

contended regard be given to the policy guidelines which provided for backdating only in 'special circumstances', which included, amongst other things, a person being overseas or not seeing advertising of the scheme. A further counter to exercising the discretion was Brignell's failure to declare his income.

Brignell urged the AAT 'to look at the big picture' to allow membership to take effect from the date his age pension was cancelled. He argued he had repaid all his age pension for earlier years and that by working and not receiving the pension, he had resulted in a saving of public money. He argued that Centrelink had provided him with incorrect advice at the outset and referred to his alerting Centrelink about a possible overpayment and his superannuation payout which had been garnisheed.

### The findings

The Tribunal distinguished *Jessop*. In that case, special benefit was being paid to the husband which disqualified the applicant for family allowance supplement. A subsequent compensation payment resulted in the husband having to refund his special benefit and the AAT held that 'he was entitled to it by virtue of the then existing circumstances. It could not be suggested that payment was at the time illegal or not in accordance with the law.'

The Tribunal found Brignell had not 'received' age pension as he was not legally entitled due to excessive income. He had not received the benefit of the age pension during the period from his turning 65 in September 1996 to September 2001 when he finally retired.

The Tribunal noted that although the policy guidelines used the expression 'special circumstances', the legislation did not. Whilst accepting Brignell may have failed to respond to letters, the Tribunal did not see that as relevant. The Tribunal accepted that he acted on incorrect advice at the outset and had alerted Centrelink to the overpayment and his impending superannuation payout. The Tribunal had regard to the purpose of the scheme and decided to backdate the effect of registration to 3 August 1998, the date Brignell first made enquiries about eligibility.

### Formal decision

The AAT set aside the decision under review and determined that Brignell was not disqualified for the pension bonus scheme by virtue of s.92C(b) and that his registration as a member take effect from 3 August 1998.

[S.L.]

## Farm help: definition of 'farmer'

HONOR and SECRETARY TO  
THE DFaCS  
(No 2003/179)

Decided: 25 February 2003 by  
O. Rinaudo.

### Background

John Honor and his wife acquired a cane farm in 1972, which they operated through a partnership. Their son, Graham, worked on the farm for about eight or nine months each year. In addition to the cane farming, the family operated a cane harvesting business.

In 1996, John suffered a heart attack and claimed disability support pension. The nature of his involvement with both enterprises changed from a manual role to one of oversight and bookwork. Graham's involvement with the farming increased commensurately.

The cane farm was put on the market in August 2000 and was sold in August 2001. The cane harvesting business ceased operations in October 2000. Both John and Graham Honor claimed farm help income support on 13 December 2000.

### The issues

The Tribunal considered whether either John or Graham satisfied the definition of farmer found in s.3(2) of the *Farm Household Support Act 1992* (the FHS Act), for the purposes of qualifying for farm help income support under s.8B. The issues before the Tribunal were:

- (i) with respect to both John and Graham: whether the cane harvesting business was a 'farm enterprise' within the terms of the FHS Act, and whether they derived a significant part of their income from a farm enterprise; and
- (ii) with respect to Graham alone: whether he had a right or interest in the land used for the purposes of a farm enterprise.

There was no dispute that the cane growing business constituted a 'farm enterprise'. However, the Tribunal concluded that the cane harvesting business did not constitute a 'farm enterprise' after finding that this phrase would require some 'degree of involvement in the raising of stock or development of land' (Reasons para. 26).

Although relevant tax returns showed that Graham was paid as an employee of the businesses, the family and their accountant maintained that Graham joined the partnership in around 1997/98. The SSAT made a finding of

fact that Graham was conducting the cane farming and cane harvesting businesses in partnership with his parents, which was conceded by the respondent in its submission to the Tribunal. The Tribunal found that both Graham and John had the relevant 'right or interest' in the land for the purpose of the FHS Act.

The Tribunal adopted the approach of Foster J in *ACI PET Operations Pty Ltd v Comptroller-General of Customs* (1990) 26 FCR 531 when considering the meaning of 'significant' and the requirement that a farmer must derive a significant part of his or her income from the farm enterprise (Reasons, paras. 32 and 33). It noted that when making this assessment, both the Centrelink Manual and previous decisions of the Tribunal supported the use of the gross income earned in a financial year. The applicants unsuccessfully argued that the net figures should be used for this assessment.

The Department argued that, when considering whether or not the applicants derived 'significant income' from a farm enterprise, only the last two years income was relevant. The Tribunal rejected this argument, citing the decision of the Federal Court in *Parrett v Secretary, DFaCS* [2002] FCA 716 (at para. 45), and concluded that the decision maker should have regard to the totality of the income derived over the period during which the farm enterprise operated.

Finally, although the nature of the work performed by John Honor changed after his heart attack, the Tribunal was satisfied that both applicants contributed a 'significant part of his ... labour and capital to the farm enterprise'.

### Formal decision

The Tribunal set aside the decision under review and remitted it to the respondent for reconsideration in accordance with its reasons.

[E.H.]