Pension entitlements for farmers

Means test or mean test?

Malcolm Voyce

Farmers' pensions depend on findings of fact that are both subjective and unpredictable. Sooner or later the courts will have to deal with the issue of entitlement.

Drought, low commodity prices and declining rural property have brought renewed anxiety to retiring farmers about their eligibility for the pension.

Frequently, retiring farmers want not to be dependent on pensions, but in their ambition to leave a viable unit to their successor they may be forced to consider the pension. The receipt of a pension by a farmer may smooth the transition of the farm to a successor, avoiding a lull in production.

Typical situations are:

- a farmer has retired from the farm to a nearby town and a child has taken over the farm but the title remains in the parents' hands. The farm may be making little return to support the farming child or to assist the farming parents in their retirement;
- a farmer may never really 'retire' from the farm but may go on living in the farm house while the farm, because of the rural recession or his declining management, may earn little or no money.

Background to means tests

I look at the hurdles farmers may have to face to obtain a pension by an examination of the means tests for both income and assets. Special consideration is then given to the hardship tests. I exclude from consideration the recent assistance for farmers under the rural adjustment scheme.

Pensions were originally introduced in 1908 to establish a system which was designed to provide 'equitable aid without weakening individual initiative or impairing the Anglo-Saxon characteristics of self-help and manly independence'.[1] The original scheme applied to men over 65 years of age and (from 1910) to women over 60 years. Pensions were means tested on the basis of both income and property.

The removal of the assets test from pension eligibility requirements and its replacement by an income test occurred in 1977 following pressure from the National Country Party as many farmers were handicapped by being asset rich but income poor.

The reintroduction of an assets test in 1985 was because there was apparent evidence of extensive and increasing avoidance of the income test by people who did not need the pension. The Government decided to reintroduce a test on both income and assets along similar lines to the previous test. The new test recognised the value of the principal home by excluding the value of the home, although a higher level of allowable assets was recognised for non-home-owners. As regards home ownership, the exception allows the house and surrounds of two hectares (see s.1108 *Social Security Act* 1991 'the Act'). This takes no account of the value of the house. This test is prejudicial to rural dwellers as it allows city dwellers a greater advantage because of higher land values on smaller land areas.

The assets test was accompanied by hardship provisions. In introducing the *Social Security and Repatriation (Budget Measures and Assets Test) Bill* 1984, the Minister described the object of the hardship provisions as follows:

> The exclusion of the principal home and the asset exemption levels mean that the asset test will not affect the majority of pensions. However, special provision is made to ensure that people affected by the assets test are not placed in severe finan-

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cial hardship. In keeping with the intention of the assets test, these provisions will generally apply only where it would be unreasonable to sell or raise money on an asset, and that as a result of not exempting all or part of the assets the pensioner would not have sufficient income. They will be administered on a case by case basis by the examination of individual circumstances, but will not be generally available to people whose hardship results from having deprived themselves of assets.

The assets test was introduced without consultation with groups affected and it resulted in major outcries from interest groups. The concessions in the form of the hardship provisions were of particular help to farmers.

The means test (income or assets) which is applied is the one which will lead to the lowest level of pension being granted. If an applicant has income above a certain level he/she will not be granted a pension. If an applicant has little income but assets (which could be sold or leased or mortgaged) a pension may not be granted.

Shaver has observed that the history of the age pension has been associated with conflict between two contradictory elements, namely 'a welfare objective deriving from conceptions of human need and a political objective flowing from arguments about social rights'.[2]

For farmers faced with the hardship test, this conflict is resolved in favour of the welfare objective. Under this conception the possibility of a farmer/retiree obtaining a pension depends on the applicant's capacity to bring his/her case within the provisions of the *Social Security Act*. In effect, this means there is no automatic right to a pension as social security administrators must make complex findings which are subjective and discretionary in nature. The consequence is that there are no delineated rights for a pension; rather pensions are discretionary welfare measures.[3]

Income test

A farmer with income may not receive the full pension and, in the case of married couples, their combined income is taken into account in assessing their eligibility for a pension. In calculating the profits of a farm business to determine 'income' for the purposes of the *Social Security Act*, stock on hand at the beginning and end of the trading year should be taken into account (*Fisher v Secretary DSS* (1991) ASSC 192-123).

Assets test

Under the assets test, property such as real property, shares, etc. reduce the weekly pension by $2 a week and $1000 for the assets if the assets exceed the allowable limit. The allowable threshold is quite substantial and is increased upwards every year to allow for inflation. The current assets test is, as at 2 July 1992:

	Home Owner	Non-home owner
Single	112 500	193 000
Married	160 000	240 500

A farmer who retires on his property can include with his residence a curtilage of 5.5 acres around his home. There are rigid rules stopping farmers subdividing rural property which prevent them from keeping their house and selling the rest of the property. Farmers must keep all their property or sell the lot. This contrasts with urban properties where an owner may be able to subdivide or rent part of his property.

It is not permissible to get rid of assets by, for instance, giving them to relatives in order to claim the pension (see ss.1105-1111 and 1123-1126 of the Act).

The hardship tests

As a result of pressure from various interest groups, the proposed effects of the assets test were modified by hardship tests.

Farmers complained the assets tests threatened to 'unravel the traditional fabric of rural Australia' as they were designed to stop people with large assets from obtaining a pension and they argued rural pensioners would be discriminated against as thousands would be:

> faced with two equally distressing choices — choices that would not have to be made by the urban elderly. They can choose to sell their property or they can choose to live beneath the poverty line for their remaining years, on a pay-as-you-die basis, and go to their graves knowing their children will be left with a debt to the Government they cannot pay without selling the farm.[4]

The tests in the form they were introduced mean the value of assets is treated differently where the Secretary of the Department of Social Security accepts the normal application of the assets test would place pensioners in severe hardship. The hardship provisions cater for people, typically retired or non-active farmers, who have substantial assets which produce little or no income and which cannot be sold or used for a loan.

Thus the full '*blast*' of the assets test will be disregarded where it would be unreasonable or impossible to sell or raise money on an asset and, as a result of not exempting all or part of the assets, the pensioner would have insufficient income.

Such a pensioner may not be '*out of the woods*' yet because a person who is regarded as having an unsaleable asset is still subject to a '*special notional income test*' which may reduce the pension.

A provision of special concern to farmers was introduced by s.1130(6) of the Act which allows, in the case of family farms, for the notional rate in certain circumstances to be modified. This enshrined in a statutory form principles previously adopted by the Tribunal.[5]

Hurdling over hardship

Four preconditions must be met before the full benefit of hardship provisions is applicable to farmers. This may affect their pension rights.

Sections 1129 and 1130 substantially reinstate s.7 of the 1947 Act. Most of the previous case law is still applicable.

Hurdle 1: an unrealisable asset

This applies where a person cannot sell or realise an asset or use the asset as security for a loan (s.1130(1). An unrealisable asset is defined by ss.11(12) and 11(13).

> 11(12) An asset of a person is an unrealisable asset if:
>
> (a) the person cannot sell or realise the asset; and
>
> (b) the person cannot use the asset as a security for borrowing.
>
> 11(13) For the purposes of the application of this Act to a social security pension, an asset of a person is also an unrealisable asset if:
>
> (a) the person could not reasonably be expected to sell or realise the asset; and
>
> (b) the person could not reasonably be expected to use the asset as a security for borrowing.

Where a person is not receiving a full pension because of an 'unrealisable asset' and where the 'Secretary is satisfied that

the person would suffer severe financial hardship' the Secretary may determine that the assets test does not apply. A property has been held to come within the description of 'unrealisable' where it failed to attract meaningful or realistic bids when placed for sale (*Reynolds* 32 *SSR* 404).

In the case of *Farrow* (1986) 32 *SSR* 404, the Tribunal considered personal factors as being of relevance such as the applicant's age, health and family circumstances, the circumstances in which the applicant came to hold the land, financial resources and so on.

In *Secretary DSS v Copping* (1987) 12 ALD 634 it was held that in considering what is an unrealisable asset, the Secretary should consider all the circumstances, including the personal relations of those concerned in the property which, in his judgment, might reasonably be taken into account by 'the person' or the person's spouse, as the case may be, in deciding how the property was to be exploited to produce income.

In regard to an unrealisable asset and the words 'could not be expected to sell' the Federal Court in *Repatriation Commission v Hall* (1988) 15 ALD 84 held there is no need to characterise personal or social factors as against social and economic ones and thereby exclude the former from consideration.

In *Hall* the Court saw the test as an objective test:

> . . . in our opinion, it is clearly an objective test. Though the test takes account of personal circumstances, it is not dependent upon the personal view of the claimant for a pension as to what should or what should not reasonably be done. As was said by Jenkinson J in *Copping's* case, the decision as to what is not reasonable is one for the Secretary, Department of Social Security, or by the Tribunal on review, though it is to be made after taking all relevant circumstances, including personal circumstances, into account. Among the relevant factors to be considered are the purpose or object of the assets test provisions and the aim of the legislation to ensure that pensions are not paid to those who can afford to maintain themselves. The test of reasonableness takes into account the public or community interest as well as the interests of the claimant for a pension and of other persons with whom the claimant is associated. [at 86]

Such a personal circumstance was:

> . . . the commitment of the family to the land, the involvement of succeeding generations in the one property and the lack of a sufficient return from the property to support more than the one generation which leads so often to the conclusion that the elderly parents who own the farm property could not reasonably be expected to sell or realise the property and that they would suffer severe financial hardship. [at 86]

The requirement of reasonableness has been 'generously interpreted' in some cases not to require farmers to sell their family farms to be eligible for the pension. These decisions coincided with departmental policy on family farms. This policy is now reflected in the new s.1130(6) of the Act.

Hurdle 2: disposals and severe financial hardship

Section 1129 gives the Secretary a discretion to disregard a disposal of income or assets. The relevant criteria were developed so that a person would not dispose of income without adequate consideration so they could obtain a pension. There are allowable levels of annual disposals.

Where an elderly farming couple placed themselves in financial hardship when they were not legally obliged to do so by paying their child's loan, their case was not deemed eligible under the hardship provisions (*Noble v Secretary DSS* 18 ALD 621). Likewise where an *ex gratia* payment was made for past services to a child, the Tribunal held the disposition would not be disregarded (*McClelland v Secretary DSS* (1988) 15 ALD 315).

Section 1129(1) requires an applicant to suffer 'severe financial hardship' which has been held to be defined as 'arduous financial suffering' (see *Lumsden v Secretary DSS* (1986) 34 *SSR* 430). Such a determination will depend on the applicant's income and whether he/she has cash reserves available, although certain cash and asset reserves are allowable to meet the vicissitudes of life (see *Doyle v Secretary DSS* 1986 10 ALN 193). In some cases, departmental guidelines have been followed and their use judicially upheld to hold that severe financial hardship may be present if the readily available funds do not exceed $6000 as at 2 July 1992 (*Lumsden*).

Hurdle 3: the application of a notional rate where there is an unrealisable asset

Section 1130(5) says where there is an unrealisable asset there will still be some reduction in the value of the unrealisable asset causing the hardship. The person's maximum payment rate is lowered to what is called the 'notional annual rate of ordinary income', often called 'deemed income'.

The person's annual rate of income which could be expected to be obtained from unrealisable assets is reduced to 2.5% of the value of a person's assets or the amount that could reasonably be obtained from a purely commercial application of the assets test, whichever is the lesser.

Hurdle 4: the special provision for family farms

During the late 1980s successive Ministers were pressured to alleviate the effect of the assets test on farmers. A typical response was the press release by the Minister for Social Services on 26 May 1985:

> The Department will also accept that it would not be reasonable to expect a pensioner to sell a farm, or land larger than the normal building block, if they have lived on the farm for more than 20 years or have been farmers for over 20 years. If there are other special reasons, a period of less than 20 years may be accepted.

Accordingly departmental guidelines were given that the 'deemed income' of 2.5% was to be assessed on the property in such situations.

In 1987 the Act was amended so a deemed income of 2.5% was to be assessed on the property in such circumstances.

The *Social Security Act* 1947 by 1991 gave limited relief through the application of a notional rate of income where there was an unrealisable asset. Case law had found one of the circumstances where an asset was deemed 'unrealisable' was the special circumstances of family farms, where to insist that the farm be sold would mean that the livelihood of the child would be destroyed and the farm would pass out of the family's hands.

Cases concerning family farms and 'unrealisable assets' in the new context of changes in the law in 1991 are now examined.

The *Williamson* case (1986) 10 ALD 19 was heard in 1986. The applicant applied under the *Veterans' Entitlements Act* which contains similar provisions to the *Social Security Act*. At that time the farm had been in the family for several generations. The veteran owned three rural blocks, two of which were made collateral security when he lent money to the son on the farm to buy another block to make the whole farm viable. The income from the farm was not sufficient to pay the mortgage nor to pay rent to the parents.

The court heard a report by agricultural consultants that the farm was running to maximum capacity and while the farm was generating sufficient income to support the son, there was insufficient to support the parents.

The Tribunal accepted that the Williamsons could not be expected to sell or lease the farm due to the special nature of farming and the way properties are inherited:

> In our opinion, in the application of the income and assets tests, it is necessary to have regard to the special circumstances which confront families whose livelihood is dependent upon farming or grazing. Whatever may be the formal arrangements between parents and their children, it is common that and expected that farming properties will be passed from parent to son and from son to grandson. Frequently, this must be achieved without there being any financial benefit to the parent arising from the disposition of the farm to the younger generation. Of necessity, the younger generation will often not have the financial resources required to purchase the property from the parent.
>
> The property must pass by will or by gift or through a trust structure or a sale involving an exchange of cheques. We think that these means of passing on farm properties from one generation to another should not be discouraged. We would regard it generally as unreasonable that viable farm properties that are required for the support of one generation should be broken up by sale simply because of the older generation's need for support. It is of no overall benefit to Australia to discourage the concern which families have in maintaining and working farm properties and in passing those properties from generation to generation...
>
> In principle, we think that the special position of farming and grazing families ought to be taken into account and that it is generally unreasonable to expect parents to sell a farm when the farm is suitable for and required and used for the support of a child or children. [at 22]

The court held it was unreasonable to require Williamson to sell or lease the farm and destroy his son's livelihood particularly as the slump in the value of rural properties may have resulted in a substantial loss to both Williamson and his son.

In *Henry* (32 *SSR* 403) the farm was not viable and the best economic option was for it to be sub-divided. There was no family member to take over the farm. The Tribunal concluded:

> In determining the question of reasonableness, it is necessary to keep in mind the special relationship which farming families have with the land. In *Williamson and Repatriation Commission* (delivered 24 June 1986) emphasis was laid upon the interest which farming families have in handing down a viable farm from one generation to the next and of the concern which they and the community have in ensuring that viable farms continue to operate and support the younger generation and are not broken up simply because the older generation has a need for funds. In *Williamson's* case it was pointed out that in farming families it is often understood that a farm will be preserved for the younger generation, whatever might be the precise legal arrangements or legal ownership in force. This is indeed one of the aims of a family discretionary trust, namely, to overcome the problems of transfer of ownership from one generation to another. [at 403]

The Tribunal differed from *Williamson* and held the farm should be sold:

> We do not ourselves think it reasonable that the community should support Mr M.H. Henry and Mrs I.F. Henry so that the trust is able to maintain the whole of the Glenburn farm while it appreciates in capital value to the ultimate benefit of the four grandchildren. Looking at the farm from the point of view of the children, it seems to us inevitable that, sooner or later, it will be sold as a whole or by way of sub-division. [at 403]

The *Social Security Act* 1991 re-enacted the departmental policy to allow for a modification of the notional rate of income (deemed income) in the case of family farms. The new s.1130(6) as to family farms should be understood in that context. Section 1130(6) reads:

> If:
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> (a) an unrealisable asset is a farm; and
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> (b) the farm is operated by a person who is a family member of the person to whom this section applies; and
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> (c) it is not reasonable to expect the farm to be used for another purpose;
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> the Secretary, in working out the amount per year that could reasonably be expected to be obtained from a purely commercial application of the farm, is to have regard to the overall financial situation of the person operating the farm.

In practice, the Social Security Department has adopted the following method of calculation. The deemed income of a farmer for the purposes of this section, will be the lesser of the following three options: (a) the commercial market rent value; or (b) 2.5% of the market value of the land; or (c) an amount of half of the net income above the family allowance supplement level.

In the case of a couple with a child where they would receive $15 000 by way of family allowance supplement; if the income from the farm was $17 000 their deemed income would be $2000. They would therefore receive half of $2000 which is $1000.

Conclusion

The matter of farmers obtaining pensions aptly illustrates both the problem of rules which give administrators the capacity to make wide ranging findings of fact that are subjective in nature, and the problem of discretions in administrative law.

For instance, in determining the facts the Secretary must consider whether it is reasonable for the farm to be used for another purpose. The Secretary is also required to assess the annual rate of income that could reasonably be expected to be 'obtained from a purely commercial application' of the person's assets. Further, the overall financial situation of the farm must be considered. Not only is the assessment of the yield of the property a question of judgment, but the Department is required to make economic and long-term assessments of the farm (taking into account seasonal adjustments) and must consider the attitudes and wishes of the pensioner.

Statutory formulations which are a mixture of rules requiring a wide range of factual determination and discretionary provisions arguably derogate from the full realisation of a welfare state where rights are clearly delineated and enforceable by legal redress.

Another difficulty for retiree farmers obtaining pensions is that determining eligibility still depends on a judicial testing of the deployment of the administrative 'rules of thumb' in the Secretary's s.1130(6) calculation.

This method of calculating pensions may be outside the Act. It has yet to be tested for compliance with the rule that a policy must be within the confines of the empowering statute (*Green v Daniels* (1977) 13 ALR 1). Thus although there is nothing to prevent a government department from developing guidelines and policy to be applied in the exercise of statutory powers, particular decisions may be held to be invalid if they have not taken into account the merits of each case.

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tions on police verbal and the rise in the power of the Internal Intelligence Unit of the Corrective Services Department. (Brown and Duffy 1991, above, pp.198-202). But some of the individual cases investigated by the ICAC occurred prior to the Yabsley regime and the IIU was established in 1985. It may have been worth investigating whether another condition for the rise of prison informants was the state of the internal administration of the Department of Corrective Services during and after the scandal surrounding the early release on licence scheme in NSW in the early 1980s and the role of key senior officials common to both periods. The Jackson licence release scheme was referred to the ICAC in August 1988 by then Premier Greiner (*SMH* 'Jackson's jail release scam to go to ICAC' 19 August 1988). For a detailed treatment of this period see Chan, Janet, *Doing Less Time*, Sydney Institute of Criminology, 1992.

8 *Lance William Chaffey & Ors v Independent Commission Against Corruption* Supreme Court of NSW Administrative Law Division 29 January 1993 unreported.

9. *Independent Commission Against Corruption v Chaffey & Ors* NSW Court of Criminal Appeal 30 March 1993 unreported.

10. Under s.31(1) of the *Independent Commission Against Corruption Act* 1988 the Commissioner has a discretion to hold hearings 'in public or in private, or partly in public and partly in private'. The legislation had been amended in 1990, the earlier form of s.31(1) providing that 'a hearing shall be held in public, unless the Commission directs that the hearing be held in private'. The amendment was prompted by the concerns of the Joint Parliamentary Committee of Parliament set up under s.63 of the *ICAC Act* 'to monitor and to review the exercise by the Commission of its functions' that 'reputations can be unfairly and unnecessarily damaged in public hearings'. Under s.31(3) 'the Commissioner is obliged to have regard to any matters which it considers to be related to the public interest.' Section 12 provides that 'in exercising its functions, the Commission shall regard the protection of the public interest and the prevention of breaches of public trust as its paramount concern'.

11. A further development in this inquiry is the laying of a charge of contempt of the ICAC against *Sydney Morning Herald* reporter Ms Deborah Cornwall. The charge relates to her refusal to reveal her sources in relation to an article in which she quoted an unnamed police officer stating that 'it was Neddy who dobbed in' a nominated prisoner for a murder and that this person 'might be interested to know that. He is doing life at the Bay as well'. Mr Temby has argued that the statement was wilfully false information designed to discredit Smith and warn off other potential ICAC informants. The journalists code of ethics protecting the confidentiality of sources is not usually regarded as extending to the provision of knowingly false information. While Ms Cornwall appeared to acknowledge before the ICAC that she had been misled, in a later hearing before the Supreme Court her counsel challenged the contention that the statement was obviously false. The matter has been set down for late April. See Malcolm Brown, 'Herald reporter to face contempt charge', *SMH* 26.3.93; Brown, Malcolm, 'Contempt charge to go to hearing', *SMH* 27.3.93.

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Solicitors advising farmer retirees might well bring proceedings testing the applicability of these methods of calculating pensions when faced with particular needs of their clients. Resolving this uncertainty would certainly help farmer retirees take more decisive action over the handing down of the family farm. Another uncertainty is the fact the *Social Security Act* is always being amended.

The eligibility of farmers for pensions depends on findings of fact which are subjective in nature, and by implication, unpredictable. The current approach to assessing pensions is based on a new government policy as yet untested in the courts. The implication is that farmers are welfare recipients, not the holders of clear entitlements.

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LAWYERS AND SOCIAL WORKERS IN COLLABORATION

The School of Social Work at the University of New South Wales is conducting research into ways of facilitating and improving collaboration between social workers and lawyers. The project is funded by the Law Foundation of New South Wales and aims to examine areas of practice in which the roles of the two professions overlap or where they share common skills and knowledge.

The research will identify the respective tasks undertaken by social workers and lawyers in these areas, and the clarity of mutual understanding. It will place particular emphasis on articulating and publicising innovative strategies for collaboration between the two professions. A further aim is to develop new methods of teaching such skills and strategies to undergraduate students and in continuing education.

The researchers will conduct interviews with practitioners of both disciplines as well as convening group discussions on key issues identified. The results of the research will be published in early 1994 and will be disseminated as widely as possible.

The coordinator of the project, Mick Hillman, is the social work placement supervisor at Kingsford Legal Centre in Sydney. The centre is a compulsory placement for students enrolled in Australia's only combined Social Work/Law degrees program.

If you are interested in discussing or participating in this research, please contact Jane Hargreaves, (02) 697 4764 or Mick Hillman (02) 398 6366.