

Activity test breach: notices issued under 'this Act'; whether this can include Social Security (Administration) Act

SECRETARY TO THE DFaCS and LIND
(No. 2003/242)

Decided: 13 March 2003 by C.R. Wright QC.

The issue

The issue before the Tribunal was whether the phrase 'under a provision of this Act' in a section of the *Social Security Act 1991* (the SS Act) includes both that Act and the *Social Security (Administration) Act 1999* (the SS(A) Act).

Background

Lind was receiving newstart allowance when she began casual work with Caltex. She had been sent various notices, including one dated 24 August 2000, advising her of her obligation to notify the Department if (among other things) she commenced work. Lind did not declare her income from Caltex or notify the Department that she had commenced work, and on 18 June 2001 an activity test breach rate reduction of 18% was applied to her newstart allowance for 26 weeks under s.630 AA of the SS Act. This section refers to a failure to comply with a requirement under a provision of 'this Act' to notify income.

However, the notice informing her of her obligations to notify the Department was not issued under the SS Act, but under s.68 of the SS(A) Act. Prior to the introduction of the SS(A) Act on 20 March 2000, the requirement to provide information relevant to the payment of newstart allowance was found in s.658 of the SS Act.

The SSAT set aside the decision, determining that the penalty in the SS Act could not apply because Lind had not been required to provide information under the SS Act, but under the SS(A) Act.

Legislation

The breach was imposed under s.630AA of the SS Act which provides:

- (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 provisions of information):

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

- (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 provisions 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 provisions of information — an activity test non-payment period applies to the person.

The notice of August 2000 was sent under s.68 of the SS(A) Act which provides (in part):

- (1) Subsection (2) applies to a person to whom a social security payment is being paid.
- (2) The Secretary may give a person to whom this subsection applies a notice that requires the person to do either or both of the following:
 - (a) inform the Department if:
 - (i) a specified event or change of circumstances occurs; or
 - (ii) the person becomes aware that a specified event or change of circumstances is likely to occur;
 - (b) give the Department a statement about a matter that might affect the payment to the person of the social security payment.
- ...
- (5) An event or change of circumstances is not to be specified in a notice under this section unless the occurrence of the event or change of circumstances might affect the payment of the social security payment or the person's qualification for the concession card, as the case requires.

What is the effect of the phrase 'a provision of this Act' in s.630AA of the SS Act?

The Department argued that with the introduction of the SS(A) Act all of the provisions of the SS Act and the SS(A) Act were rolled into 'social security law' by ss.224 and 245 of the SS(A) Act, and that no alteration to the existing state of affairs was contemplated. Therefore the

reference to 'a provision of this Act' incorporated a reference to the repealed s.658 of the SS Act, and to its corresponding provision, s.68 of the SS(A) Act. Alternatively, where an information notice states that it is given under the 'social security law' it applies to requirements of both the SS Act and the SS(A) Act.

In *Secretary, DFaCS and Quinn* (AATA81 of 2002) of 12 February 2002, DP Forgie approved this reading of 'the Act' as applying to the 'social security law' as that term is defined in the SS Act and the SS(A) Act. *Quinn* was followed by J Cowdroy in *DFaCS and Hosie* decided on 17 January 2003. A similar decision by SM Beddoe in *DFaCS and Suzor* has been appealed to the Federal Magistrate.

Despite the weight of these decisions, DP Wright did not accept the Department's submissions. In considering the amalgamation of Acts he referred to Pearce & Geddes' *Statutory Interpretation in Australia*, 5th Edition. Having considered two major authorities, the authors conclude that there is a distinction between the incorporating of a new Act into an earlier Act, or vice versa — the incorporation of an earlier Act into a new one. However, in each case there were specific provisions in the new Act that the Acts were to be read as one or read and construed together in a particular manner.

In *Lind*, DP Wright considered that in the absence of a specific provision for amalgamation or incorporation in either the SS Act or the SS(A) Act it was not possible to conclude that the two Acts have been amalgamated or incorporated. Accordingly, the phrase 'a provision of this Act' in the SS Act could not be read to mean 'a provision of the social security law'.

Therefore the breach penalty in s.630AA of the SS Act could not apply to Lind, as she had not been required to provide information about her employment and income under the SS Act.

Formal decision

The decision of the SSAT was affirmed.

[H.M.]