that they come to Australia in these circumstances.

(Reasons, para. 15)

The AAT considered that the arrangements Cocks had put in place were the only feasible arrangements in the circumstances. As he could not reasonably be expected to enjoy the pooling of resources whilst he was resident in Australia, it was appropriate to exercise the discretion in s.24 of the Act in his favour when he resided in Australia. However, whilst he was overseas residing with his wife and child, resources were pooled and he should be treated as a member of a couple.

Formal decision

The decision was set aside and substituted with a decision that whilst Cocks resides in Australia he be treated as not being a member of a couple and paid at the single rate, and whilst he is overseas he be treated as a member as a couple and paid at the married rate.

[K.deH.]

Newstart allowance: income maintenance period; severe financial hardship; circumstances reasonably foreseeable

SECKER and SECRETARY TO THE DFaCS

(No. 2000/290)

Decided: 11 April 2000 by J. Dwyer.

Background

Secker was in receipt of newstart allowance (NSA) when his wife claimed parenting allowance in April 1998. In her claim she advised of a termination payment of $1576, which she received after she ceased employment, this being prior to the birth of her second child. Despite claims to the contrary in a Centrelink letter to Secker on 21 April 1998, Secker had not referred at all in his NSA claim forms to his wife's termination payment. In April 1998 (purportedly 7 April 1998, although this date was later accepted as the decision date by the Tribunal - as discussed below) a Centrelink delegate determined that an income maintenance period (IMP) should be applied to Secker's NSA payments from 17 April 1998 to 19 May 1998. Secker only became aware of the imposition of the IMP in May 1998 when he received substantially fewer NSA payments than he had expected. On querying this with Centrelink, he was unable to obtain an explanation but eventually reference to an IMP was made by a Centrelink officer. By that time both the NSA and parenting payments were being reduced. Secker sought a review of the decision to impose the IMP, but the SSAT in March 1999 affirmed this decision.

The legislation and issues

The *Social Security Act 1991* (the Act) provides in s.1283 that the decision to be reviewed on appeal from the SSAT is the decision as affirmed by the SSAT. This was relevant as Centrelink was unable to identify any documentation disclosing with certainty when the decision about the IMP had been made, notwithstanding the SSAT conclusion that it had been made on 7 April 1998.

The Act by s.1068B-D15 further provides that an IMP may be disregarded in whole or part in certain circumstances. That section provides:

> s.1068B-D15 The Secretary may determine that the whole or any part of an income maintenance period that would, apart from this point, apply to the person, does not apply to the person if the Secretary is satisfied that:
>
> (a) the application of the income maintenance period to the person would cause the person severe financial hardship; and
>
> (b) the circumstances that would cause the severe financial hardship were not reasonably foreseeable by the person.

The Tribunal was thus in the first instance required to consider whether the decision appealed against was reviewable at all and, if so, whether an IMP was correctly imposed on Secker in respect of his NSA payments.

Was there a reviewable decision before the AAT?

The Tribunal after examining the relevant file documents concluded that there was no copy of any decision made on 7 April 1998. This date had been adopted by the SSAT as the date of the decision but was referred to only in a file document which purported to be a reconsideration of a decision to impose an IMP. The Tribunal also found that there was no notification to Secker of any decision regarding the IMP by the decision maker, nor of any reasons for the decision. The Tribunal noted that, notwithstanding the purported decision date of 7 April 1998, the payment on termination of employment (which gave rise to the possibility of an IMP) did not occur until 17 April 1998, and that Secker was by letter dated 16 April 1998 advised that he would be paid NSA at the maximum rate from 27 March 1998. In addition, the Tribunal noted a letter on file indicating that as at 21 April 1998 Centrelink was still seeking information in order to determine whether an IMP ought to be imposed — that is, some two weeks after the IMP was supposedly imposed.

The Tribunal considered whether there was a reviewable decision, as the decision reviewed by the SSAT could not (the Tribunal concluded) be the correct original decision and decision date. The Tribunal (applying the Federal Court in *Collector of Customs (New South Wales) v Brian Lawlor Automotive Pty. Ltd* (1978) 2 ALD 1) concluded that it should take a generous view of its jurisdiction, and should give a wide meaning to the term 'decision': '... the word simply refers to a decision in fact made, regardless of whether or not it is a legally enforceable decision'. The Federal Court in *Brian Lawlor* had concluded that the Tribunal had jurisdiction provided there had been a decision in fact, and provided that the decision was purportedly made in exercise of powers conferred by an enactment, whether or not as a matter of law the decision was validly made.

In this matter, the Tribunal concluded that an original decision could not be identified, nor could a specific date for that decision be ascertained with certainty. However, its effects (as reduced payments) were felt by Mr and Mrs Secker, and the lack of an identifiable original decision should not deprive them of an opportunity for review.

Should an income maintenance period apply to Secker?

The Tribunal noted that Secker had not himself received any termination payment, and that therefore the relevant legislative provisions were those which applied to Mrs Secker's parenting payment. The effect on Secker's NSA was a flow on effect due to his wife being taken to have received income in the form of the termination payment in a particular fortnight. Thus the relevant legislative provision regarding IMP was s.1068B-D15, noted above.

The SSAT had concluded that the imposition of the IMP had resulted in some financial hardship, but not severe financial hardship, as the family was already

experiencing some financial difficulties before Mrs Secker ceased employment. The Tribunal sought detailed financial statements from Mr and Mrs Secker. The Tribunal concluded from these, having regard to Mr and Mrs Secker's liabilities and their small income during the IMP, that they were in severe financial hardship from 17 April 1998 to 19 May 1998. Centrelink argued that the family was in financial difficulty before the IMP was imposed, and that the termination payment was expended on known and foreseeable expenses which were voluntarily undertaken. As such the requirement of s.1068B-D15(b) was not satisfied. However, the Tribunal concluded that, had the IMP not been imposed, the family would have been able to manage their debts so as not to be in severe financial hardship. They had expected that their living expenses would be met by the NSA payments, and so expended the termination payment on the various debts they had.

In determining the issue of 'reasonable foreseeability' the Tribunal was required to consider not only the family's debts and liabilities but also the imposition of the IMP itself. In this case no explanation had been given to Secker as to the effect of the IMP until after the whole of the termination payment had been expended, and thus:

> ... the imposition of [an IMP] when Mr and Mrs Secker had committed the termination payment to paying off some debts and had relied on their social security payments for daily living expenses caused them to suffer severe financial hardship ... those circumstances were not reasonably foreseeable...

Formal decision

The Tribunal set aside the decision under review. It directed that no IMP should apply, and that the termination payment received by Mrs Secker should be treated as income in the fortnight of receipt only.

[P.A.S.]

Restart Re-establishment Grant: control of the farm enterprise where writ of possession issued

ELLIOTT and SECRETARY TO THE DFaCS

(No. 2000/151)

Decided: 29 February 2000, by B.A. Barbour.

Background

The following facts were agreed:

- on 29 June 1998, the NSW Supreme Court ordered that the mortgagee bank (the bank) was entitled to a writ of possession over the farm enterprise managed by the Ercildoune partnership, which consisted of three adjoining properties;
- on 13 July 1998, the applicant applied for a Farm Family Restart Grant for the Ercildoune family property;
- by letter dated 15 July 1998, the bank declined to issue a 'Determination of qualification for farm family restart scheme certificate'. It considered the certificate would be inappropriate given that no application for continued or additional finance had recently been considered and, in any event, any such application could not be entertained;
- on 28 July 1998, a writ of possession was issued in relation to the three adjoining properties managed by the Ercildoune partnership;
- on 11 September 1998, a notice to vacate the farm was issued and the property was vacated on either 30 September or 8 October 1998;
- the farm property was sold several weeks after it was passed in at auction;
- on 30 September 1998, the claim for Farm Family Restart Scheme Grant was refused. This decision was appealed to an ARO who affirmed the decision, and Elliott then appealed to the SSAT which also affirmed the decision.

The legislation and issues

Elliott sought review of the decision of the SSAT.

The relevant legislation is contained in ss.8B and 8C of the *Farm Household Support Act 1992* (the Act) and the *Restart Re-establishment Grant Scheme* 1997 (the Scheme). The scheme provides that grants of up to $45,000 (less restart income support paid to the applicant or their partner) may be payable on the sale of farms or of rights or interests in farms. Eligibility for the Scheme is contained in clause 2.1 of the Scheme which provides that a person is only eligible to apply for a re-establishment grant if they are qualified for restart income support (under Division 1B of Part 2 of the Act). The criteria for restart income support are set out in ss.8B and 8C of the Act. In summary, s.8B provides that a person is qualified for restart income support for a period if the person has been a farmer for two years prior to the period and a certificate of inability to obtain finance for the relevant period has been issued. Section 8C provides that a person will not be qualified for restart income support if the person is not effectively in control of the farm enterprise for which the support is claimed.

The primary issue was whether the applicant was 'effectively in control' of the farm enterprise. A further issue was whether the applicant was qualified for a grant given the refusal of the mortgagee bank to issue a certificate of inability to obtain finance.

Applicant's argument

The applicant disputed that he had lost control of the farm for the purposes of the Scheme when the NSW Supreme Court ordered that the bank was entitled to possession of the property because, in his submission, from the date of the order, the bank had the right, if it chose to do so, to enforce the order by issuing a writ of possession, and by then executing the writ and taking possession. The applicant submitted that at any time until a sale by the bank took place, he retained his equity of redemption and could have re-financed the debt and redeemed the mortgage. On this view, he remained in possession and control of the property until 11 September 1998 when the notice to vacate the farm was issued. He continued to farm the property and trade on the land until 8 October 1998 when he and his family moved out. The bank had agreed that the property need not be vacated until that date. The applicant noted the property was not sold by the bank until 2-3 weeks after it failed to sell at an auction arranged by the bank on 5 November 1998.

The applicant pointed out that the Act empowers the Minister to 'formulate a scheme for the provision of payments to be made ... on the sale of farm enterprises, or rights or interests in the farm