

Age pension rate: farm property; notional rate of income from unrealisable asset

**BENNETT and SECRETARY TO
THE DFaCS
(No. 2003/373)**

Decided: 24 April 2003 by J. Dwyer.

The issue

The issue in this matter was whether the rate of age pension (AP) to be paid to Mr and Mrs Bennett should be calculated taking into account an amount of \$7325 as the notional annual rate of ordinary income from an unrealisable asset — in this case, the Bennetts' farm property, Centrelink, and in turn the SSAT in November 2002, had determined that this figure should be included in determining the rate of AP to be paid to the Bennetts.

Background

Mr and Mrs Bennett moved to Victoria from New South Wales in 1995, and purchased two adjoining properties at Neerim, part of which they later sold, using the proceeds to build a new house on the remaining property. They used the property for cattle grazing and raising calves, and in the financial year 2000/2001 showed a profit from these activities of \$3625. Although formally owned by a company of which they were the sole directors, it was not in dispute that the assets of that company (ie the farm) were to be attributed to Mr and Mrs Bennett. It was also not in dispute that the asset in question — the farm — was unrealisable. The farm was hilly, with no irrigation licence, with water provided by an old and unreliable pump. The farm had been valued at \$430,000, including the farmhouse and curtilage which was valued at \$137,000.

The Bennetts contended that no income could reasonably be expected to be obtained from a commercial use of their farming property.

The law

The rate of AP payable to a person is determined with reference to his or her assets. Sections 1129 and 1130 of the *Social Security Act 1991* (the Act) together provide for assets which are 'unrealisable' to be disregarded when determining the amount of assets. These sections provide:

1129.(1) If:

(a) either:

- (i) a social security pension is not payable to a person because of the application of an assets test; or
 - (ii) a person's social security pension rate is determined by the application of an assets test; and
- (b) either:
- (i) sections 1108 and 1109 (disposal of income) and 1124A, 1125, 1125A and 1126 (disposal of assets) do not apply to the person; or
 - (ii) the Secretary determines that the application of those sections to the person should, for the purposes of this section, be disregarded; and
- (c) the person, or the person's partner, has an unrealisable asset; and
- (d) the person lodges with the Department, in a form approved by the Secretary, a request that this section apply to the person; and
- (e) the Secretary is satisfied that the person would suffer severe financial hardship if this section did not apply to the person;

the Secretary must determine that this section applies to the person.

1130.(1) If section 1129 applies to a person, the value of:

- (a) any unrealisable asset of the person; and
- (b) any unrealisable asset of the person's partner;

is to be disregarded in working out the person's social security pension rate.

Section 1130(2) of the Act provides that, where s.1129 applies — that is, where a person has an unrealisable asset and makes the appropriate application to Centrelink — the person's maximum pension rate is to be reduced by 'an amount equal to the person's adjusted annual rate of ordinary income'. The term is defined in s.1130(3) to be the sum of various income sources including '... the person's notional annual rate of ordinary income from unrealisable assets ...'

The 'notional annual rate of ordinary income' from an unrealisable asset is defined in s.1130(5) to be:

1130.(5) A person's **notional annual rate of ordinary income** from unrealisable assets is:

- (a) the amount per year equal to 2.5% of the value of the person's and the person's partner's unrealisable assets; or
- (b) the amount per year that could reasonably be expected to be obtained from a purely commercial application of the person's and the person's partner's unrealisable assets;

whichever is the less.

Thus, the effect of these provisions is that where a person has an unrealisable asset the value of that asset is to be

disregarded in determining the rate of pension to be paid. However, the maximum rate of pension payable is to be reduced by a notional annual rate of ordinary income which could be expected to be obtained from commercial use of the asset in question, or by an amount equal to 2.5% of the value of that asset, whichever is less.

The reasoning of the AAT

The Tribunal noted the evidence from Centrelink that an amount of \$15,000 could be obtained from leasing the farm property, based on comparison with similar properties in the same area. The Tribunal also noted that the Bennetts did not wish to lease the property, as they did not wish their use of the property to be interfered with by any lessee, and were concerned about security issues should another person (the lessee) have access to the property or keys to the farm gates.

The Tribunal noted the decision in *Dineen v Secretary, Department of Sociual Security* (1988) 17 ALD 91 that '... [t]here must be a presumption that a person ... will do his reasonable best to obtain income from the property, consistent with his personal capacities, family obligations and other relevant circumstances ...' Applying this principle, the Tribunal concluded that Mr and Mrs Bennett's concerns were not sufficient to indicate that no amount could reasonably be obtained from commercial use of the asset, and that \$15,000 could reasonably be expected to be obtained from such a commercial use. As this amount was greater than the amount of \$7325 (representing 2.5% of the value of the asset — which was not disputed), the Tribunal applied s.1130(5) and concluded that this lesser amount should be the notional annual rate of ordinary income to be used in calculating the rate of AP to be paid to Mr and Mrs Bennett.

Formal decision

The Tribunal affirmed the decision under review.

[P.A.S.]