period 5 September 1996 to 20 February 1997. This decision in turn was based on the relevant legislation, that 50% of this payment was for economic loss and as a consequence, she was required to refund 27 weeks overpayment totaling $4565.80.

The issue

The issue before the Tribunal was whether Dee's circumstances were special such that all or part of the compensation payment should be treated as not having been made.

The law

The relevant legislation is set out in s.17.

> 17(3) For the purposes of this Act, the **compensation part of a lump sum compensation payment** is:
>
> (a) 50% of the payment if the following circumstances apply:
>
> (i) the payment is made (either with or without admission of liability) in settlement of a claim that is, in whole or in part, related to a disease, injury or condition; and
>
> (ii) the claim was settled, either by consent judgment being entered in respect of the settlement or otherwise; or
>
> (ab) 50% of the payment if the following circumstances apply:
>
> (i) the payment represents that part of a person's entitlement to periodic compensation payments that the person has chosen to receive in the form of a lump sum; and
>
> (ii) the entitlement to periodic compensation payments arose from the settlement (either with or without admission of liability) of a claim that is, in whole or in part, related to a disease, injury or condition; and
>
> (iii) the claim was settled, either by consent judgment being entered in respect of the settlement or otherwise; or
>
> (b) if those circumstances do not apply — so much of the payment as is, in the Secretary's opinion, in respect of lost earnings or lost capacity to earn.

Section 1165 provides that a pension, benefit or allowance is not payable to a person during a lump sum preclusion period and sets out the method for calculating the preclusion period. Section 1166 of the Act provides that a person may have to repay an amount where both lump sum and compensation-affected payments have been received.

Discussion

Dee argued that it was possible to quantify her loss from the accident as $120 a week for 26 weeks, being $3120. There was therefore no justification in maintaining, as Centrelink had done, that the economic loss component was $15,000. She was not 'double dipping', she was claiming only her actual loss.

The Tribunal found that the calculation of the preclusion period was correct and the quantum of the amount to be repaid on a strict application of the law was $4565.80. The Tribunal noted that this calculation was not disputed. The issue for Dee was whether this amount should be recovered in view of Dee's special circumstances (Reasons, para. 41).

Clearly in *Secretary, Department of Social Security v Smith* (1991) 30 FCR 56, the Federal Court specifically suggested that it was appropriate for the discretion contained within s.1184 of the Act to be used in cases where the arbitrary nature of the 50% rule results in unfairness in a particular case (Reasons, para. 44).

Dee does not rely on her financial circumstances or her health as special circumstances but rather, the unfair and unjust consequences of the application of the 50% rule to her individual case.

The Tribunal considers it well within the purview of s.1184 of the Act for unjust or unfair consequences of the application of legislation to be considered as special. Furthermore, in *Ellis v Secretary, Department of Social Security* (1997) 46 ALD 1, it was considered appropriate to consider the lack of causal relationship between an injury and the benefit entitlement as a special circumstance. As was noted in *Kirkbright v Secretary, Department of Family and Community Services* (2000) 106 FCR 281, the Tribunal in that matter had erred in its interpretation of the legislative intent of the amendments to s.1165 of the Act, as discussed in the *Explanatory Memorandum to the Social Security Legislation Amendment (Budget and Other Measures) Bill* 1996, Part 2 of Schedule 15.

The Tribunal concludes that even though in Dee's case, she does not have special circumstances in relation to her financial and health situation, this should not preclude consideration of the s.1184 discretion in relation to whether there is unfairness or an injustice arising out of the strict application of the legislation. In my view, and as concluded by Mansfield J in *Kirkbright* (above) and by von Doussa in *Smith* (above), s.1184 (or its 1947 equivalent) is designed to enable decision makers to ameliorate unfairness or injustice arising out of the strict application of the legislation. Mansfield J further concluded in *Kirkbright* (above) that the absence of other special circumstances such as financial or health matters, cannot by itself preclude the application of the special circumstances provision. This conclusion is supported by the authorities of *Beadle v Director-General of Social Security* (1985) 7 ALD 670 and more recently, *Martinez v Secretary, Department of Family and Community Services* [2000] FCA 1090 (Reasons, paras. 49-51).

Further:

> The Tribunal finds that unfairness occurs in Dee's case as a result of the application of the legislation itself.

(Reasons, para. 54)

> In calculating the reduction of the preclusion period, the Tribunal notes *Secretary, Department of Social Security v Thompson* (1994) 53 FCR 580, in which the Federal Court concluded it was appropriate to use 'intuitive justice' as to the amount of the reduction and that it would take 'legalism and bureaucratic pedantry too far' to require the artificial exercise of a calculation process in relation to the whole compensation payment. Accordingly, the Tribunal finds that section 1184 of the Act should be exercised in Mrs Dee's favour to allow so much of the lump sum to be regarded as not having been paid so as to treat $3120.00 as the amount to be considered in the calculation of the preclusion period. In so finding, the Tribunal does not consider that the consent settlement was in anyway manipulated to achieve a specific result with implication for Social Security benefits.

(Reasons, para. 55)

Formal decision

The matter was remitted to the respondent to calculate the preclusion period, on the basis an amount of compensation be treated as not having been made apart from the amount of $3120.00.

[A.B.]

Newstart allowance: whether failure to provide information about income

SECRETARY TO THE DFaCS and QUINN
(No. 2002/0081)

Decided: 12 February 2001 by S.A. Forgie.

Background

Quinn was receiving newstart allowance (NSA) and each fortnight he completed an application for payment. In each form he was asked whether he worked in the fortnightly period just

completed and, if so, he was asked to supply details of the amount that he had earned. In the period from 24 October 2000 to 3 May 2001, he earned $4603.90 but he disclosed only $1401.30.

Quinn was advised by a letter of 22 May 2001 that he had incorrectly stated his earnings, that NSA had been stopped and that he would be penalised, namely if he were to reapply for NSA any payments made to him in the 26 week period commencing on 15 May 2001 would be reduced by 18%. The Social Security Appeals Tribunal set aside that decision.

The issue

Before 20 March 2000, s.658 of the *Social Security Act 1991* (the Act) provided that a person to whom a NSA is being paid may be given a notice that requires the person to give a statement about a matter that may affect the payment. A person must not, without reasonable excuse, refuse or fail to comply with such a notice.

Section 630AA of the Act provides:

630AA.(1) If a person:

(a) refuses or fails, without reasonable excuse, to provide information in relation to a person's income from remunerative work (the **failure**); or

(b) knowingly or recklessly provides false or misleading information in relation to the person's income from remunerative work (the **provision of information**);

when required to do so under a provision of this Act, a newstart allowance is not payable to the person.

630AA.(2) If a newstart allowance becomes payable to the person after the time it ceases to be payable under subsection (1), then:

(a) if the failure or the provision of information is the person's first or second activity test breach in the 2 years immediately before the day after the failure or the provision of information — an activity test breach rate reduction period applies to the person; or

(b) if the failure or the provision of information is the person's third or subsequent activity test breach in the 2 years immediately before the day after the failure or the provision of information — an activity test non-payment period applies to the person.

An activity test breach is defined by s.23(1) as a failure, misconduct or any other act to which any of certain specified provisions apply, which include s.630AA(1).

An activity test breach rate reduction period is defined by s.23(1) as a period that is specified in certain provisions, including s.644AA that in turn provides that if an activity test breach rate reduction period applies to a person then the period applicable is 26 weeks. In addition, s.644AB provides that the period commences on the day on which written notice is given to the person, and the effect of s.644AE is that the rate is reduced by 18% if the activity test breach is the person's first breach in the two years immediately before the day after the activity test breach.

With effect from 20 March 2000, the Act was amended by the *Social Security (Administration and International Agreements) (Consequential Amendments) Act 1999* (the Amendment Act), and the *Social Security (Administration) Act 1999* (the Administration Act) commenced.

The Amendment Act repealed s.658 of the Act, although s.68 of the Administration Act provided that a person to whom a social security payment is being paid may be given a notice that requires the person to give a statement about a matter that may affect the payment. Section 74 states that a person must not, without reasonable excuse, refuse or fail to comply with such a notice.

The issue was whether a reference to 'a provision of this Act' in s.630AA(1) of the Act should be interpreted as a reference to the Act itself or whether it may be interpreted as a reference to the Administration Act.

Other provisions

In reaching its decision the AAT also noted the following provisions of the Act that had been inserted by the Amendment Act:

23.(15) A reference in this Act to the social security law is a reference to this Act, the Administration Act and any other Act that is expressed to form part of the social security law.

23.(16) A reference in this Act to a provision of the social security law is a reference to a provision of this Act, the Administration Act or any other Act that is expressed to form part of the social security law.

It also noted the following provisions of the Administration Act:

244. A reference in:

(a) a provision of a law of the Commonwealth or a Territory enacted before 20 March 2000 (whether or not the provision has come into operation); or

(b) an instrument or a document;

to a provision of [the Act] that has been repealed by [the Amendment Act] is, on and after 20 March 2000, to be construed as a reference to the corresponding provision of this Act.

245.(1) If one provision of [the Act] and one provision of this Act have the same legal effect, the 2 provisions correspond to each other.

245.(2) If:

(a) a provision of [the Act] has a particular legal effect in relation to a number of payment types; and

(b) a provision of this Act has that legal effect in relation to one or more, but not all, of those payment types;

the provisions correspond to each other, for the purpose of subsection (1), in relation to the payment types referred to in paragraph (b).

245.(3) In this section:

legal effect includes conferring the power to issue an instrument.

payment type means a pension, benefit or allowance.

The arguments

For the Secretary it was submitted that the words 'a provision of this Act' relate to a provision of the Act as it was prior to 20 March 2000. Relying on ss.244 and 245 of the Administration Act it was submitted that, as s.658 was a section under which a person could be required to give information and as it was repealed by the Amendment Act, regard could be had to s.68 of the Administration Act as the section to which s.658 of the Act corresponds.

Alternatively, the notices issued under s.68 are notices issued under the social 'security law'. As the requirements to provide the information issued to Quinn identify themselves as notices issued under social security law they can then be considered to have affect in applying the provisions of any social security law which includes the Act and therefore s.630AA.

For Quinn it was submitted that interpretation of the Act requires a consideration of both its purposes and the financial consequences to a person of any interpretation of that legislation. The consequences of the Secretary's interpretation of s.630AA is that Quinn would face cessation of payments, a reduction of future payments and re-calculation of his past NSA with subsequent recovery of the debt occurring at a time when his NSA had been reduced. The cumulative effect would be to deprive him of the capacity to support himself from moneys provided for the purposes of the Act as well as leaving him potentially open to being prosecuted under the Administration Act. The Act is intended to be 'social welfare legislation' and regard should be had to its beneficial purposes to provide maintenance and relief to those facing financial hardship unless to do so is contrary to

specific provisions of the Act (*Gee and DGSS* (2) (1981) 4 ALD 376). In addition, the particular penalty under consideration is a penal provision and, as such, should be construed strictly (*Sec, DSS & Carruthers* (1993) 18 AAR 373), *Bartlett v R* (1990) 100 ALR 177 and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355). Any interpretation favouring the individual should be applied *(Vitalone and Sec, DSS* (1995) 38 ALD 169). At the same time the Act is beneficial legislation and so should be interpreted having regard to its beneficial purposes and policy.

The AAT noted that the effect of the Secretary's submission is that the reference in the Act to 'a provision' of the Act in s.630AA(1), which was enacted prior to 20 March 2000, rather than to a specific provision is sufficient to bring ss.244 and 245 of the Amendment Act into effect. Regard must be had to all of the provisions of the Act that would empower the Secretary to require a person to provide information about his or her income from remunerative work and that have been repealed by the Amendment Act. Consideration must then be given to whether any of those repealed sections corresponds to a section in the Administration Act. Provisions of the Act which, prior to its amendment, would have met this general description were ss.655A, 656, 657 and 658. Sections 655A, 656 and 658 respectively correspond to ss.75(2), (3) and 68 of the Administration Act. Sections 657 and 67 do not correspond to each other. Since the repeal of ss.655A, 656, 657 and 658 by the Amendments Act, the Act no longer contains any provisions that would empower the Secretary to require a person to provide information about his or her income from remunerative work within the meaning of s.630AA(1).

It seemed to the AAT that an alternative interpretation of s.630AA(1) of the Act was to begin from the position that s.244 of the Administration Act refers to 'a provision' in a law referring to 'a provision' of the Act 'that has been repealed' by the Amendment Act. Before s.244 has effect, it may be argued, it must be possible to identify a provision that has been repealed and to which reference is made in a provision of a law of the Commonwealth or Territory under consideration. Section 630AA(1) is a provision of a law of the Commonwealth that was enacted before 20 March 2000. It refers to another provision in the same law of the Commonwealth. It does not, though, refer to 'a provision ... that has been repealed' by the Amendment Act by referring to the section number of a provision that can be identified as having been repealed. The broader description that appears in s.630AA(1) allows only a range of provisions to be identified rather than 'a provision'.

A consideration of other amendments made by the Amendment Act needs also to be made. The Amendment Act amended sections such as s.1224 by omitting the words 'this Act' from s.1224(1)(b)(ii) and substituting the words 'the social security law or this Act as in force immediately before 20 March 2000'. It would seem parliament specifically recognised that a debt may arise by reason of a recipient's failing to comply with a provision of the Act as it was in force before 20 March 2000 or with any provision of what was expressed as the social security law from that date.

If regard is had to these provisions, it could be said that parliament turned its mind to the amendments it wished to make and that in choosing not to amend s.630AA(1) and to leave intact its reference to 'a provision of this Act' requiring that Quinn give information before his failure to provide any requested information leads to his not being paid NSA, it made a deliberate decision to limit it to a provision of the Act as in force in its amended form after 20 March 2000. It could be said that this position is supported by reference to principles of statutory interpretation leading to a conclusion that, where there is an ambiguity, an interpretation favouring the person to be benefited by beneficial legislation and confining the impost of a penal provision is to be preferred. Quinn's submission referred to cases applying such principles. At the same time, adopting an interpretation that confines s.630AA(1) to provisions found in the Act itself means that it would have no application in any circumstances (and not just in Quinn's) for there are no provisions in the Act which require a person to provide the relevant information.

Purpose of social security law

Beginning with the principles of statutory interpretation, it seemed to the AAT that, on occasion, they can be a little more complex in their application than suggested in the submission for Quinn. Rather than ambiguities necessarily being interpreted liberally to achieve the purpose of beneficial legislation and not extending the operation of penal provisions beyond their strict words, proper interpretation of an ambiguous provision depends on the dominant purpose of the legislation. That occurs in a case such as this where legislation has both beneficial provisions and penal provisions. The AAT referred to paragraph 9.4 of D.C. Pearce and R.S. Geddes in *Statutory Interpretation in Australia* (Butterworths, 4th edition, 1996) and to *Wuugh v Kippen* (1986) 64 ALR 195.

The AAT also had regard to two further principles of statutory interpretation. The first is that 'As a general rule a court will adopt that construction of a statute which will give some effect to all of the words which it contains' (*Beckworth v R* (1976) 12 ALR 333). The second is described in paragrah 2.20 of Pearce and Geddes as the approach adopted by the Courts to endeavour to adopt an interpretation that will ensure the validity of legislation.

The AAT was of the view that:

> ... prior to 20 March, 2000, it was appropriate to take into account only the purpose of the Act itself. Since that date it is apparent from an examination of its provisions and those of the Administration Act that they, together with any other legislation expressed to form part of the social security law, must be considered together in order to ascertain Parliament's purpose ... When regard is had to the social security law, of which the Act is a part, it is apparent that its purpose is to provide for the payment of certain pensions, benefits and allowances in order to provide maintenance and relief to those who would otherwise face hardship and or require financial assistance. It achieves this purpose by providing for various types of payment. At the same time, its purpose is to ensure that each person receives no more than that to which he or she is entitled under the Act. It achieves this by employing two strategies. First, it imposes obligations upon the recipients of any benefits under the Act and imposes penalties for breaches of those obligations. Second, it establishes systems for recovering the amounts which he or she has been paid but to which he or she was not entitled. It follows that a person may suffer both a penalty for a breach of an obligation and, as a result of his or her failure to fulfil that obligation, face recovery action for amounts that would not have been paid to him or her had he or she fulfilled the obligation. That is illustrated by reference to s.630AA and s.1224 in this case. It is quite clear that application of the provisions carrying out the purpose of the social security law may leave a recipient in very straitened circumstances indeed and this would seem to be contemplated by the social security law.
>
> In light of Parliament's intending to achieve a quite complex purpose, it is difficult to conclude that it would have intended that s.630AA(1) should be of no effect. It would be of no effect if it were to be read, as Mr Quinn would argue, as being confined to a provision of the Act as it is enacted after 20 March, 2000 for there are no longer any pro-

visions in the Act that would empower the Secretary to require a person to provide information about his or her income from remunerative work and so no provisions of the type to which reference is made in s.630AA(1). Since that date, all such provisions are found in the Administration Act. The section would have effect if it were given the meaning I have set out in paragraph 29 above. That is to say, it would have effect if s.630AA(1) were taken as a provision of a law of the Commonwealth enacted prior to 20 March, 2000 (as it is) referring to provisions of the 1991 Act (as it does by reference to their requiring a person to provide certain information) that have been repealed (as they have been). The effect of s.244 is that those provisions then be read as referring to corresponding provisions in the Administration Act. That interpretation accords with the purposes revealed by the social security law even though, in its application in a particular case, it may be thought to lead to the imposition of unbearable hardship.

For these reasons the AAT concluded that in the circumstances of this case, s.630AA(1) should be read as applying in a situation in which Quinn has refused or failed without reasonable excuse to provide information in relation to his income from remunerative work as required by a notice given under s.68 of the Administration Act. As there was no dispute between the parties that such a notice was given and that he did fail without reasonable excuse to provide the information, it follows that his failure was an activity test breach. Again, there was no dispute between the parties as to the consequences of that activity test breach, namely that he is subject to a NSA activity test rate reduction amount of 18% for the NSA rate reduction period.

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that the original decision be affirmed.

[K.deH.]

Farm Family Restart Grant: definition of farmer

HERRICK and SECRETARY TO THE DFaCS (No. 2002/0091)

Decided: 15 February 2002 by J. Handley.

The issues

The applicant applied for a Farm Family Restart Grant under the Farm Household Support Act 1992. This was rejected by the delegate of the Secretary, and the rejection was affirmed by the SSAT. The issue was whether Herrick was a farmer as defined by that Act.

The facts

Herrick and his wife were share farmers. There was an agreement between Herrick and the owners of the property that the property was to be run as a dairy farm. The agreement set out what was to be provided by the owners of the property and what was to be provided by Herrick. The owners provided the land and stock, milking facilities, a house, machinery and vehicles. Herrick provided management and labour to milk and manage the farm, his own four-wheel all-terrain vehicle (ATV) and trailer, hand tools and computer and software. Further, all costs were paid by the owners except for a limited list which were shared. Herrick obtained an overdraft of $5000 in the first year and up to $11,000 in the second year to meet his obligations.

The law

The Act defines 'farmer' as:

> ... a person who
>
> (a) has a right or interest in the land used for the purposes of a farm enterprise; and
>
> (b) contributes a significant part of his or her labour and capital to the farm enterprise; and
>
> (c) derives a significant part of his or her income from the farm enterprise.

'Farm enterprise' is defined by the Act as:

> ... an enterprise carried on within any of the agricultural, horticultural, pastoral, apicultural or aquacultural industries.

The issue for the Tribunal was whether Herrick had contributed a 'significant part of his ... capital to the farm enterprise'. There was no dispute that Herrick had contributed a significant part of his labour to the enterprise.

Discussion

The Authorised Review Officer decided that Herrick's contribution did not amount to a significant contribution to the capital of the farm enterprise, because he did not own the land, the cows or the machinery. The SSAT held that taking out an overdraft to pay expenses did not amount to a contribution of capital.

The Tribunal decided that a contribution to the running of the farm should be considered in the context of the expenses of Herrick, not the cost of running the farm as such. Moreover, monies derived from an overdraft amount to 'capital' for the purposes of the Act.

> I am satisfied that those expenses were significant, in the context of the [applicant's] total expenses and also in the context of the [applicant's] total income derived from the farming enterprise. In order to meet his obligations under the share farming agreement the applicant was required to incur certain items of expenditure which on his evidence could only be achieved by obtaining or having access to monies secured by the overdraft.

(Reasons, para. 32)

Formal decision

The Tribunal set aside the decision under review and decided that Herrick was a 'farmer' as defined under the *Farm Household Support Act 1992*.

[A.B.]

Family allowance: notice incorrectly given

TRIEU and SECRETARY TO THE DFaCS No. 2002/0143

Decided: 7 March 2002 by G. Ettinger and Isenberg.

Background

Trieu's claim for family allowance was rejected because information, in particular Trieu's 1997/98 tax returns, which had been considered necessary for consideration of her entitlement and had been requested, had not been provided.

Issues

The issue before the Tribunal was whether Trieu was entitled to family allowance for the period from her claim in October 1999. In order to decide the above issue the AAT was required to consider: whether the Department had validly issued a notice under s.1304 of the *Social Security Act 1991* (the Act); if the Department had not issued a valid notice under s.1304 of the Act, whether it was entitled to rely on the Trieu's failure to comply with that notice in rejecting her claim for family allowance

Legislation

The relevant legislation is contained in ss.838(1)(d) and 1304 of the *Social Security Act 1991*. The relevant parts include:

> **1304(1)** The Secretary may require a person to give information, or produce a document that is in the person's custody or under the