments ... It was not included in order to confer a power capable of being used in aid of ensuring persons who were not receiving or had not received social security benefits to which they were or had been entitled to receive those benefits.

(Reasons, para. 39)

The Court also noted that a person could be imprisoned if they did not provide the information sought.

Even if s.1304 were to be construed without taking into account its purpose, it would then impose upon the DSS an administrative burden that would plainly be impossible to fulfil. It would apply to every benefit paid under the Act. If the power had been given to the Secretary to be used for the benefit of certain people, then those people must be specifically identified and the conditions under which the power is to be exercised must be specifically stated (See *Julius v Bishop of Oxford* (1880) 5 App Cas 214). The Court rejected both Shiel's arguments, noting that if there had been a duty, the AAT had no power to make an award as a result of the Secretary breaching such a duty.

Formal decision

The appeal of Shiel was dismissed.

[C.H.]

Newstart and parenting allowance: disposal of assets

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

Decided: 27 August 1999 by Weinberg J.

Anstis and his wife appealed the decisions of the AAT that they had disposed of assets which should be taken into account when calculating the rate of newstart allowance payable to him, and the rate of parenting allowance payable to his wife.

The facts

On 22 December 1997 Anstis made enquiries about the payment of newstart allowance for himself and parenting allowance for his wife. They lodged claims and as Anstis would not be available for work until 2 January 1998 the allowances were payable from that date. On 22 December Anstis established the Anstis Discretionary Trust to which he transferred a part interest in a joint tenancy with his wife. The value of the asset was $30,000. Centrelink took into account the value of that asset when calculating the rate of payment of the allowances.

The law

After noting comments in *Blunn* v *Cleaver* (1993) 47 FCR 111 on the complexity of the *Social Security Act 1991* (the Act), the Court considered the structure of the Act as a whole.

> The scheme of the Act is to make provision for 'income', whether earned, derived or received, to be taken into account in determining whether a pension, benefit or allowance is payable, and if so at what rate.

(Reasons, para.17)

A person's financial assets will also determine the rate of allowance paid. The definition of financial assets in s.9(1) includes deprived assets. Deprived assets are deemed to earn ordinary income at a statutory rate. The Act is structured so that members of a couple are treated as a single economic unit for the purposes of determining whether they are entitled to a benefit and at what rate.

With regard to the disposal of assets s.11(10) defines 'pension year' as:

> **11.(10)** A reference in sections 1123 to 1128 (disposal of assets) to a **pension year**, in relation to a person who is receiving:
>
> (a) a social security or service pension; or
>
> (b) a social security benefit; or

(c) a family allowance;

is a reference to:

(d) ... or

(e) ... or

(f) otherwise — the period of 12 months beginning on the day on which a pension, benefit or payment referred to in paragraph (a), (b) or (c) or a job search allowance first became payable to the person;

and to each following and each preceding period of 12 months.

Section 1126 deals with disposal of assets and states:

1126.(1) subject to subsections (2), (3) and (4), if, on or after 1 March 1986:

(a) a person who is a member of a couple has disposed of an asset of the person:

(i) during a pension year of the person; or

(ii) if the person is not receiving a pension or payment of a kind referred to in s.11(10) but the person's partner is receiving such a pension or payment or is receiving a youth training allowance — during a pension year of the person's partner; and

(b) the amount of that disposition, or the sum of that amount and the amounts (if any) of other dispositions of assets previously made by the person or the person's partner during that pension year, exceeds disposal limit;

then, for the purposes of this Act:

(c) there is to be included in the value of the person's assets for the period of five years that starts on the day on which the disposition takes effect:

(i) 50% of the amount by which the sum of the amount of the first-mentioned disposition and of the amounts (if any) of other dispositions of assets previously made by the person or the person's partner during the pension year exceeds disposal limit; or

(ii) 50% of the amount of the first-mentioned disposition;

whichever is the lesser amount; and

(d) there is to be included in the value of the assets of the person's partner for the period of five years that starts on the day on which the disposition takes place:

(i) 50% of the amount by which the sum of the amount of the first-mentioned disposition and of the amounts (if any) of other dispositions of assets previously made by the person or the person's partner during the pension year exceeds disposal limit; or

(ii) 50% of the amount of the first-mentioned disposition;

whichever is the lesser amount.

According to s.1125A if a person disposes of assets in a pre-pension year:

1125A.(1) Subject to subsections (2), (3), (4) and (5), if:

(a) a person has disposed of an asset; and

(b) the person is a member of a couple when the person or the person's partner claims a pension, benefit or payment of a kind referred to in s.11(10A) or when the person's partner claims a youth training allowance; and

(c) the person disposed of the asset:

(i) during a pre-pension year of the person; or

(ii) if the person has not claimed a pension, benefit or payment of a kind referred to in s.11(10A) but the person's partner has claimed such a pension, benefit or payment or has claimed a youth training allowance — during a pre-pension year of the person's partner; and

(d) the amount of that disposition, or the sum of that amount and the amounts (if any) of other dispositions of assets previously made by the person or the person's partner during that pre-pension year, exceeds the disposal limit;

then, for the purposes of determining whether a pension, benefit, payment or allowance is payable to the person:

(e) there is to be included in the value of the person's assets for the period of 5 years that starts on the day on which the disposition took place:

(i) 50% of the amount by which the sum of the amount of the first-mentioned disposition and of the amounts (if any) of other dispositions of assets previously made by the person or the person's partner during that pre-pension year exceeds the disposal limit; or

(ii) 50% of the amount of the first-mentioned disposition; whichever is the lesser amount; and

(f) there is to be included in the value of the assets of the person's partner for the period of 5 years that starts on the day on which the disposition took place:

(i) 50% of the amount by which the sum of the amount of the first-mentioned disposition and of the amounts (if any) of other dispositions of assets previously made by the person or the person's partner during that pre-pension year exceeds the disposal limit; or

(ii) 50% of the amount of the first-mentioned disposition; whichever is the lesser amount.

Note 1:...

Note 2:...

Note 3:...

Note 4: if a pension, benefit or family allowance is payable to the person, section 1126 operates to determine the rate of payment and section 1125A ceases to apply to the person.

Anstis' argument

Anstis argued that the phrase in s.1125A, 'for the purposes of determining whether a pension, benefit, payment or allowance is payable to the person' limited the power of Centrelink to use the deprived asset to calculate the rate of payment. He argued that s.1125A should be read narrowly and applied only to the question of whether newstart allowance was payable at all, and not the rate at which it was payable. In contrast, in s.1126, the expression 'for the purposes of the Act' was used and thus the section could be more widely interpreted. The legislature intended to restrict the powers in relation to assets disposed of in a pre-pension year to deciding eligibility in s.1125A. Anstis referred to the Explanatory Memorandum that, according to the SSAT, did not support his case.

Note 4 to s.1125A states that if a pension is payable to a person, then s.1126 operates to determine the rate and s.1125A ceases to apply. Therefore s.1125A is not to be used to calculate the rate. Because the asset had not been disposed of during a pension year, s.1126 did not apply in Anstis' case according to his argument.

The SSAT had stated that if Anstis' interpretation was followed, s.1125A would become meaningless. Note 4 was there to ensure that s.1125A did not apply retrospectively. According to the SSAT the term 'payable' included what can be paid — the rate.

Anstis also argued that s.1125A referred to 'a person' and therefore could not apply to his wife. The SSAT rejected this argument noting that the Anstises owned the property jointly and that any transfer must have been by both parties. Therefore s.1125A applied to both of them.

The AAT decision

The AAT agreed with the SSAT's decision that s.1125A applied to Anstis. With respect to Mrs Anstis' eligibility for payment, the AAT stated that it would be illogical that when a member of a couple disposes of an asset, that asset could be maintained against the partner of the person only if the partner is receiving an allowance incorporating a component for the partner. The AAT found that irrespective of who disposed of the asset, 50% of the asset should be maintained against each couple.

Payable and s.1125A

The phrase 'for the purposes of determining whether a pension, benefit, payment or allowance is payable to the

person' should not, in the view of the Court, be construed narrowly or restrictively. The word '*payable*' is defined in dictionaries as being a sum of money that is to be paid or is capable of being paid. If a sum is capable of being paid, then the amount to be paid must be calculated. Weinberg J rejected the argument that wherever 'payable' is used in the Act, it is a threshold question of whether an allowance is to be paid, and that the Act always addresses 'calculation of the rate payable' specifically. The sections of the Act must be read in light of the purposes of the Act and where appropriate, extrinsic material. A purpose of the Act is to ensure that people cannot deprive themselves of assets and then receive a pension.

> The word 'payable' in s.1125A, even when used in conjunction with the word 'whether', necessarily, albeit implicitly, assumes a capacity to calculate a rate of entitlement. This interpretation seems to me to accord with the requirement that a purposive construction be given to a provision of this nature.

(Reasons, para. 107)

The Court noted that the sections surrounding s.1126 dealing with disposal of assets in pension years incorporate calculation of the rate payable. It was logical that the same reasoning would apply to s.1125A.

> The distinction between pre-pension years and pension years which is embodied in ss.1125A and 1126, provides no reason why s.1125A alone should be construed as an 'all or nothing' provision, while s.1126 should be construed as incorporating the elaborate calculation methods.

(Reasons, para. 109)

Weinberg J specifically endorsed the finding of the SSAT that Anstis' interpretation of Note 4 to s.1125A would make the introduction of s.1125A meaningless. The SSAT was correct in finding that the purpose was to ensure that s.1125A was not applied retrospectively.

Parenting allowance

The Court accepted Anstis' arguments regarding the construction of s.1125A as it applied to his wife.

> The expression 'payable to the person' in s.1125A(1) should be confined 'to the person who has disposed of an asset' as set out in s.1125A(1)(a). It does not apply to the person who is claiming the pension, benefit, payment or allowance.

(Reasons, para. 114)

The Court acknowledged that the word '*person*' could be read broadly enough to encompass a person who claims a pension or benefit. This would accord with the objects of the Act, but:

> At the end of the day, however, I am not persuaded that I should give the word 'person' in s.1125A an interpretation which is so much at odds with the ordinary and natural meaning of the word in the context of the section in which it appears.

(Reasons, para. 120)

Pension year

The Court referred to the AAT decision of *De Ryk and Secretary to the DSS* (1994) 35 ALD 85, where the AAT had found that because s.1125A had been introduced into the Act after De Ryk had disposed of assets and lodged his claim, it did not apply to him. The AAT considered the definition '*pension year*' in s.11(10) and concluded that De Ryk had disposed of his assets before the commencement of the pension year because it was before De Ryk had applied for a pension. The Court did not believe that the AAT decision of De Ryk had been decided correctly because the words extending the meaning of pension year in s.11(1) had not been referred to.

The definition of 'pension year' in s.11(1) expanded the term for the purposes of s.1126. The term appeared to cover the 12 months prior to the date the pension first became payable, the 12 months from the date from which the pension year commences and the following 12 months. The Court did not finally determine the question because it did not find it necessary to do so for the purposes of this case. However, it noted that this was one possible interpretation.

Because s.1126(1) applied rather than s.1125A, the value of the assets disposed of by Anstis was to be taken into account for five years. Although s.1125A did not apply to Mrs Anstis, s.1126 did and thus the decision to take into account the disposed assets when determining her rate of payment was correct.

Formal decision

The appeal was dismissed, and there was no order as to costs.

[C.H.]

Newstart allowance: 'actively seeking paid work'

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

Decided: 24 June 1999 by Branson J.

Castleman appealed to the Federal Court against an AAT decision that his claim for newstart allowance should be rejected on the basis he did not satisfy the activity test.

The facts

Castleman is a certified practising accountant who has been employed as a university lecturer and by the Tax Department. He had also completed a Diploma of Teaching although at the time of the AAT decision he had not completed a period of practical teaching. Centrelink rejected his claim for newstart allowance on the basis that Castleman was not prepared to look for all types of work he was capable of doing.

The law

Section 593(1) of the *Social Security Act 1991* (the Act) provides that a person is qualified for newstart allowance if, throughout the period, the person is unemployed and satisfies the activity test. Section 601(1) of the Act states:

> **Activity test**
>
> **601.(1)** Subject to subsections (1A) and (3), a person satisfies the activity test in respect of a period if the person satisfies the Secretary that, throughout the period, the person is:
>
> (a) actively seeking; and
>
> (b) willing to undertake;
>
> paid work, other than paid work that is unsuitable to be undertaken by the person.
>
> **601.(1A)** The Secretary may notify a person (other than a person who is not required to satisfy the activity test) who is receiving a newstart allowance that the person must take reasonable steps to apply for a particular number of advertised job vacancies in the period specified in the notice.

The AAT decision

The AAT found that Castleman was making written applications for employment in his particular field of expertise but was not prepared to actively seek work outside that field. The AAT stated that paid work was any work except for work that was unsuitable to be undertaken by the person. The AAT also found that Castleman had