detained at the service. A person in prison who becomes mentally ill may be transferred to a mental health service for treatment.

In gaol

The AAT decided that Garden was 'in gaol' when he was transferred back to the mental health service in May 1999, and thus he was not entitled to DSP. On behalf of Garden it was argued that he should be treated as a person who had become mentally ill while serving a period of imprisonment and had been transferred to hospital for treatment. He was not undergoing psychiatric confinement because he had been charged with an offence but because he was mentally ill.

Gray J referred to the previous Federal Court decision of *Blunn v Bulsey* (1994) 53 FCR 572 in which it was decided that the person's detention must be connected with the offence. The AAT had applied *Bulsey* and decided that Garden was detained in connection with the offence. Garden had received treatment since his arrest, he had been in psychiatric units in prison or in mental health services, and he received some treatment while in prison. These were all questions of fact. The Court found that the AAT was bound to follow *Bulsey*, which it did. It distinguished Garden's situation from Bulsey's situation by applying the law to the facts found by the AAT. This was not an error of law.

Gray J then went on to consider whether the test outlined in *Bulsey* correctly set out the law.

> The question posed by s.23(5(b) of the *Social Security Act* is whether a person is being detained in connection with his or her conviction for an offence. It is not, as Einfeld J characterised in *Blunn v Bulsey* at 576, a question of a connection between the mental condition of the person concerned with a crime for which that person has been imprisoned. The required connection is a connection between the lawful detention and the fact of a conviction for the offence. It is unnecessary to inquire whether mental illness played a role in the commission of the offence, only whether the detention is connected with the conviction.

(Reasons, para. 21)

There need be no connection between the mental condition of the person being sentenced and the offence. The person is detained in a mental health service because their mental condition at the time of sentencing requires it.

The intention of the legislation is that where a person has been convicted of an offence and detained in a prison or some other facility at any time during the sentencing period a social security payment will not be payable. It is assumed that the sentence will be served either in prison or some other place of detention. Therefore it does not matter whether the person is transferred from prison to a psychiatric unit or back again. It was incorrect in *Bulsey* to say that there must be more than a temporal connection.

Rehabilitation

A person is also deprived from receiving a social security payment if undergoing psychiatric confinement because they have been charged with an offence (s.1158(a)). This section covers those on remand, those found unfit to plead and those acquitted because of their mental condition. In Garden's situation successful rehabilitation would result in him returning to gaol. It was argued on behalf of Garden that the legislative intention was that if he was undergoing a course of rehabilitation he would be entitled to a social security payment. Gray J decided:

> The intention is to exclude the normal entitlement to social security pensions in respect of all convicted offenders, for so long as they continue, in effect, to serve sentences of imprisonment, whether in prison or by means of detention in other places. If the legislature had intended to preserve an entitlement to social security pensions for all those undergoing courses of rehabilitation for mental illness while serving sentences of imprisonment, it could have made express provision to this effect.

(Reasons, para. 27)

Formal decision

The Federal Court dismissed the appeal.

[C.H.]

Retirement assistance for farmers: meaning of 'make a request'

SECRETARY TO THE DFaCS v HAAGAR
(Federal Court of Australia)

Decided: 11 September 2001 by Cooper J.

The law

Part 3.14A of the *Social Security Act 1991* (the Act) provides for retirement assistance for farmers. The purpose of the Part is to provide that, if the conditions set out in the Part are met, the value of certain interests transferred by a qualifying farmer will be disregarded in determining whether a social security payment is payable or at what rate a social security payment is payable.

Division 4 of Pt 3.14A is headed 'Requests for increase in rate of social security payment'. The Division relevantly provides as follows:

1185G If:

(a) the rate at which a social security payment is being, or has been, paid to a person is less than the rate (the increased rate) at which it would be, or would have been, paid if the value of the qualifying interests transferred by the person or the person's partner had not been included in the value of the person's assets, or of the partner's assets, in calculating the rate of the person's social security payment; and

(b) the person wants the social security payment to be paid at the increased rate;

the person must make a request to that effect.

1185H A request under s.1185G must be made in writing and must be in accordance with a form approved by the Secretary.

1185J(1) If:

(a) a person makes a request under s.1185G in respect of a social security payment; and

(b) the Secretary is satisfied that the rate at which the social security payment is being, or has been, paid to the person is less than the rate at which it would be, or would have been, paid if the value of the qualifying interests transferred by the person or the person's partner had not been included in the value of the person's assets, or the partner's assets, when calculating the rate of the person's social security payment;

the Secretary must determine that the request is to be granted.

The issues

The AAT determined that a request under s.1185G of the Act for a social security payment to be paid at an increased rate, was made by the Haagars when the written request in the proper form was posted.

The DFaCS contended that the proper construction of s.1185G of the Act required that until receipt by the Secretary of a written notice in proper form no request was made for the purpose of the section. On the construction contended for by the DFaCS, the request was not made until receipt of the written request by the Gympie office of Centrelink in the ordinary course of post. The determination of when the request was made, also determined the

to pay the social security payment at the higher rate operated: s.1185J(2).

The Secretary submitted that the AAT erred because:

- it incorrectly distinguished relevant case authority which held that an application was only made when received, eg *Re Kiss and Donohoe and the Repatriation Commission* (1995) 38 ALD 443; *Roberts v Repatriation Commission* (1992) 111 ALR 436;
- the efficiency of administration, having regard to the presence of s.1885J(1)(b) of the Act, favours the requirement that the request be received before it is made for the purpose of the division;
- the natural and ordinary meaning of the phrase 'making a request' involves, and is not complete until, actual communication of that request is made to the recipient of the request;
- the statutory requirement that the request be in writing, and, the absence of express statutory authority to make the request by post, coupled with the appellant's obligation to act and determine the request when made, are compelling circumstances in favour of a requirement of receipt;
- s.29 of the *Acts Interpretation Act 1901* (Cth) operated so as to deem service of the letter to have been effected at the time at which the letter would be delivered in the ordinary course of post.

The respondents submitted that the AAT made no error of law and that the decision was correct as a matter of construction, having regard to the decision of the *English Court of Appeal in North West Traffic Area Licensing Authority v Brady* [1981] RTR 256. In that case it was held that a lorry driver, wishing to take advantage of beneficial legislative provisions, which enabled the licensing authority to issue a heavy goods vehicle driver's licence if a driver applied for a licence before the end of 1976, complied with the legislative requirement if he posted his application for a licence before the end of 1976. Griffiths LJ stated that he could 'see no warrant for construing the words 'is made' as equivalent to 'has been received by' as [was] the contention of the licensing authority'.

The Federal Court's decision

The Court stated that the meaning of the phrase 'make a request' in s.1185G of the Act was to be determined by the application of the ordinary principles of statutory construction which required that the words be given their ordinary meaning in the context where they appeared having regard to the statutory objects sought to be achieved by the words in that context: *Collector of Customs v Agfa-Gevaert* (1996) 186 CLR 389 at 401–402.

The use of cases as to the meaning of the same or similar words in another statutory context was therefore of little, if any, assistance. The AAT had therefore correctly distinguished cases which looked at when an application was 'made' within the meaning of the *Administrative Appeals Tribunal Act 1975* and the *Veterans Entitlement Act 1986*. The Court also noted that the decision in *North West Traffic Area Licensing Authority v Brady* had not been applied in the United Kingdom and had been distinguished on the basis of the particular statutory context with which it dealt: *Lenlyn Ltd v Secretary of State of the Environment* [1985] 50 P & CR 129 at 134; *Camden London Borough Council v ADC Estates Ltd* (1990) 88 LGR 956 (CA) at 964–965; 966–967.

The Court then looked to the purpose of Part 3.14A of the Act and the particular provisions of relevance under that Part. Cooper J said:

> Section 1185J is important in two respects. Firstly, it identifies the person empowered to grant the request as the Secretary. Secondly, it identifies the Secretary as the person who must be satisfied of the existence of the circumstances in s.1185G(a) and s.1185J(1)(b) which give rise to an entitlement to be paid at the increased rate ...
>
> Once it appears that the statutory scheme contemplates the giving of notice of the request, including the contents of the request, to the Secretary and for it to be acted upon by the Secretary, it is difficult to avoid the conclusion that the legislature intended that the request would be made for the purpose of s.1185G when a request in the statutory form was at the latest received by Centrelink for consideration by the Secretary and that no request was made, in the sense of being complete, until it was received by or on behalf of the Secretary as the person empowered to grant the request.
>
> In *Secretary, Department of Family and Community Services v Rogers* (2000) 104 FCR 272, I said as to the giving of notice in a statutory context (at 284):
>
> 'A notice is a notification, a making known, a communication of some matter from one person to another. In the statutory context, the statute identifies the matter to be notified by the notice. Notice is given when it is received by the person to whom the notice is to be given: the giving and receiving of the notice are two aspects of the same action and are simultaneous. Consequently, the giving of notice ordinarily will require that the person to be given notice actually receives notification of the matter to be communicated. Of course, whether by statute or contract, this two-sided act of giving and receiving of notice may be deemed to be done by some act other than actual receipt of the notification by the recipient: *Sun Alliance and London Assurance Co Ltd v Hayman* [1975] 1 WLR 177 (CA) at 183, 184, 185.'
>
> These observations are applicable to the present case once it appears that the giving of notice of the written request and its contents is part of the statutory scheme for making a request for increase in the rate of social security payment.

(Reasons, paras 22, 25 to 27)

Cooper J noted that the issue of the application of s.29 of the *Acts Interpretation Act 1901* did not arise. However, for the reasons set out above, the Court concluded that a request was not made for the purposes of s.1185G of the Act, until receipt of the written request in statutory form by, or on behalf of, the Secretary and that in this respect the AAT erred in law.

Formal decision

The decision of the AAT was set aside and the matter remitted to be determined according to law and the Court's reasons.

[A.T.]