(b) if the principal home is a flat or home unit, a garage or storeroom that is used primarily for private or domestic purposes in association with the flat or home unit.

Exempt assets are those described in s.1118(10) paragraphs (a) to (s). Paragraph (d) reads, in part:

> In calculating the value of a person's assets for the purpose of this Act disregard the following: if the person is a member of a couple the value of any right or interest of the person in one residence that is the principal home of the person, of the person's partner or both of them.

The submissions

Leung submitted that the whole of the structure at his residential address was his principal home, and in doing so placed reliance on the decision of the Full Court of the Federal Court in *Secretary, Department, Education, Training and Youth Affairs v Ovari* 98 FCR 140. His second argument was that the flat had no value, as it could not be realised.

The Department argued that the flat did not form part of the principal home and therefore was not an exempt asset.

Discussion

The AAT considered *Ovari*, and also considered *Secretary, Department of Family and Community Services v Kulshrestha* (2003) AATA 227, in which *Ovari* was distinguished by Deputy President Forgie. The Tribunal concluded that *Kulshrestha* applied to the present case, quoting D.P. Forgie's consideration of *Ovari* in *Kulshrestha* (at paras 24-26):

> The Full Court did not explain the meaning of a principal home. Some assistance as to the meaning of the expression 'principal home' is available from the dictionary definitions. The word 'home' has a number of meanings but in context in which it appears in the Act it means (1) a house or other shelter that is the fixed residence of a person, a family or household ...
>
> The meanings ascribed to the word 'principal' include first or highest in rank, importance, value, etcetera, chief or foremost. Taken together a person's principal home is the place of residence that is his or her chief or first and foremost residence ...
>
> Having regard to the principles in the authorities and to the ordinary meaning of the expression what is Dr Kulshrestha's principal home? The place in which Dr Kulshrestha resides is 47 Braeside Avenue, it is the place where he cooks, eats, sleeps, washes himself and his clothes and generally lives. It is the place where he usually resides and it is the place that he regards as home.
>
> 47 Braeside Avenue is part of a larger building comprising both it and 47A Braeside Avenue. At one time when he and his family lived together he and they resided in the whole of the building. The whole of the building could then be regarded as his home. We are not satisfied that he has resided in the whole building at the relevant times. Indeed, we are satisfied on the basis of his evidence and of the plan that the building is capable of being divided into two residences but may also be used as one. On the basis of the tenancy agreement we are satisfied that it has been divided into two and that his tenants have exclusive possession of 47A Braeside Avenue. Dr Kulshrestha is not entitled to enter that part of the building at will. He may only enter in accordance with the terms of the lease and insofar as the law permits him to do so. He may not carry out the activities of daily living in 47A Braeside Avenue or indeed any of them. In relation to 47A Braeside Avenue Dr Kulshrestha is a landlord and his tenants, rather than Dr Kulshrestha are the people for whom it is home. It is not Dr Kulshrestha's home and therefore we are satisfied that it is not part of his principal home. We find that his principal home is limited to 47 Braeside Avenue and does not encompass the whole of the building.

The AAT decided that the decision in *Kulshrestha* must be followed, and that the flat was not part of Leung's principal home.

The Tribunal next considered whether a value could be attributed to the asset. Departmental guidelines state that 'assets are generally assessed at their net market value'. It noted:

> The net market value is the amount you would expect to receive if you sold the asset on the open market less any valid debts or encumbrances. Prima facie this would indicate that as in this particular case the asset cannot be separately sold, its value on an open market being nil, then it has no value in the hands of the respondent.

The Tribunal then turned to *Bowden v Repatriation Commission* 15 AAR 325 at 326/7 where it was held that the fact that a flat was an unrealisable asset could only be taken into account pursuant to the hardship provisions of the Act, not in determining the value of assets.

Formal decision

The decision of the SSAT was set aside, and the matter remitted to the Department with the direction that the flat on Leung's property was an asset for the purposes of the *Social Security Act 1991*, and that the value of that asset was to be ascertained after full inspection and assessment by the Australian Valuation Office.

[H.M.]

Youth allowance independent rate: paid work in period or periods of employment over 18 months

MORAN and SECRETARY TO THE DFaCS (No. 2003/1003)

Decided: 7 October 2003 by R.G. Kenny.

The issue

Moran applied for Youth Allowance ('YA') to assist him during his full-time study at University of Queensland. He sought to be paid at the 'independent' rate, meaning that his payments would be calculated without regard to his parents' earnings. However, in January 2003 Centrelink determined that he could not be paid at the independent rate, a decision affirmed at the SSAT in May 2003.

The law

The meaning of 'independent' for social security purposes is contained in s.1067A of the *Social Security Act 1991* ('the Act') which provides:

> **1067A.(10)** A person is independent if the person has supported himself or herself through paid work consisting of:
>
> (a) full-time employment of at least 30 hours per week for at least 18 months during any period of 2 years; or
>
> (b) part-time employment of at least 15 hours per week for at least 2 years since the person last left secondary school; or
>
> (c) a period or periods of employment over an 18 month period since the person last left secondary school, earning the person at least the equivalent of 75% of the maximum Commonwealth training award payment that applied at the start of the period of the employment.

Here the question was whether Moran had earned, over an 18-month period, the equivalent of 75% of the relevant applicable training award payment.

Background

From October 2000 to August 2001 Moran was employed part-time with Myer Stores and earned $8362. He was then unable to work for some 10 months due to chronic fatigue syndrome, but from July 2002 he again worked until December 2002, earning $8465. In addition to his earnings, he received two payments of $4031 from REST Superannuation as income protection insurance payments, in respect of the periods October 2001 to April 2002, and April to

June 2002. Moran conceded that these two payments could not be construed as payments received from paid work, but argued that if they were to be excluded from a calculation of his earnings, so the periods to which they referred should be excluded from any calculation of the period of time over which he earned income. His earnings from Myer Stores exceeded the threshold set by s.1067A of the Act, but had been earned (when the periods of unemployment through illness were included) over longer than 18 months. In addition, Moran contended that had he not been ill and had his average monthly earnings continued, he would have earned more than the threshold income in under 18 months.

Centrelink argued that the 18-month period referred to in s.1067A was a single time frame and could not be an aggregation of separate time periods.

The decision

The Tribunal noted that s.1067A(10) of the Act requires that the person have '*supported himself or herself through paid work*' and concluded that this was limited to one of the three forms of employment specified within ss.(a), (b) and (c) of that section. Although other payments — such as income protection payments — could have some nexus to paid employment, these could not be taken into account in determining whether a person had supported him or herself within the terms of s.1067.

Moran had earned a total of $16,827 which exceeded the relevant Commonwealth training award, but had done so in two separate periods of employment spanning some 25 months broken by a 10-month period of unemployment. The Tribunal noted that the term '18 month period' in s.1067A(10) is expressed in the singular, whereas elsewhere in the paragraph the word 'period' is used in both singular and plural form, and concluded that in s.1067A(10) it referred to a single, unbroken period of 18 months.

As Moran had earned more than 75% of the relevant Commonwealth Training Award but not in a single unbroken period of 18 months, he did not fall within the definition of 'independent' as provided in s.1067A(10) of the Act.

Formal decision

The Tribunal affirmed the decision under review.

[P.A.S]

Farm Restart Re-establishment Grant: whether a farm owner, valuation of shares in private company

HUNT and SECRETARY TO THE DFaCS
(No. 2003/741)

Decided: 1 August 2003 by W.J.F. Purcell

Background

Hunt owned 66 shares in Nalang Properties Pty Ltd ('the Company'), a family company which owned land separately farmed now by Hunt's brothers, and a neighbour who had been granted a sub-lease by Hunt. Hunt was a partner with his wife, in the Murrabinna Partnership ('the Partnership'), which formerly farmed a portion of the Company's land pursuant to a lease. However, Hunt executed an under-lease of the partnership lease to his neighbour, for the period 1 March 1999 to 28 February 2004.

Hunt lodged a claim for a Restart Re-establishment Grant. On 3 August 2000 the claim was rejected on the basis that Hunt still had an interest in farming, due to his shares in the Company, which were considered to be a farm asset. On 4 June 2001 the SSAT set aside the decision, and substituted a decision that the shares were a personal asset, rather than a farm asset, and remitted the matter to Centrelink for further consideration. On 24 July 2001 a delegate reconsidered the matter and decided that the under-lease constituted an interest in farming, and that the value of the shares was likely to exceed the then asset limit of $157,500. On 2 August 2002 the delegate considered that as the under-lease expired within a five-year period, Hunt could not undertake not to return to farming within five years. On 22 August 2001, a complex assessment officer assessed the value of Hunt's shares in the Company at $370,410.

On 3 September 2001, an Authorised Review Officer affirmed the decision, and stated that he considered that the shares were clearly not primary production assets, and that the asset value of the shares could not be reduced by the value of primary production liabilities (ie liabilities of the farming partnership Murrabinna Pastoral Company). In his opinion the only way the value of the shares could be reduced would be if Hunt had borrowed money using his shares as security. The Authorised Review Officer could see no evidence of that, and he found that Hunt's assets were worth $370,410, using the net asset backing method. As the assets were in excess of the assets limit of $157,500, the Authorised Review Officer noted, in addition to affirming the decision, that the lease reverted to Hunt at the end of the sub-lease, in February 2004, and there was some doubt as to whether he would then be classed as a farm owner or operator, at that time.

Legislation

The Farm Help Re-establishment Grant Scheme 1997, formulated under s.52A of the *Social Security Act 1991* ('the Act'), defines a 'farm owner or operator' as 'a person who has a right or interest in the land used for the purposes of a farm enterprise'. Qualification for the Re-establishment Grant ('the Grant') is set out in Division 2, which provides:

> **Division 2 Qualifying for the re-establishment grant**
>
> 3.2 Who is qualified for a re-establishment grant?
>
> (1) A person is qualified to receive a re-establishment grant if:
>
> (a) the person was eligible to apply for the re-establishment grant when the person applied; and
>
> (b) the person's farm enterprise has been sold (and completion of the sale has taken place) within 1 year, or such longer period as the Minister, in writing, allows under section 3.2A, after:
>
> (i) if the person has received farm help income support — the person last received farm help income support; or
>
> (ii) in any other case — the person applied for the re-establishment grant; and
>
> (baa) the sale is completed before 1 December 2004; and
>
> (ba) immediately before the sale the person was effectively in control of the farm enterprise; and
>
> (c) the sale was on commercial terms and at arm's length; and
>
> (d) the person and, if the person had a partner when the person applied for the re-establishment grant, the partner (whether or not they remain partners):
>
> (i) are not farm owners or operators; and
>
> (ii) do not own any farm plant or machinery, farm livestock or other assets essential for the effective running of a farm enterprise; and
>
> (e) the person has complied with any direction under Division 2 of Part 2 of this Scheme or section 13A of the Act to obtain advice; and