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SOCIAL SECURITY

Including Student Assistance Decisions

Opinion

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The Administrative Review Tribunal — again

The decision in *Secretary to the DFaCS and Butt* 4(5) *SSR* 60 has implications for the social welfare system over and above the actual result in that case. The decision addressed a number of issues which had been problematic over the years — whether Centrelink can pay a recipient of payments on the basis of an estimate whenever the estimate has been provided, or only where there is a specific request; and for what period of time a 'notifiable event' can be used to change the tax year on which the rate is calculated.

What this decision demonstrated clearly was that social welfare legislation is complex. Over the years governments have attempted to simplify the legislation. The *Social Security Act 1991* had as one of its aims the simplification and expression in plain English of social welfare legislation. That the welfare system is now more complex than it was five or ten years ago is undeniable. Each effort at simplification appears to have failed. There is currently a review of social welfare legislation under way, and a raft of changes have already been introduced, again with simplification as one of the objectives. (See, for example, the *A New Tax System (Family Assistance) Act* discussed in (1999) 3(10) *SSR* Opinion.) I think we can be certain that however successful this is, social welfare will always remain a complex area of law for practitioners and even more so for welfare recipients.

The meaning of 'request' in the legislation has generated numerous appeals to the SSAT and the AAT, although it is central to the administration of family payments. It is but one example of issues of fundamental importance to the system which have nonetheless been difficult to define and interpret.

This decision also demonstrated the importance of representation by experienced advocates. In *Butt* the applicant was represented by the Welfare Rights Centre and the Department by a departmental officer. The applicant could not have made the submission she made had she been representing herself. The appearance of two experienced advocates allowed meaningful submissions and arguments to be put to the Tribunal.

The *Administrative Review Tribunal Bill* and the *Consequential Amendments Bill* have proposed changes which together would make it harder for the new

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Tribunal to grapple with the complexities of the system.

The *Administrative Review Tribunal Bill* states at cl.105 that representation is allowed only by leave of the Tribunal, and only if the practice and procedure directions do not prohibit such representation. We do not know what the attitude of the Tribunal will be, nor what the content of the practice and procedure directions will be. However, there are some indications that the government does not look favourably on the appearance of lawyers in the new Tribunal, especially in the income support division. The Department will have the right to appear at all hearings, and therefore will of necessity be represented. It is unlikely that the Department will avail itself of this right in all cases, but in those matters where it does, it will be represented by an advocate who will have had considerable experience. The rights of welfare recipients may be further eroded.

The second issue arises in the Consequential Amendments Bill and may be the result of an oversight. With the establishment of the Administrative Review Tribunal the current administrative review tribunals, with the exception of the Veterans' Review Board, will cease to exist. The current members of the tribunals will cease to be members of administrative review bodies.

The current members of the Migration Review Tribunal and the Refugee Review Tribunal have been 'rolled over' into the Administrative Review Tribunal for a period of 12 months. While this will mean that the original appointments to this body will not be as transparent as is desirable, the rollover has benefits for the system and for applicants. From the view point of administrative efficiency it will undoubtedly be better to be able to continue cases after the change over without needing to have cases handed to new members. From the point of view of the applicants and the relevant Departments there will be clear advantages in having members dealing with the issues who have expertise in the area. In so far as transparency of appointment is concerned, there will be the opportunity to appoint new members (including some at least of the current members), after whatever 'teething problems' the new Tribunal will experience have been dealt with.

It is therefore surprising that the same consideration has not been given to members of the Social Security Appeals Tribunal. Social Security legislation is complex, certainly at least as complex as the *Migration Act*. The impact on applicants against decisions of Centrelink, to have those applications heard, in the main, by people who are not experienced Tribunal members may be that they are further disadvantaged.

The failure to rollover existing SSAT members also means that all matters before the Tribunal will need to be finalised before the start up date of the Administrative Appeals Tribunal. There are clear transitional measures in place, but all matters heard by the existing Tribunal will need to have been decided — that is, the decision written up and signed by the members — prior to 1 July 2001. Even if members of the new Tribunal are appointed ready to start by 1 July, there will be a hiatus of at least 14 days. In a high volume jurisdiction, this can lead to considerable delays before matters can be heard.

With a combination of:

- the inclination against lawyers,
- the approaching start up of the federal magistracy with no experience in the income support jurisdiction as an appeal body from the Administrative Review Tribunal, and
- the possibility of inexperienced members on the Tribunal itself

there is the potential for serious further disadvantage to a group already suffering disadvantage.

[A.B.]

Administrative Appeals Tribunal Decisions

Age pension: whether payments from company income earned or derived

PARNELL and SECRETARY TO THE DFaCS (No. 20000/885)

Decided: 9 October 2000 by K.L. Beddoe.

Background

The Parnells were in receipt of an age pension and wife pension respectively since 1989. Until 1995, Mr Parnell carried on a business in his own right and using a business name 'Tee Shot Gulf'. He ceased that business when he entered into a venture with Singapore interests conducted by a company – Player Sport International Pty Ltd (the company). Parnell transferred stock from his previous sole trader business to the company. Parnell managed the business of the company in part from his home and involved extensive use of his car on company business.

Centrelink decided to take income said to be derived from the company into account for assessment of rate of pensions for the period 27 July 1998 to 26 February 1999.

Issues

The issues were:

- whether the company ceased to carry on business in November 1998 and
- whether amounts of domestic expenses of an admittedly private nature, paid by the employer and, in some instances, recovered through a shareholders loan or drawing account were income derived or earned for the purposes of the Act?

Legislation

Section 55 of the *Social Security Act 1991* provides that a person's age pension rate is worked out using Pension Rate Calculator A at the end of s.1064 of the Act. The ordinary income test is set out under Step 5 of Module A. Module E of s.1064 provides the steps to work out income reduction. 'Income' and 'ordinary income' are defined in s.8(1) of the Act. The relevant parts are:

> 'income' in relation to a person means an income amount earned, derived or received by the person for the person's own use or benefit.
>
> 'Income Amount' is also defined in section 8(1) to mean:
>
> (a) valuable consideration; or
>
> (b) personal earnings; or
>
> (c) moneys; or