The submissions

O'Brien argued that he was not legally obliged to repay the full amount of the loan at any particular time. He argued that the value of the loan should be limited to the 'borrowers maximum liability at any point'.

The Department used the face value of the debt for the purposes of the assets test although it allowed some discounting.

The findings

The Tribunal considered s.1122 of the *Social Security Act 1991* and the documentation provided by O'Brien. It stated:

> The applicant's argument has some attraction. If an advance is made pursuant to a loan, and the terms of the loan provide for repayment of an amount less than the face value of the loan, there is no reason why the discounted amount should not be the relevant figure for the purposes of s.1122. But the loan documentation must clearly evidence that intention. The documentation in this case does not meet that requirement. It seems to me the applicant is attempting to formalise and explain what was in fact a loose arrangement that had not been negotiated at arms' length.

(Reasons, para. 17)

The Tribunal then considered the case of *Joyce and Repatriation Commission* (AAT 10410, 15 September 1995). In this case a loan was made to a trust and the applicant argued that the value of the loan should be the market value of the assets if the loan was called in. The AAT rejected this argument, acknowledging that the assets would not meet the value of the loan at the time but noted that this situation may change and repayment may be possible in the future.

The Tribunal agreed with this approach and noted that O'Brien had not attempted to call up the loan from the trust so that a definite value could be ascertained.

The Tribunal concluded that s.1122 requires the face value of the loan to be used, 'unless some other amount is repayable under the terms of the agreement'. In this case there was no clear agreement about the amount payable by the trust and there was no demand for repayment. Consequently the face value of the loan should be used for the purpose of the asset test.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Age pension: income test and life assurance

DAVIES AND SECRETARY TO THE DFaCS (No. 2002/904)

Decided: 3 October 2002 by Senior Member W.J.F. Purcell.

Background

In 1985 Davies changed jobs and requested that a non-exempt policy be reassigned as an endowment policy. Consequently a life assurance policy was created. Premiums were set at $1200 a year and the policy was payable on 28 March 2001 (Davies' 65th birthday), or, alternatively, on his death.

In March 2001, Davies became eligible for age pension and he advised of the surrender of his policy. Centrelink assessed the sum of $15,772 as income for a period of 12 months commencing on April 2001. This decision, in itself had no impact on his pension until August 2001 when he advised the Department of changes to his combined assets. As a consequence his pension became subject to the income test and his rate was struck at $261.90 a fortnight. On appeal to the SSAT, the income amount was discounted by the value of bonus additions of $2164.91 which in turn reduced the amount to be maintained as income to $13, 607.09.

Legislation

The relevant sections of the *Social Security Act 1991* (the Act) considered by the Tribunal were ss.8 and 1073:

> **income**, in relation to a person, means:
>
> (a) an income amount earned, derived or received by the person for the person's own use or benefit; or
>
> (b) a periodical payment by way of gift or allowance; or
>
> (c) a periodical benefit by way of gift or allowance;
>
> but does not include an amount that is excluded under subsection (4), (5) or (8);
>
> ...
>
> **income amount** means:
>
> (a) valuable consideration; or
>
> (b) personal earnings; or
>
> (c) moneys; or
>
> (d) profits;
>
> (whether of a capital nature or not);
>
> ...
>
> **(11)** An amount received by a person is an exempt lump sum if:
>
> (a) the amount is not a periodic amount (within the meaning of subsection 10(1A)); and
>
> (b) the amount is not a leave payment within the meaning of points 1067G-H20, 1067L-D16 and 1068-G7AR; and
>
> (c) the amount is not income from remunerative work undertaken by the person; and
>
> (d) the amount is an amount, or class of amounts, determined by the Secretary to be an exempt lump sum.
>
> Note: Some examples of the kinds of lump sums that the Secretary may determine to be exempt lump sums include a lottery win or other windfall, a legacy or bequest, or a gift—if it is a one-off gift.
>
> Section **1073 (1)**
>
> Subject to points 1067G-H5 to 1067G-H20 (inclusive), 1067L-D4 to 1067L-D16 (inclusive), 1068-G7AA to 1068-G7AR (inclusive), 1068A-E2 to 1068A-E12 (inclusive) and 1068B-D7 to 1068B-D18 (inclusive), if a person receives, whether before or after the commencement of this section, an amount that:
>
> (a) is not income within the meaning of Division 1B or 1C of this Part; and
>
> (b) is not:
>
> (i) income in the form of periodic payments; or
>
> (ii) ordinary income from remunerative work undertaken by the person; or
>
> (iii) an exempt lump sum.
>
> the person is, for the purposes of this Act, taken to receive one fifty-second of that amount as ordinary income of the person during each week in the 12 months commencing on the day on which the person becomes entitled to receive that amount.

Submissions

Davies argued that his endowment policy operated during its term of 16 years in the same way as a superannuation insurance policy. The end benefit provided for retirement in the same way as superannuation would. The Act (until 1983) treated this type of insurance, as well as superannuation insurance, as an exempt lump sum.

The current Act does not mention endowment insurance and departmental guidelines which changed from July 1997 treated bonuses as income for a period of 12 months. Davies argued that this guideline was harsh, inequitable and discriminatory and that no income should be maintained.

Davies submitted that the decision should be made under s.8(11)(d) exempting the bonuses for the same reasons that applied prior to July 1997.

He relied on the case of *Saundry and Secretary, Department of Social Security* (1988) 16 ALD 200 as authority for the proposition that there was an entitlement to pro rata bonuses, rather than the fully accumulated amounts that were declared. Alternatively, he requested that the bonuses that accrued prior to the change in the guidelines (prior to July 1997) be exempted.

He also relied on the case of *Varcoe and Secretary, Department of Family and Community Services* [2000] AATA 1002 for authority that the proceeds of the policy be treated as an exempt lump sum, except for net earnings after July 1997. In that case the Tribunal used its power under s.8(11)(d) to split the bonuses received.

The Department argued that the life insurance policy did not fall within the definition of income in s.8 or the definition of financial assets and income streams provided by s.9. Consequently it could not be considered to generate an income contemporaneously with the policy's existence, despite growth in the capital. Therefore it was not until maturity that income could be assessed and under s.1073 the lump sum is treated as though received over a 12-month period.

The Department argued that the discretion in s.8(11)(d) should only be exercised in a manner consistent with the aim of the legislation. The Department argued that the Tribunal exercised its power incorrectly in the case of Varcoe by directing that only the income accrued during the period that Mr Varcoe received the pension be assessable. In the alternative the Department argued that Varcoe could be distinguished as Davies had prior warning of the treatment of the lump sum and there was no evidence of financial hardship.

Findings

The Tribunal considered s.1073 and concluded that the total accumulated bonuses should be assessed as income, irrespective of the period during which the bonuses accumulated, or whether the person was receiving social security payments.

In relation to the case of *Varcoe*, the Tribunal agreed that there is an inequality in the treatment of lump sum superannuation payments and lump sum payment on maturity 'of age insurance policies, but found that this has arisen 'within the historical context of the development of superannuation schemes investment products and changes in departmental policy'.

The Tribunal did not agree that it was appropriate to treat as income only bonuses accrued after July 1997. It found that the discretion allowed for in s.8 (11)(d) should be applied in situations described by the notes attached to the subsection. For example, where there was a lottery win, a legacy or bequest or a one-off gift. The Tribunal found these examples related to unexpected amounts not the type of product that was the subject of this appeal.

The Tribunal found that the life insurance policy was 'not of the character contemplated by section 8(11)(d) and consequently the amount received was not "an exempt lump sum"'.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Jurisdiction: absence of claim

TAYLOR and SECRETARY TO THE DFaCS
(No. 2002/989)

Decided: 23 October 2002 by M.J. Carstairs.

A claim for mobility allowance (MOB) by Taylor on 27 September 2001 was granted with payments to start from that date. She then sought arrears on the basis that she had made MOB claims 7 and 12 years previously. After a search of its records a Centrelink delegate refused arrears as there was no evidence of earlier MOB claims. On review, the authorised review officer (ARO) decided he had no jurisdiction as there had been no decision concerning MOB at those earlier times. The SSAT reached the same conclusion for the same reason.

Taylor informed the AAT she had made the first claim while at the Rivendale Community Centre, and was later told there that it had been refused. She had told the SSAT that seven years ago she had filled in and posted the forms for MOB herself, and had received a decision rejecting the claim.

In response the Secretary stated that:

- Taylor had lodged DSP claims on 7 April 1992 and 28 February 1995;
- the information she provided with both claims suggested she would not have been qualified for MOB at those times;
- these was no record on its paper files or computer records of MOB claims before 27 September 2001;
- if a letter had been sent to Taylor rejecting a MOB claim about 1995 there would have been a record of it in Centrelink's computer; and
- if such a notice had been sent, Taylor's appeal against the decision was out of time and arrears of MOB would not be payable.

The AAT noted that in *Ward v Nicholls* (1988) 20 FCR 18 the Federal Court had held that the AAT had power to review a decision declining jurisdiction. Further, both the ARO and the SSAT had made substantive decisions that a MOB claim had not been lodged before 27 September 2001. More importantly, the Centrelink delegate had declined payment on that basis.

Section 1040(1) of the *Social Security Act 1991* provided that a person who wants to be granted a MOB must make a proper claim. Sections 1041 and 1042 provided that the claim must be in writing in an approved form and lodged at an office of the Secretary or other approved place. Sections 1038 and 1039 provided that MOB was not payable before the date of claim.

The AAT was satisfied on the basis of the extensive searches made by Centrelink that the Secretary or his agents received no claim. In the absence of such a claim the combined effect of the above provisions was that no payment of MOB could have been made.

Formal decision

The AAT set aside the decision that there was no jurisdiction, and affirmed the Centrelink delegate's decision that MOB was not payable.

[K.deH.]

[**Contributor's Note:** All the decision makers in this matter couched the decision in terms of paying arrears, whereas the actual decision is the commencement date under ss.1038 and 1039.]