

A COMPARISON OF UNEMPLOYMENT BENEFITS AUSTRALIA AND THE U.S.

By

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Australia's scheme of income support for the unemployed was introduced in 1944 as part of the Labour Government's package of post-war reconstruction measures. The Unemployment Benefit (UB) provisions, which became effective in 1945, were contained in the *Unemployment and Sickness Benefits Act* (Cth), which was one component of the federal program of social security.¹ Prior to 1945, benefits for the unemployed had been provided by individual States and charitable organisations and were generally granted in-kind rather than in cash.² In 1947, all of the separate social security laws were codified and incorporated in the *Social Security Act 1947* (Cth) [hereinafter "the Act"]. The Unemployment Benefit provisions, which were contained in Part XIII of the Act, were modelled on New Zealand legislation, which in turn had been based upon the 1911 United Kingdom legislation.³ A key distinction of the Australian legislation, however, was that the Unemployment Benefit scheme operated on a non-contributory, tax-funded basis, i.e. eligibility for benefits was not dependent upon the accumulation of credits or contributions. This feature has been retained in the Act today and there is no indication that a contributory scheme is contemplated for Unemployment Benefits or other social security provisions. The purpose of this article is to describe the Australian Unemployment Benefit program and compare it with the U.S. program. With this in view, the sections following discuss the Department of Social Security (DSS) which administers the social security program, including Unemployment Benefit; the benefits available to the unemployed; the benefit determination and appeals processes, and finally, the employment programs of the United States and Australia are compared.

The Department of Social Security

In Australia the Unemployment Benefit is administered by the Department of Social Security (DSS), a federal agency established in 1939 and headed by the Secretary of Social Security. In addition to Unemployment Benefits, DSS administer social security legislation for various benefit programs including, but not limited to, the aged,⁴ invalids,⁵ the sick,⁶ widows,⁷ sole parents,⁸ and families with children.⁹ With a staff of approximately 17,000 in more than 300 locations throughout Australia, the DSS is decentralised and incorporates a Central Office in Canberra, the national capital. State offices located in the six state capital

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1. Earlier enactments included the *Invalid and Old Age Pension Act (1908)*, the *Maternity Allowance Act 1912*, *Child Endowment Act (1941)*, and amendments to the *Invalid and Old Age Pension Act* in 1943 which added allowances for wives and children of invalid pensioners and benefits for funeral costs of deceased, aged and invalid pensioners.
2. For a concise description of the history of unemployment relief in Australia see B. Cass, *Social Security Review Issue paper No.4, Income Support for the Unemployed in Australia: Towards a More Active System*, Canberra, 1988, at 11-15.
3. P. Hanks, *Administrative Law — A Case Study — Unemployment Benefits*, Melbourne Faculty of Law Monograph, Monash University, Melbourne, at 1.
4. *Social Security Act 1947* (Cth), Part IV Division 2.
5. *Ibid.*, Part IV, Division 3.
6. *Ibid.*, Part XIII, Division 2.
7. *Ibid.*, Part VI.
8. *Ibid.*, Part V.
9. *Ibid.*, Part X.

cities — Sydney, New South Wales; Melbourne, Victoria; Brisbane, Queensland; Hobart, Tasmania; Adelaide, South Australia and Perth, Western Australia — serve as administrative headquarters for each State and Territory. The DSS has 20 Areas (19 Areas and Tasmania). Most Area Offices are responsible for 10 to 12 Regional Offices within each Area. Within each State or Territory, DSS maintained Area Offices that functioned as micro management within the State Office. However, in 1988-89 there was a major devolution of functions from State Offices to the 20 Area Offices. With this devolution, the Area Offices now perform a number of functions including benefits delivery, control and recovery, training, personnel, and finance and budgets. The purpose of this shift of responsibility to the Area Offices was to provide more responsive and efficient support services to staff working in the Regional Offices, to give the Area Managers the authority to manage most functions in their areas, and to improve communication within the DSS by fostering a close nexus between the Area and Regional Offices. There are over 200 Regional Offices, including Unemployment Benefit District Offices, located in the metropolitan, provincial and larger rural centres. In addition, there are 16 small offices, including Local Offices, located in country towns; these offices provide information and act as a channel between clients and their Regional Office. The Regional Offices also provide visiting services to the more sparsely populated areas. It is the Regional Offices that provide the bulk of the services to DSS clients.¹⁰

Another federal agency that works closely with DSS in the administration of Unemployment Benefit is the Commonwealth Employment Service (CES). The CES assists unemployed individuals in finding employment. In order to file a claim for Unemployment Benefit the applicant must be registered as unemployed with the CES.¹¹ Another recent development that directly affects the Unemployment Benefit delivery system is the co-location of DSS and CES offices. Where this is not possible, the DSS and CES offices are usually located within close proximity to each other.

The Australian Unemployment Benefit Program

The Unemployment Benefit Program reflects a “full employment” policy that is designed to compensate all workers for the loss of earnings due to a permanent separation from employment.¹² Although Unemployment Benefits are not predicated upon any particular categorisation of employee, all claimants must, as a minimum requirement, be capable of undertaking and willing to undertake suitable paid work. Generally, the program covers all workers and salaried employees.

The *Social Security Act 1947* (Cth) provides that a person shall be entitled to Unemployment Benefits if he or she (1) is not in receipt of an age pension, an invalid pension, a wife’s pension, a spouse career’s pension, a supporting parent’s benefit, or a service pension;¹³ (2) is a male aged 18 to 64 or a female aged 18 to 59;¹⁴ (3) is an Australian resident¹⁵

10. For a more detailed description of the Department of Social Security organisational framework, see 1988-89 *Department of Social Security Annual Report*, Department of Society Security at 3-8 and 23-25.

11. Act s. 116(1)(d). The CES also administers the “work test”, an integral part of the Unemployment Benefit eligibility process. See *infra* text s. 3.(d).

12. See Hanks, *supra* note 3, at 1.

13. Act s. 116(1).

14. *Ibid.*, s. 116(1)(a). Prior to January, 1988, persons aged 16 to 18 were entitled to receive Unemployment Benefits. Since then, persons who qualify for Unemployment Benefits receive a job search allowance which is paid at the unemployment rate for 16 to 18 year olds. Act s. 117A. See *infra* text s. 3.(h).

15. The Act provides that an Australian resident is one who resides in Australia and who is either an Australian citizen or a person who has been granted an entry permit, a return endorsement or a resident return visa in force under the Migration Act 1958. Act s. 3.

who has remained in Australia throughout the relevant period;¹⁶ (4) has satisfied the Secretary that he or she was unemployed through the relevant period¹⁷ and is capable of undertaking, and willing to undertake, suitable paid work and has taken reasonable steps to obtain such works;¹⁸ and, (5) is registered as being unemployed by the Commonwealth Employment Service.¹⁹ In addition, the Act provides that a person is not qualified to receive Unemployment Benefit unless he or she satisfies the Secretary that unemployment is not due to the person being, or having been engaged in an industrial action and that unemployment was not due to another person being or having been engaged in industrial action.²⁰ Finally, a person is not entitled to Unemployment Benefits if his or her unemployment is due to a voluntary act,²¹ misconduct as a worker,²² or refusal to accept a suitable offer of employment.²³

The term "unemployed" is not defined in the *Social Security Act 1947* (Ch). However, it has been considered by the Administrative Appeals Tribunal²⁴ on numerous occasions. Generally, "unemployed" means "not being engaged in work of a remunerative nature".²⁵ The Department of Social Security regards a person who "is not engaged in work for reward or payment and is not substantially committed to or occupied in other activities rather than employment and ... is in the labour market" as unemployed.²⁶ The Department of Social Security makes a special exception for certain individuals who are engaged in full and part-time activities. For instance, long-term unemployed beneficiaries engaged in approved vocational training or full-time volunteer work are regarded as unemployed.²⁷ In addition, persons on extended leave without pay who lose seniority rights may be considered unemployed.²⁸ Moreover, persons who are temporarily not working due to seasonal closures may be regarded as unemployed, provided that during the period of closure the employee is not covered by recreation leave entitlements or payments for public holidays.²⁹ Finally, the

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16. *Ibid.*, s. 116(1)(b). A person is deemed to have remained in Australia throughout the relevant period notwithstanding a temporary absence from Australia provided that such absence is not longer than 3 months. If a period of temporary absence is longer than 3 months, a person is deemed to have been in Australia during the first 3 months of that period. Act s. 118(2A).
 17. The term "unemployed" is not defined in the *Social Security Act 1947* (Cth). However, the meaning of the word unemployed has been considered by the Administrative Appeals Tribunal (AAT) on numerous occasions. Generally, "unemployed" means "not being engaged in work of a remunerative nature", In *Re McKenna & Director-General of Social Services* (1981) 3 ALD 219.
 18. See Act s. 116(1)(c)(i), 116(1)(c)(iii). A person is capable of undertaking suitable paid work if he or she is physically and mentally able and available to undertake such work. Unemployment Benefits, (CCH) 36-100 (1989). The determination of whether a person is willing to undertake suitable work is generally left to the CES. The CES reports to the DSS when it finds that a person is unwilling to undertake suitable work. A person may be unwilling to undertake suitable work if he or she fails to attend an interview arranged by the CES, declines referral to a suitable job vacancy, or fails to accept an offer of suitable work. Unemployment Benefits (CCH) 36-200 (1989). The requirement that a person was unemployed during the relevant periods and is capable of and willing to undertake suitable paid work is referred to as the "work test".
 19. Act s. 116(1)(d).
 20. *Ibid.*, s. 16(5). However, if the Secretary finds that the person's unemployment was due to another person or person's being, or having been, engaged in industrial action the claimant may still be entitled to benefits if the Secretary is satisfied that he or she is not a member of the trade union of which the other person or persons are or were members.
 21. *Ibid.*, s. 126(1)(a).
 22. *Ibid.*, s. 126(1)(b).
 23. *Ibid.*, s. 126(1)(c).
 24. For a description of the Administrative Appeals Tribunal see *infra* text s. 4(b)(iii).
 25. In *Re McKenna & Director-General of Social Services* (1981) 3 ALD 219.
 26. Benefits Manual, Issue No. 816U, at 2-8 (Jan. 25 1989).
 27. Act s. 116A: Benefits Manual, Issue No. 816U, at 2-8 (Jan. 25 1989).
 28. See Benefits Manual, *supra*. n.26, at 2-10.
 29. *Ibid.*, at 2-11.

Secretary is given broad discretion to regard claimants who engage in paid work as being unemployed if the Secretary is of the opinion that such work should be disregarded in light of the nature and duration of the work and other surrounding circumstances.³⁰

Satisfaction of the work test is a condition of eligibility for Unemployment Benefits. The work test requires not only that the claimant was unemployed during the relevant period, but also that he or she is capable of undertaking and willing to undertake suitable paid work and has taken reasonable steps to obtain such work.³¹ In addition, the beneficiary must remain continuously registered with the Commonwealth Employment Service.³² Generally, a person is capable of undertaking suitable paid work if he or she is physically and mentally able and available to undertake such work.³³ A person is not capable of undertaking suitable paid work if he or she is (1) physically unable to work due to illness; (2) caring for children at home or substantially engaged in other activities from which the claimant cannot relieve himself on short notice; (3) legally restrained from undertaking employment; or (4) travelling from one area to another.³⁴ A special exception is made for long-term beneficiaries who are engaged in short periods of approved full-time training or volunteer work. Beneficiaries in this category are excused from showing that they are capable of undertaking satisfactory paid work, provided that they remain registered with the Commonwealth Employment Service and accept any job or interview that becomes available during their engagement in training or volunteer work.³⁵ Besides establishing that the claimant is capable of undertaking suitable paid work, the claimant must also show that he or she is willing to undertake suitable paid work. The determination of whether a person is willing to undertake suitable work is made on the advice of the Commonwealth Employment Service. A person is generally regarded as satisfying this requirement if he or she accepts a referral or an offer of suitable employment. It is immaterial whether the person is actually hired as a result of a referral or is unable to commence work through no fault of his or her own.³⁶ A person may be unwilling to undertake suitable paid work if he or she fails to attend an interview arranged by the CES, declines referral to a suitable job vacancy, fails to accept an offer of suitable work, or demonstrates that he or she is not genuinely seeking employment.³⁷

Suitable work is broadly defined as full-time, casual, short-term, temporary or part-time work which is within a person's capacity to perform, that pays at least as much as an award wage or the going wage for such work and which offers the conditions and amenities usually associated with that type of work.³⁸ It should be noted that suitable paid work includes any part-time, casual or temporary work that it is within a person's capacity to perform, and is not limited to a person's usual or preferred type of work. A person who accepts part-time, casual or temporary work that is not his or her preferred type of work is not precluded from seeking more suitable permanent employment if he or she so chooses.³⁹ In addition, an unemployment claimant is required to show that he or she has taken reasonable steps to obtain suitable paid work before payment of benefits is made. The determination of whether

30. Act s. 116(4); Benefits Manual, Issue No. s. 16U, at 2-12 (Jan. 25 1989).

31. Act s. 116(1)(c).

32. *Ibid.*, s. 116(1)(d).

33. See Unemployment Benefits, *supra* n.18.

34. See Benefits Manual, *supra* n.36, at 5-31.

35. *Ibid.*

36. *Ibid.*, at 5-22.

37. See Unemployment Benefits, *supra* n.18.

38. See Benefits Manual, *supra* n.18.

39. *Ibid.*

a claimant has satisfied this requirement is made by considering what the person has actually done to find work. Although all claimants are required to remain registered with the Commonwealth Employment Service, registration alone is insufficient to satisfy the obligation of having taken reasonable steps to obtain suitable work. A claimant is required to exert independent, affirmative efforts to secure employment on his or her own behalf in order to satisfy this obligation.⁴⁰

Another condition of eligibility requires that the claimant remain registered as being unemployed with the Commonwealth Employment Service. Registration must be maintained continuously through the period during which Unemployment Benefits are paid.⁴¹ A lapse in registration may result in cancellation or suspension of benefits. In the event a person fails to remain continuously registered with the CES, the Act provides a short grace period during which time benefits may still be received. Generally, a person who re-registers within five to ten working days of a lapse may have his or her benefits restored with full arrears, as long as the person is otherwise eligible to receive benefits.⁴² If a person fails to re-register within the grace period, benefits will be cancelled. Future entitlement to Unemployment Benefits may be had only by the lodgment of a new Unemployment Benefits claim.⁴³ It should also be noted that the Secretary has broad discretion to waive the registration requirement if he or she is satisfied that a lapse results from matters beyond the claimant's control.⁴⁴

Unemployment Benefits are payable to eligible claimants on a sliding flat rate basis according to the beneficiaries' status. There are four⁴⁵ categories of beneficiaries: (1) unmarried persons over the age of 18 and under the age of 21 with no dependents;⁴⁶ (2) unmarried persons over 21 with no dependents;⁴⁷ (3) unmarried persons with a dependent or dependents;⁴⁸ and, (4) married persons.⁴⁹ Benefits may be reduced or increased if the beneficiary receives income from other sources or is obligated to pay maintenance for dependent children.

Unemployment Benefits are subject to an income test which reduces the amount of benefit payable to a person whose fortnightly rate of income exceeds a specified limit.⁵⁰ Income is broadly defined as "any personal earnings, moneys, valuable consideration or profits ... earned, derived or received by [a] person for the person's own use or benefit by any means from any source whatsoever ..."⁵¹ Under the income test, the weekly rate of benefit is reduced by 25% of the amount by which a person's income exceeds \$60.00 per fortnight.⁵² Where a person's income exceeds \$140.00, the weekly rate of benefit is further reduced by an amount equal to the sum of \$20.00 plus 50% of the amount by which that income exceeds \$140.00 per fortnight.⁵³ Unemployment Benefits are also subject to a maintenance income

40. *Ibid.*, at 5-27.

41. Act s. 116(1)(d).

42. See Benefits Manual, *supra* n.26, at 5-11.

43. *Ibid.*

44. Act s. 116(2).

45. This does not include the Job Search Allowance, a benefit created in January 1988 for persons 16 to 18 formerly entitled to receive Unemployment Benefit. Act s. 117A. See *infra* text s. 3(h).

46. Act s. 118(1)(b).

47. *Ibid.*, s. 118(1)(c).

48. *Ibid.*, s. 118(1)(d).

49. *Ibid.*, s. 118(1)(f).

50. *Ibid.*, s. 122(1).

51. *Ibid.*, s. 3(1).

52. *Ibid.*, s. 122(1)(a).

53. *Ibid.*, s. 122(1)(b).

test which reduces benefits by 50% of the amount by which maintenance income exceeds a specified dollar amount.⁵⁴ In addition, Unemployment Benefits are subject to an asset test for beneficiaries over 25 years of age.⁵⁵ Under the asset test, Unemployment Benefits cease to be payable once the value of the beneficiary's property reaches a threshold limit. Finally, Unemployment Benefits may be increased if a qualified claimant has a dependent spouse⁵⁶ or is making periodic maintenance payments to dependent children or a spouse who is living apart from the claimant.⁵⁷

Additional sources of income received by eligible workers may reduce Unemployment Benefits under the income test.⁵⁸ The income test provides that Unemployment Benefits are reduced by 50 cents on each dollar of fortnightly income between \$60.00 and \$140.00. For every dollar of fortnightly income above \$140.00, fortnightly Unemployment Benefits are reduced by a dollar. In the event that Unemployment Benefits are reduced under the income test and increased under the dependent spouse, maintenance, or rent assistance provisions, the Act provides that the basic rate of benefit is reduced first.⁵⁹ Since the basic rate of benefit is not exempt from income tax, that portion of benefit that is subject to income tax is affected by the income test first.⁶⁰ Certain other allowances, such as rent assistance⁶¹ and remote area allowances,⁶² may be received by qualified beneficiaries in addition to Unemployment Benefits. These allowances are not calculated in the income test. Rent assistance is available to Unemployment beneficiaries who (1) pay more than \$20.00 per week in rent; (2) are not paying government rent; (3) are not ineligible property owners; (4) have been in Australia throughout the entitlement period;⁶³ (5) have served a qualifying period;⁶⁴ (6) are married and over 25 years of age or over 18 years old and living apart from their parents, step-parents or guardians; (7) are not in receipt of an incentive allowance nor living with a spouse in receipt of a prescribed allowance; and (8) do not have a spouse in receipt of a prescribed pension.⁶⁵ Remote Area Allowances are available to unemployment beneficiaries who are physically present and have their usual places of residence in certain remote regions of Australia.⁶⁶ Remote Area Allowances are flat rate payments. These payments are not subject to a separate income test. Like Unemployment Benefits, Remote Area Allowance rates are determined according to the beneficiary's age and marital status.⁶⁷

Job Search Allowance is a special benefit available to 16 and 17 year old persons designed to encourage young people to undertake training and employment opportunities rather than become dependent upon long-term Unemployment Benefits. The purpose of the Job Search Allowance program is to eliminate any financial incentive for young people to leave school early.⁶⁸ Eligibility for Job Search Allowance corresponds to the qualifications for

54. *Ibid.*, s. 122A.

55. *Ibid.*, s. 122(10).

56. *Ibid.*, s. 118(2).

57. *Ibid.*, ss. 118(3), s. 118(4).

58. *Ibid.*, s. 122(1).

59. *Ibid.*, s. 122(5).

60. See Unemployment Benefits, *supra* n.18.

61. Act s. 120.

62. *Ibid.*, s. 21.

63. An entitlement period is a continuous period during which a person pays or is liable to pay rent exceeding a specified limit. *Ibid.*, s. 120(1)(a).

64. A qualifying period is a continuous period of 26 weeks during which the person was a qualified person. *Ibid.*, s. 120(1).

65. See Benefits Manual, *supra* n.26, at 16-3.

66. Act s. 22; see Benefits Manual *supra* n.26, at 28-3.

67. See Benefits Manual, *supra* n.26 at 28-6, 28-7.

68. *Ibid.*, s. 32-3.

Unemployment Benefits. A person is eligible for Job Search Allowance if he or she is (1) not in receipt of a prescribed pension;⁶⁹ (2) between the ages of 16 and 18; (3) an Australian resident who has remained in Australia throughout the relevant periods; (4) registered as being unemployed with the Commonwealth Employment Service; and (5) is capable of undertaking, and willing to undertake, suitable paid work and has taken reasonable steps to obtain such work.⁷⁰ Once a Job Search Allowance beneficiary attains the age of 18, Unemployment Benefits automatically becomes available to eligible claimants. Qualified beneficiaries need not file a separate claim form for Unemployment Benefits nor satisfy the waiting period requirement for Unemployment Benefits.⁷¹

Job Search Allowance is subject to a parental income test for dependent Job Search Allowance claimants. Under the parental income test, Job Search Allowance may be reduced if the taxable income of the claimant's parents exceeds a specified threshold limit. Independent Job Search Allowance claimants are subject to the same income test as Unemployment Benefit claimants.⁷² Job Search Allowance may be suspended or cancelled if a Job Search Allowance beneficiary (1) no longer satisfies the eligibility requirements; (2) declines referral to a training course or a work experience program; (3) fails to attend a scheduled interview; (4) declines placement in a training or work experience program; (5) accepts placement in a training or work experience program but fails to commence work; or (6) is dismissed or leaves a training or work experience program without sufficient reason.⁷³

In addition to the Job Search Allowance, single unemployment beneficiaries under 18 who are homeless and without parental or custodial support may be eligible to receive Young Homeless Allowance. The Young Homeless Allowance is available to qualifying persons who have been living away from the parental home for a continuous period of six weeks or more because he or she (1) has no parental home; or (2) is forbidden to live at home by the parent(s); or (3) cannot be expected to live at home because of circumstances such as domestic violence, sexual abuse, or similar extraordinary circumstances; and (4) is not in receipt of continuous support from parents or guardians; and (5) is not receiving continuing income support from another Government agency.⁷⁴

Unemployment Benefits may be cancelled if the beneficiary no longer meets the eligibility requirements. Benefits may be cancelled or suspended for a period of two to twelve weeks where: (1) unemployment results from a voluntary and unjustified act;⁷⁵ (2) unemployment results from misconduct;⁷⁶ (3) a person fails or refuses to accept a suitable offer of employment without sufficient reason;⁷⁷ (4) a person refuses or fails to comply with a requirement imposed by the Secretary to undergo a medical examination, receive medical treatment, undertake a course of vocational training, or undertake suitable work;⁷⁸ or, (5) a person fails to take reasonable steps to obtain employment.⁷⁹ In addition, Unemployment Benefits may be cancelled if a person ceases to be registered as being unemployed with the CES⁸⁰, or the person is seasonal or intermittent worker whose income is sufficient to maintain

69. Such pensions include Sickness Benefit, Widow's Pension, and Invalid Pension.

70. Act s. 117A(1).

71. *Ibid.*, s. 117A(4).

72. See Benefits Manual, *supra* n.26 at 32-8.

73. *Ibid.*, at 33-20.

74. See Annual Report, *supra* n.10.

75. Act s. 126(1)(a).

76. *Ibid.*, s. 126(1)(b).

77. *Ibid.*, s. 126(1)(c).

78. *Ibid.*, s. 126(1)(ca).

79. *Ibid.*, s. 126(1)(d).

80. *Ibid.*, s. 126(1)(e).

the worker and his or her dependents, notwithstanding the fact that the worker is temporarily unemployed.⁸¹ Finally, if the beneficiary is imprisoned or confined to a psychiatric institution, Unemployment Benefits may be cancelled for the period of imprisonment or confinement.⁸²

Benefit Determination and Appeals Process

There are four (4) principal steps that an Unemployment Benefits claimant must take in order to perfect an Unemployment Benefit Claim. First, a claimant must register as being unemployed with the Commonwealth Employment Service. Second, the claimant must obtain an Unemployment Benefit Claim Form. Third, the claimant must complete the Unemployment Benefit Claim form. Finally, the claimant must submit the Unemployment Claim Form to the appropriate office of the Department of Social Security.⁸³

The first step in the Unemployment Benefit application process is to register with the CES. Each claimant must personally appear at his or her local CES office to register for work. If no work is available for the claimant, the CES will provide the claimant with an Unemployment Benefit Claim Form and advise the claimant of the local Social Security office to which the completed form must be submitted.⁸⁴ Next the Unemployment Benefit claimant must complete the Unemployment Benefit Claim Form and personally present the form to the appropriate DSS office. If the unemployment claimant was previously employed and lost his or her job prior to initiating the application process, he or she must also provide the DSS with an Employment Separation Certificate prepared by his or her previous employer.⁸⁵ A DSS counter officer will then review the applicant's claim form and verify the applicant's identity.⁸⁶ At the Secretary's discretion, unemployment claimants may be required to attend a pre-grant interview at the DSS office to further verify eligibility for benefits.⁸⁷ During a pre-grant interview, claimants may be asked whether their employment was terminated due to their own misconduct. In addition, unemployment applicants may be asked whether they are prepared to accept suitable full-time work; travel up to one and a half hours each day to and from work, if necessary; arrange for transportation to and from work if no public transportation is available; spend up to ten percent of their wages on weekly fares; and relocate to an area with greater employment opportunities.⁸⁸ Once an unemployment claimant has lodged a claim form, the DSS will provide the applicant with a First Income Statement. The First Income Statement sets forth details of the applicant's income, changes in circumstances, and efforts to find employment. The First Income Statement must be completed by the applicant and personally returned to the DSS within two weeks after the applicants's claim was initially lodged.⁸⁹

Once the First Income Statement has been presented to the DSS, an application for Continuation of Unemployment Benefit will be issued to the claimant. The claimant is required to complete the application and return it to the DSS within two weeks. The DSS will continue to provide unemployment claimants with subsequent Applications for Continuation of Unemployment Benefits each fortnight which the claimant must complete and return to the DSS in order to continue to receive Unemployment Benefits.⁹⁰ In addition, the claimant

81. *Ibid.*, s. 126(1)(f).

82. *Ibid.*, s. 167(3).

83. Department of Social Security, *How to Claim Unemployment Benefit* (1988).

84. Department of Social Security, *How to Claim Unemployment Benefit* (1987).

85. *Supra* n.83.

86. *Ibid.*

87. J. Kirkwood, *Social Security Law and Policy*, Sydney Law Book Company, 1986.

88. *Ibid.*

89. *Ibid.*

90. *Ibid.*

must continue to seek employment, remain registered with the CES, report on all efforts to obtain employment, and attend all interviews arranged by the CES.⁹¹ Once the unemployment claims have been processed, and if approved, applicants begin to receive Unemployment Benefits on a fortnightly basis in arrears. Rather than paying unemployment claimants directly through the mail, all Unemployment Benefits are deposited into the claimants' accounts at a bank, building society or credit union.⁹² The *Social Security Act 1947* (Cth) provides for a comprehensive review and appeals process for all Unemployment Benefit claimants who are dissatisfied with an entitlement decision.

Any Unemployment Benefit claimant who is dissatisfied with an entitlement determination has the right to seek either a review of or an appeal from the decision. The Act establishes three forums for review. First, the Act authorises the Secretary, or an appointed Review Officer, to review entitlement decisions.⁹³ Secondly, a review may be conducted by the Social Security Appeals Tribunal (SSAT).⁹⁴ Thirdly, a disappointed Unemployment Benefit claimant may seek review of an adverse decision by the Administrative Appeals Tribunal (AAT).⁹⁵ Once an Unemployment Benefit claimant has exhausted the administrative appeal process, he or she may lodge a final appeal in Federal Court.⁹⁶ In addition, there are a number of less formal avenues available to disappointed Unemployment Benefit claimants, including representations to a member of Parliament or the Commonwealth Ombudsman. Resort to the *Freedom of Information Act* or the *Administrative Decisions Act 1977* (Cth) (Judicial Review) may sometimes be appropriate.⁹⁷

The Act authorises the Secretary to review entitlement decisions if the Secretary is satisfied that there is sufficient reason to review the decision.⁹⁸ The role of the Secretary in the process of review is to reduce the number of external appeals to the SSAT and the AAT by varying erroneous primary decisions or by explaining and elaborating upon the grounds for an adverse primary decision.⁹⁹ In general, the Secretary, or an appointed Review Officer, is charged with the following duties: (1) to establish whether material information exists which the DSS is or was unaware of at the time of the primary entitlement determination; (2) to clarify any misunderstandings; (3) to rectify any mistakes that have occurred; (4) to explain and elaborate upon the decision under review; (5) to reconsider the merits of the primary decision; and (6) to act as a liaison with the Regional Offices and Benefits Administration and Training Units regarding the quality of Regional Office decision making.¹⁰⁰ The Secretary may review a decision even if the claimant has made an application to the SST or the AAT for review of the decision.¹⁰¹ Where a claimant has applied for review by the Secretary and the claimant has simultaneously applied to the SSAT or the AAT for review, the Secretary must give the National Convener of the SSAT written notice of the application and its determination.¹⁰² The Secretary is empowered to take three actions on review of an entitlement decision. The Secretary may either affirm, vary, or set the decision aside and

91. Department of Social Security, *More About Your Unemployment Benefits* (1987).

92. *Supra*, n.83.

93. Act s. 172.

94. *Ibid.*, s. 177.

95. *Ibid.*, s. 205.

96. See Kirkwood, *supra* n.87.

97. Department of Social Security, *Review & Appeals Handbook*, (1988).

98. Act s. 172.

99. Administrative Review Council, Report No.21: *The Structure & Form of Social Security Appeals* (1984).

100. *Supra* n.97.

101. Act s. 172(2).

102. *Ibid.*, ss. 172(4)-(5), 173(4).

render a new determination.¹⁰³ Once a decision is rendered by the Secretary, the unemployment claimant is entitled to written notice of the Secretary's determination.¹⁰⁴ The notice must set forth the date on which the request for review was received, the Secretary's determination, the material facts and criteria upon which the decision was based, and the reasons for the decision. In addition, the notice must advise the claimant of his or her right to apply to the SSAT and the AAT for further review.¹⁰⁵

Any person affected by an entitlement decision may apply by written or oral request to the SSAT for review of the decision.¹⁰⁶ The SSAT may review the decision, even if the applicant has applied for review by the Secretary or the ATT.¹⁰⁷ The SSAT, in its present form, was created by Act of Parliament on November 1, 1988. The Act states that the Tribunal shall pursue the objective of providing a mechanism of review that is fair, just, economic, informal, and quick.¹⁰⁸ The Act provides that the SSAT shall consist of a National Convener, Senior Members, and Members.¹⁰⁹ The National Convener is appointed by the Governor-General in Council for a period of up to five years. The Convener is responsible for the overall operation and administration of the SSAT. The Convener is required to take reasonable steps to ensure that decisions of the SSAT are consistent and that its functions are performed efficiently and effectively, and generally, to monitor Tribunal operations.¹¹⁰

Each designated Tribunal area is headed by a Senior Member. Senior Members are appointed by the Governor-General in Council for up to three years. There is a Senior Member in the capital of each state and territory. Senior Members are responsible to the Convener for all Tribunal operations within their area. They are assisted by deputy registers, who are responsible for the day-to-day running of operations, but are directly responsible for consistent and good quality decision-making.¹¹¹ Members are appointed by the Minister for Social Security for up to three years. The role of each Member is to sit on a Tribunal and to make decisions on the merits of each case under review. Members must apply the law, taking into account the relevant facts, exercising relevant discretion and having regard to relevant policy.¹¹² The Act states that Panel composition in every appeal shall be a minimum of three and a maximum of four, except in special circumstances.¹¹³ The current practice is to constitute a three member panel with membership drawn from different disciplines, with an additional fourth member in appropriate medical cases. The Senior Member appoints a Presiding Member for each SSAT panel. Legal Members are appointed because of their experience and qualifications as lawyers. Their responsibility includes providing advice on the interpretation and application of the Act and other statutory enactments, — both federal and state. Welfare/Community Members contribute their experience and training, particularly relating to socio-cultural and socio-economic assessments required under various provisions of the Act which confer discretion upon the Secretary. Medical Members bring their medical expertise to assist other members in understanding and assessing the value of

103. *Ibid.*, s. 174(1).

104. *Ibid.*, s. 174(2).

105. *Ibid.*, s. 175. See also Benefits Manual, *supra* n.26, at 25-10 (Nov. 29 1988).

106. Act s. 177, 179.

107. *Ibid.*

108. *Ibid.*, s. 176.

109. *Ibid.*, s. 216.

110. *Ibid.*, ss. 216, 217.

111. Interview with Ann Coughin, National Convener, SSAT, Melbourne, May, 1989. See also SSAT National Procedures, s. 3-11, 4.02, 4.03 (Feb. 1989).

112. *Ibid.*, s. 219.

113. *Ibid.*, s. 222.

medical evidence before the SSAT, and to render opinions on matters of medical inference from proven facts. Executive Members are full-time members who have a knowledge of DSS operations. Appointed by the Minister of Social Security for two year terms, they are not staff members of DSS during their appointment. They draw to the attention of other members relevant legislation, sections of the DSS policy manuals, and instructions and matters impinging upon departmental administration relevant to the decision under review. Any member of a SSAT panel may be given the duties of a Presiding Member for a particular hearing session. The duties of the Presiding Member include: (1) ensuring that the objectives of the SSAT are carried out in the hearing and in the determination of matters heard by the SSAT; (2) conducting the hearings with due regard to procedural fairness and in accordance with SSAT procedure; (3) ensuring that adequate written reasons for decisions are prepared and provided for the parties within 14 days of the decision.¹¹⁴

The SSAT is responsible for conducting an independent examination of the issue under review. Like the Secretary, the panel is empowered to either affirm, vary or set aside the decision and substitute a new decision or send the matter back to the Secretary for reconsideration.¹¹⁵ For purposes of reviewing an entitlement decision, the SSAT may conduct an informal hearing during which the panel may interview the applicant, interview the applicant's employer or social worker, and consider evidence submitted by the applicant and the DSS.¹¹⁶ In conducting a review, the SSAT is not bound by technicalities, legal forms or rules of evidence, but may inform itself on any matter relevant to a review of a decision.¹¹⁷ Although the SSAT lacks subpoena power to require witnesses to appear at the hearing or documents to be produced, the National Convener may ask the Secretary of the DSS to provide information or documentation relevant to the review of a decision.¹¹⁸

Questions submitted to the SSAT are decided by a majority of the panel. Where the members of a panel are equally divided on an issue, the question is decided by the presiding member of the tribunal.¹¹⁹ Once the SSAT reaches its decision on review, it must prepare a written statement that sets out its determination, the reasons for its decision, its findings on any material questions of facts, and all evidence or other material on which its findings of facts were based.¹²⁰ The SSAT must provide each party with a copy of its statement within 14 days of its decision, together with a notice of a further right of review to the AAT.¹²¹ On October 31, 1989, the SSAT completed its first 12 months of hearings and deciding appeals since the amending legislation gave the Tribunal full decision-making powers. Prior to November 1, 1988 the SSAT decisions were merely in the nature of recommendations and were not binding upon the DSS. This recommendatory status was in place from February 1975 to October 31, 1988.

A recent report presented at the First Annual Conference of the SSAT in November 1989 offered some interesting findings. First, the "new" SSAT is doing less business; in its first year, the SSAT received 7207 appeals and finalised 8496 cases (it inherited 3230 appeals from its non-determinative predecessor). This compares with 11,187 appeals lodged with the old SSAT and 9685 finalised decisions in the year ended June 30, 1980. Second, of the 8496

114. SSAT National Procedures, s. 3.19 (Feb. 1989).

115. Act s. 182(1).

116. See Kirkwood, *supra* n.87.

117. Act s. 193.

118. *Ibid.*, s. 190.

119. *Ibid.*, ss. 200, 201.

120. *Ibid.*, s. 204(1)(a).

121. *Ibid.*, s. 204(1)(b).

finalised appeals in 1988-89, 5583 were actually decided by the Tribunal; the others either were withdrawn by the applicants, conceded by DSS, or beyond the SSAT's jurisdiction. Of these 5583 decisions, 2423 were resolved fully or partially in the applicant's favour (2211 were set aside and 312 were affirmed), and 3460 were decided in favour of the DSS (affirmed). The indicates an applicant "success" rate of 41% compared with 30% in 1987-88, indicating that the removal of the DSS veto power has been a beneficial reform, from the applicant's point of view. Third, some types of social security benefit categories generate more appeals than others: eg. approximately 9% of the DSS clientele receive Unemployment Benefits; but 20% of the SSAT appeals relate to that benefit. Similarly, while 8% of the DSS caseload involves invalid persons (adult disability), 29% of the SSAT appeals fell in that category. Finally, the report suggested that potential applicants residing outside metropolitan areas may have difficulty in using the SSAT. For example in non-metropolitan areas in New South Wales, 48% of the Unemployment Benefit beneficiaries accounted for only 28% of the Unemployment Benefit appeals for the SSAT. A higher percentage of Unemployment Benefit cases were filed with SSAT by residents of Sydney, Newcastle and Wollongong — all metropolitan areas.¹²²

The author observed an SSAT hearing in Perth. The panel consisted of the Presiding Member, an attorney, a welfare/community member and a DSS specialist. The proceedings were not transcribed. After the introductions, the claimant, who was unrepresented, was told that this was not a courtroom, that it was an informal proceeding, and that the SSAT was independent from the DSS. The Presiding Member reaffirmed with the claimant the reason for her appeal. The Presiding Member asked the claimant to explain her position in her own words. The Presiding Member then followed up with questions. At first, the questions were open-ended, and as the hearing proceeded, the questions became more directed. At no time did the claimant seem pressured by the panel members. When it became apparent that the claimant did not bring a key witness (claimant's daughter) who might corroborate much of the claimant's story, a telephone call was made to the witness. During the hearing, the daughter as asked questions on a speaker phone. The claimant was not given the opportunity to question the witness. A second witness, a physician, also was telephoned during the hearing, and he was asked questions by the Presiding Member. Both of the telephone calls were made in the presence of the claimant and other panel members.

The hearing was less formal than unemployment insurance hearings or social security hearings in the United States. The panel did make every effort, however, to ascertain the relevant facts. The input from the lay panel was very helpful, and the decision appeared to reflect a consensus of the panel. At the conclusion of the testimony, the Presiding Member closed the hearing by explaining the post-hearing procedure. The claimant left the room and the panel discussed the case — both the facts and the law — and arrived at a decision. The claimant was to be notified of the decision by mail within two weeks and of his or her right to appeal to the Administrative Appeals Tribunal.

If a claimant is dissatisfied with the decision of the SSAT, he or she has a further right of appeal to the Administrative Appeals Tribunal. The AAT is a tribunal authorised by the *Administrative Appeals Tribunal Act 1975* (Cth) as amended, to review administrative decisions of various departments and governmental agencies, including the SSAT.¹²³ The AAT is usually comprised in one of four different ways. An AAT panel may consist of a

122. (1989) 52 Social Security Reporter 681. This issue reported on a paper presented by Chris Ronalds to the First Annual SSAT Conference held in Melbourne in November 1989.

123. See Benefits Manual, *supra* n.26, 25-23.

presidential member and two non-presidential members; a presidential member alone; three non-presidential members of whom at least one is a senior non-presidential member; or a senior non-presidential member alone.¹²⁴ The tribunal is headed by a Federal Court judge. Other members of an AAT panel are either judges, lawyers or persons with experience in the subject of the appeal.¹²⁵ Unlike the composition of the SSAT, the AAT panel does not contain an officer of the DSS.¹²⁶

There are two bases for jurisdiction of the AAT. The main right of appeal is against a decision of the Secretary which has been reviewed by the SSAT. The second right of appeal is a direct appeal against a decision of the Secretary. In order to lodge a direct appeal to the AAT from a decision of the Secretary, the Secretary must certify that an important principle of general application is involved.¹²⁷ An appeal to the AAT may be lodged by any person whose interests are affected by a decision of the Secretary of the SSAT, within 28 days from the time that he or she is furnished with the decision of the Secretary or the SSAT.¹²⁸ It is possible for someone other than the claimant to lodge an appeal to the AAT, such as a person who is dependent upon the claimant is a person whose interests are affected by the decision.¹²⁹ Although the procedures adopted by the AAT are more formal than those of the SSAT, the AAT is required to conduct proceedings with as little formality and technicality as possible.¹³⁰ Unlike the SSAT, the AAT has subpoena power to require witnesses to appear at a hearing and to have documents produced.¹³¹ An AAT hearing will generally proceed with the applicant briefly outlining his or her objections to the decision of the SSAT or the Secretary, the reasons why such a decision should be changed, and the evidence which he or she proposes to offer to the AAT. The DSS may also outline its position. The applicant will then be entitled to present his or her evidence on which the DSS may cross-examine. Next, the DSS will be entitled to present its evidence on which the applicant may cross-examine. Finally, the applicant and the DSS will each have an opportunity to make a closing argument. Throughout the proceeding, the members of the tribunal are permitted to ask questions of the parties or any other persons called upon to give evidence.¹³² Pursuant to s. 32 of the *Administrative Appeals Tribunal Act* (Cth), any party to an AAT proceeding may choose to be represented by legal counsel.

The AAT is empowered to conduct a de novo review of the issues on their merits. A recent case has held that the merits of a decision

...include not only the facts of the case but also any policy which has been applied or which ought to be applied to the facts in reaching the decision. Jurisdiction is thus conferred upon the Tribunal to review policy considerations which govern or affect certain discretionary powers.¹³³

The AAT has the authority to affirm, vary or render a new decision by setting aside a prior decision of the SSAT or remitting the issue to the Secretary for reconsideration.¹³⁴ The AAT is the final arbiter of questions of fact. However, the AAT's interpretation or application of

124. See Kirkwood, *supra* n.87.

125. See Benefits Manual, *supra* n.26 at 25-23.

126. Australian Social Security Guide (CCH) 82-100.

127. See Kirkwood, *supra* n.87.

128. Act s. 205.

129. See Australian Social Security Guide, *supra* n.121, at 82-100.

130. See Benefits Manual, *supra* n.26, at 25-25.

131. See Australian Social Security Guide, 82-500.

132. *Ibid.*

133. *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 32 FLR 469 at 474.

134. Review & Appeals Handbook, *supra* n.97.

the law can be challenged in the Federal Court of Australia. Hence, the parties to an AAT appeal have a further right of appeal to the Federal Court on matters involving questions of law.¹³⁵

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) as amended, permits a person aggrieved by a Federal decision of an administrative nature to apply to the Federal Court for a review of the decision.¹³⁶ A decision may be reviewed by the Federal Court on a variety of grounds. For instance, the Federal Court may review a decision to observe procedures required by law, or decisions rendered by a tribunal which lacks authority to make such decisions. In addition, the Federal Court may review decisions induced or affected by fraud, rendered on the basis of insufficient evidence to justify the decision, or reached on the basis of an unreasonable or bad faith exercise of discretionary power.¹³⁷ A decision of the Federal Court can be challenged in the High Court of Australia if the latter grants leave to appeal. The decisions of the Federal Court and the High Court are binding upon the DSS, the SSAT and the AAT.¹³⁸

Pursuant to the *Ombudsman Act 1976* (Cth), the Commonwealth Ombudsman is available to dissatisfied Unemployment Benefit claimants to investigate a decision of the DSS or a procedural delay in entitlement determinations. In addition, the Ombudsman is empowered to investigate whether certain laws, rules and practices of the DSS are unreasonable. In this latter respect, the Ombudsman has broader powers than the courts, in as much as the courts' powers of review are circumscribed by the application of existing law.¹³⁹ The Ombudsman is not required to investigate all allegations of impropriety reported by unemployment claimants, but has discretion to investigate those complaints which deserve his attention.¹⁴⁰ Generally, if a matter is capable of being reviewed by the SSAT or the AAT, the Ombudsman will decline to investigate. However, the Ombudsman is not prevented from conducting an investigation merely because a claimant may have a right to judicial review of a DSS action.¹⁴¹ Finally, it should be noted that the Ombudsman is limited to purely investigative action, and is not authorised to overturn a DSS decision or compel the DSS to take particular action. If the DSS refuses to follow the recommendations of the Ombudsman, the Ombudsman may refer the matter to the Prime Minister or to Parliament.

Comparison of the Australian and U.S. Programs

This part of the article will compare some of the key aspects of the Australian and U.S. Unemployment Benefit programs. Although the article focuses primarily on administrative and judicial procedure, several other aspects, including coverage, contributions, benefit amount, waiting period, duration of benefits and disqualification also will be discussed.

The Unemployment Benefit program in Australia generally covers all unemployed workers. The program also covers volunteer workers and person engaged in on-the-job,¹⁴² vocational and military training.¹⁴³ Persons not covered by Unemployment Benefits include full-time students,¹⁴⁴ recipients of certain pensions,¹⁴⁵ seasonally or intermittent workers

135. Benefits Manual, *supra* n.26, at 25-26.

136. *Ibid.*

137. *Ibid.*, at 25-27.

138. *Ibid.*

139. See Kirkwood, *supra* n.87.

140. *Ibid.*

141. *Ibid.*

142. Act s. 116A.

143. *Ibid.*, s. 116(4A).

144. *Ibid.*, s. 136.

145. These pensions include age pension, invalid pension, wife's pension, spouse career's pension, widows pension, supporting parent's and service pension. *Id.*, s. 116(1).

whose income is sufficient to maintain the worker and his or her dependents,¹⁴⁶ and persons confined to penal and psychiatric institutions.¹⁴⁷ In the United States, all employees are covered by employment insurance.¹⁴⁸ Federal law allows states to exclude (1) elected officials, (2) certain policy makers, (3) members of the judiciary and legislature, (4) the National Guard, and (5) inmates in penal institutions.¹⁴⁹ In 1978, federal law expanded coverage to certain types of employment including most non-profit employment (non-profit employers with four or more employees),¹⁵⁰ domestic services,¹⁵¹ agricultural workers,¹⁵² and state and local government employees.¹⁵³ Students, aliens who are not permanent residents, and employees of relatives generally are not covered.¹⁵⁴

The contribution scheme for the U.S. unemployment insurance program is radically different from that in Australia. In Australia, the Unemployment Benefit scheme operates on a purely non-contributory, tax-funded basis. Eligibility for benefits is not dependent upon the accumulation of credits or contributions. In the United States, on the other hand, state programs require employer contributions for unemployment insurance. In addition, some states require employee contributions.¹⁵⁵ The contribution rate varies from state to state.¹⁵⁶ A key factor in determining the contribution rate is the "experience rating" of the employer.¹⁵⁷ The contribution rate imposed by a state varies on the basis of each individual employer's experience with unemployment. The rationale for this system is that the cost of unemployment insurance should be paid in such a way that those employers whose workers suffer the most involuntary unemployment should pay at a higher rate than those employers with less experience of involuntary unemployment.¹⁵⁸ The effect of the experience rating system is that the United States system is adversarial in nature. There is a built-in incentive for the employer to contest claims filed by its workers. Thus, in all unemployment insurance claims, both the employer and the employee, as well as the state unemployment agency, are interested parties. Each has a right to participate in the proceeding both at the administrative and judicial stages. In many instances, the employer and the employee are adversaries in the process.¹⁵⁹ An advantage of the adversary system is that it weeds out spurious claims by employees. However, the adversary system may work at a disadvantage to claimants with valid claims who are without resources to adequately represent themselves in the claims process. In Australia, the employer's role in the benefits determination process is far less active. The extent of the employer's participation in the process is generally limited to

146. *Ibid.*, s. 126(1)(f).

147. *Ibid.*, s. 167(3).

148. Introduction, 1B Unemployment Insurance Report (CCH) S. 20,000 at 3215, (March 3, 1987).

149. 26 U.S.C. s. 3306(c)(7); see 1B Unempl. Ins. Rep. (CCH) s. 20,273.03(4), (8) (Jan. 6, 1986).

150. 26 U.S.C. s. 3304(a)(6), 3309(c); see 1B Unempl. Ins. Rep. (CCH) s. 20,275.03 (Mar. 5, 1977).

151. 26 U.S.C. s. 3306(c)(2); see 1B Unempl. Ins. Rep. (CCH) ss. 20,165-20, 166.03 (Jan. 6, 1986).

152. 26 U.S.C. s. 3306(k); see 1B Unempl. Ins. Rep. (CCH) s. 20,265 (June 20, 1973).

153. 26 U.S.C. s. 3306(a); see 1B Unempl. Ins. Rep. (CCH) s. 20,271, at 3373 (Sept. 14, 1977).

154. 26 U.S.C. s. 3306(c)(19); see 1B Unemployment Insurance Reporter (CCH) ss. 20,230, 20,230A (Dec. 3, 1985). For information on students employed by schools, see 1B Unemployment Insurance Reporter (CCH) s. 20,215 (Dec. 3, 1985) (regarding student nurses and hospital interns).

155. For a listing of the states which require employee contributions for unemployment insurance, see All-State Tax Rates, 1B Unemployment Insurance Reporter (CCH) s. 3000, at 4803 (July 28, 1989).

156. See *Ibid.*

157. For a discussion of the experience rating system, see *Ibid.*, s. 4-1120 (June 1, 1988).

158. See *Ibid.*, s. 1120, at 4219-3 (June 1, 1988).

159. See *Ibid.* at 4224 ("[w]henver an employee receives benefits, those benefits have to be either charged to the state's fund or to the employer or employers who paid wages to the employee on the basis of which the benefits were received.")

providing verification of the claimant's status to the Department of Social Services.¹⁶⁰ The employer is not a party to the proceedings. As a result, the U.S. employer's costs, including both actual employer contributions and procedural costs, are greater than those of an Australian employer.

In Australia, the amount of Unemployment Benefit is roughly uniform for each category of eligible claimants throughout the country. The only variants are whether the unemployed person receives income from other sources,¹⁶¹ makes or receives maintenance payments,¹⁶² or has the assets that exceed a specified threshold limit.¹⁶³ In the United States, each state has its own method of determining the benefit amount. For most states the amount is approximately fifty per cent of remuneration.¹⁶⁴ State laws also provide a maximum and minimum amount of benefits to be paid to an employee in any one week. The unemployment systems in both Australia and the United States impose a waiting period on eligible claimants. A waiting period is a noncompensable period of time during which the claimant must have been otherwise eligible for benefits. The waiting period in Australia and in most U.S. states is generally one week. There is no statutory duration period for Unemployment Benefits in Australia; the benefits continue until there is a cancellation or suspension.¹⁶⁵ In the United States, the duration period varies from state to state, though the common maximum is twenty to twenty-six weeks.¹⁶⁶ After these benefits are exhausted, a U.S. worker may be entitled to thirteen weeks of extended benefits under the Federal-State Extended Unemployment Compensation Act of 1970.¹⁶⁷

The disqualification provisions of the Unemployment Benefit program in Australia are similar in many respects to state Unemployment Insurance Programs in the United States. In both countries, for example, a worker who voluntarily terminates his employment without good cause is subject to disqualification from benefits. The disqualification rules of the two countries will be compared after a separate discussion of the fundamental aspects of each.

Since unemployment insurance in the United States is governed and administered by the individual states, much variation exists as to what constitutes adequate grounds for disqualification from receipt of benefits. As noted above, a worker who voluntarily terminates his employment without "good cause" generally will be disqualified from receiving benefits. Even though most state statutes also require the rejected work to be "suitable work" before disqualifying the person, what constitutes good cause is defined differently from state to state.¹⁶⁸ Most states require that a person who without good cause fails either to apply for available, suitable work when directed to do so, or returns to his

160. See Kirkwood, *supra* n.87.

161. Income Test, *Act* s. 122.

162. Maintenance Test, *Ibid.*, s. 122A.

163. Asset Test, *Ibid.*, s. 122(b).

164. See 1B Unemployment Insurance Reporter (CCH) s. 1910, at 4403-3 (March 11, 1986).

165. See *supra* text s. 3.J.

166. 1B Unemployment Insurance Reporter (CCH) s. 3001, at 4805-16 (Aug. 8, 1989).

167. *Federal-State Extended Unemployment Compensation Act* s. 202, 26 U.S.C. s. 3304 (1982); See also 1B Unempl. Ins. Rep. (CCH) 1935, at 4409-2 (Jan. 12, 1987) (noting that the Federal Extended Benefits Program is funded on an equal basis by state unemployment compensation accounts and general revenues).

168. Several factors are considered in determining whether the employment offered is suitable. Most states consider: the degree of risk to the person's health; safety and morality; the degree of physical fitness or prior training necessary as well as that possessed by the person; any accumulation of prior earnings; the length of any previous employment; the possibility of securing local work in the person's customary occupation; and the distance of the available work from his residence. In general, all relevant factors may be considered in determining whether suitable work has been offered to the person and whether the reasons for refusal to accept constitute good cause. See 1B Unemployment Insurance Reporter (CCH) s. 1965, at 4428-31 (July 1, 1982).

position of self-employment will be disqualified.¹⁶⁹ These statutes are subject to an overlay of federal law, however, which limits their ability to deny benefits to workers under certain circumstances.¹⁷⁰ The *Federal Unemployment Tax Act* prohibits the denial of benefits to any worker for refusing to accept work (1) where there is a strike, lockout or other labour dispute at the place where the employment is offered, (2) where the wages, hours or other basic conditions of employment offered are substantially less favourable to the worker than those existing for similar work in the area, or (3) where acceptance of such employment would require the worker to join a company union or abridge or limit his right to join or retain membership in any bona fide labour organisation.¹⁷¹

The principal provisions under which an unemployed person may be disqualified from receiving Unemployment Benefits in Australia roughly correspond to the disqualification provisions in the United States. A person may be disqualified from receiving benefits if he either terminates his employment voluntarily¹⁷² or causes his own dismissal through his own misconduct as a worker.¹⁷³ Such misconduct may consist of a deliberate failure to yield a reasonable return from his or her work, improper behaviour or practice, or unauthorised absences from duty.¹⁷⁴ In addition, an unemployed person who refuses or fails to accept a suitable offer of employment without sufficient reason may be disqualified.¹⁷⁵ Additional reasons for disqualification include refusal to comply with the Secretary's requirement to take a physical or psychological examination, receive medical treatment or participate in vocational training;¹⁷⁶ failure to take reasonable steps to obtain employment;¹⁷⁷ and failure to remain registered as being unemployed with the Commonwealth Employment Service.¹⁷⁸

There are several key differences in the Australian and U.S. systems with regard to administrative and judicial procedure. First, in the United States, the employer is an interested party in all unemployment insurance claims that involve the employer.¹⁷⁹ Therefore, in the United States, employers, employees and the state unemployment agency alike may seek administrative and judicial review. In Australia, by contrast, only employees and the DSS are parties to the proceedings, and as a general rule, only they may seek review.¹⁸⁰ It should be noted, however, that appeals before the AAT may be lodged by any person whose interests are affected by an entitlement decision.¹⁸¹ Hence, in Australia, certain persons other than the employee and the DSS, but generally not the employer, have standing to apply for review by the AAT. A second distinction relates to administrative review. Although both the United States and Australian systems provide for independent administrative review of initial entitlement determinations, the Australian system establishes two levels of administrative reconsideration whereas roughly half of the states in the United States have only one level of administrative review.¹⁸² In the United States, claimants or

169. See *Ibid.*, at 4428-29.

170. See *Ibid.*, at 4429-30.

171. 26 U.S.C. s. 3301, 3304(a)(5) (1989).

172. Act s. 126(1)(a).

173. *Ibid.*, s. 126(1)(b).

174. See Kirkwood, *supra* n.87.

175. Act s. 126(1)(c).

176. *Ibid.*, s. 126(1)(ca).

177. *Ibid.*, s. 126(1)(d).

178. *Ibid.*, s. 126(1)(e).

179. See *supra* note 153 and accompanying text.

180. See Kirkwood, *supra* n.87.

181. *Ibid.*

182. In some states, a reconsideration by the state agency is required before an appeal to the board of review is allowed. See e.g., Ohio Rev. Code s. 4141.28(1).

employers dissatisfied with a determination by a local office may appeal the decision to a state administrative tribunal.¹⁸³ The tribunal, called a board of review in many states, only reviews unemployment cases. These boards are independent components of a state unemployment system and are usually comprised of three members — one appointed from labour, one from management, and a neutral member. Upon a timely application for appeal, the board will appoint a referee, usually a full-time employee of the board, to conduct a hearing.¹⁸⁴ This hearing, attended by the employer and the claimant, allows for presentation of new evidence, testimony by the parties and their witnesses, and cross-examination.¹⁸⁵ After the hearing, the referee will render a decision. In about half the states, this decision is final and the only review permitted is to the courts.¹⁸⁶ In other states, there is a further review by the board prior to judicial review.¹⁸⁷ The first level of administrative reconsideration in the United States by the state board of review is roughly equivalent to the Australian SSAT. The SSAT panel is comprised of one lawyer, one social worker and an impartial DSS employee. This tribunal hears appeals in all social security matters, including Unemployment Benefits. The SSAT proceeding is less formal (e.g. no lawyer or other claimant representative is usually present and no record of the proceedings is made). The decisions of the SSAT, however, unlike the decisions of the U.S. boards of review, are not directly appealable to the judiciary. In Australia, SSAT decisions must be appealed to the AAT, and it is the AAT decision that may be subject to limited judicial review in the Federal Court. As discussed earlier, the AAT review includes, but is not limited to social security matters.¹⁸⁸

A third major distinction between the Australian and the U.S. system lies in the procedure for judicial review of agency determinations. In Australia, the claimant is entitled to two separate *de novo* hearings — one before the SSAT and another before the AAT.¹⁸⁹ Further judicial review by the Federal Court may be permitted, although the hearings are not *de novo*.¹⁹⁰ In the U.S., state procedures do not allow for *de novo* judicial review of final board decisions.¹⁹¹ Of course, such review is generally not permitted until all administrative remedies have been exhausted.¹⁹² Depending upon particular state laws, a dissatisfied party may appeal to the courts — in most states, to a court of general jurisdiction.¹⁹³ Under the U.S. system, the court's review is limited to a review of the administrative record, and it will not consider any evidence, either in the form of testimony or documents.¹⁹⁴ The court may remand the case to the board. The scope of judicial review is limited in nature; usually the only question before the court is whether the agency determination is against the manifest weight of the evidence or is contrary to law. Thus, the system of administrative and judicial review in the United States is far less rigorous than its counterpart in Australia.

183. Social Security Act s. 303(a)(1), 42 U.S.C. s. 503(a)(i) (1982). (requiring that state unemployment insurance laws provide an opportunity for a fair hearing before "an impartial tribunal" for all individuals whose claims for unemployment benefits are denied).

184. See 1B Unemployment Insurance Reporter (CCH) 2020 at 4543 (Sept. 9, 1986).

185. *Ibid.*, at 4544.

186. *Ibid.*

187. See e.g. Ohio Rev. Code s. 4141.28(L).

188. See *supra* n.131.

189. See *supra* n.111 and n.127.

190. See *supra* n.121.

191. See 1B Unemployment Insurance Reporter (CCH) s. 2020 at 4544 (Sept. 9, 1986).

192. See *Ibid.*

193. See, e.g., N.M. Stat. Ann. s. 51-1-8(M) (1978).

194. See 1B Unemployment Insurance Reporter (CCH) s. 2020 at 4544 (Sept. 9, 1986).

Conclusion

The Unemployment Benefit is an integral part of the Australian society security system. Unlike its counterpart in the United States, the Unemployment Benefit is not an insurance program. It is funded entirely by the Federal Government and not by employer contributions, or any employment tax. Qualification for Unemployment Benefit is not as difficult in Australia, compared to the United States, and once eligibility has been established, disqualification is not as prevalent as it is in the U.S. unemployment insurance program. As Australia grows and if unemployment increases, it will be interesting to see whether the Unemployment Benefit scheme will develop into an unemployment insurance program.

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REFORMS TO AUSTRALIA'S SYSTEM OF UNEMPLOYMENT BENEFITS

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In his Budget speech of August 1990, the Federal Treasurer (Mr Paul Keating) announced forthcoming changes to Australia's system of income support for the unemployed. It is planned to implement these changes from July 1991. The following is a summary, not necessarily complete or fully detailed, of what the Commonwealth Government is proposing.

The major theme underlying the proposed reforms is to link more firmly income support schemes for the unemployed with incentives and mechanisms for getting the unemployed back into the work force. To that end, the reformed system of financial assistance to the jobless will emphasise active, effective job search by recipients, allied with increased Federal programs of job training. While there is a substantial, and to some extent compulsory, element of job searching and training integrated into the present system, it is the Federal Government's intention to increase these elements, especially by way of "beefing up" aspects of compulsion.

Under the new proposals, the "unemployment benefit" will be abolished — at least in name if not in substance. There will be a new, two tier payment system: the Job Search Allowance (JSA) and the Newstart Allowance (NSA). The JSA will be payable for twelve months only — at least in the case of those aged 18 years or more. For those unemployed aged 16 or 17, the JSA will remain the applicable benefit until they reach 18, when they may become eligible for the NSA. Under the JSA, remedial assistance may be made available to especially disadvantaged jobless persons after four weeks. After three months of receiving the JSA, an "activity test" will apply to recipients, requiring them not only to seek work, but to accept and participate in job training programs. It appears that JSA recipients will not become eligible for "mainstream" labour market programs until six months have elapsed, and the Commonwealth Employment Service (CES) has identified them as eligible for such programs. At various stages during their receipt of the JSA (usually after 3 and 6 months), recipients will be obliged to participate in in-depth reviews of their progress in job searching and/or retraining, conducted by the CES and/or the Commonwealth's Department of Social Security (DSS). Failure to participate in these reviews will usually result in loss of the JSA. For those aged 18 years or more who have been without work for at least 12 months, the NSA becomes the applicable benefit. However, it is the Commonwealth Government's intention that there will be no automatic right of transition from the JSA to the NSA. Applicants seeking to move from the former to the latter will have to make fresh application. NSA recipients will be subject to intensive reviews and interviews by both the CES and DSS. Sometimes the two agencies will conduct these reviews and interviews jointly. This review process will usually occur at least every twelve months.

An interesting aspect of the proposed relationship between NSA recipients and the relevant Commonwealth agencies, is that it is proposed that the NSA recipients will enter into individualised "contracts" with the Federal agencies. These "contracts" will embody a recipient's personalised program of job seeking and/or job retraining, as agreed between the recipient and the Federal agencies. It is apparently envisaged that these "contracts" will be

principally between the NSA recipient and the CES. It is also envisaged, apparently, that no one will be granted the NSA unless they have entered into such a "contract". From a legal point of view, these "contracts" raise several questions. Is it intended that they will carry the usual incidents of full legal enforceability, as with ordinary contracts? For example, if a NSA recipient did not adhere to his/her personalised program of work search and/or re-training as laid down in the "contract", presumably the Commonwealth could exercise its right to end or at least suspend further NSA payments. Could the Commonwealth go further and sue the defaulting recipient for damages for breach of contract? If so, what would be the measure of damages? Damages might possibly consist of those NSA payments received by the defaulter during the period of his/her breach of the "contract". On the other hand, if the Commonwealth cut off NSA payments, wrongly alleging that the recipient was breaching his/her obligations under the "contract", could the recipient sue the Commonwealth for damages for breach of contract? From a (perhaps) more practical point of view, would these "contracts" (or decisions made pursuant to them) be reviewable for Federal tribunals such as the Social Security Appeals Tribunal (SSAT), the Administrative Appeals Tribunal (AAT), or even, just possibly, by the Federal Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)?

One thing about these proposed "contracts" is quite clear. They are intended to underscore and emphasise very strongly the fact that NSA recipients are not just passive receivers of social security benefits: they (the NSA recipients) will be expected — and compelled — to actively seek reintegration into the work force at the earliest possible opportunity. If a person receives the NSA for 2 years, an extensive and intensive review of that person's status will occur. It is apparently planned that, after 2 years on the NSA, a recipient's case will be jointly reviewed by the CES and the DSS. The object of this procedure will be to determine the recipient's situation, where he/she should remain on the NSA, or, if unable to work, whether he/she should transfer to some other program of income support. Persons who are receiving the NSA on a long term basis, and who are aged between 18-54, will receive expanded access to Commonwealth funded work training programs such as "Jobstart", "Jobtrain", "Skillshare" and "Job Clubs" — provided that recipients have been assessed by the DSS and the CES as being suitable for these programs.

Many of the "nuts and bolts" aspects of the proposed JSA/NSA system will remain relatively unchanged from the existing system of unemployment benefits. Thus, there is no proposal to change the current rates of payment. The differences between the "married" and "single" rates will remain. The special rates for those with dependent children will continue. Waiting periods for benefits will remain in place. It will continue to be necessary to register for work with the CES. Recipients will also still need to present a tax file number, in order to receive payments. Employer separation certificates will be retained, as will the current procedure of fortnightly lodgment of claims with the DSS. Also, as explained above, the requirements for active work search will not only be retained under the new arrangements, but will be significantly expanded. The Commonwealth intends that all those covered by the existing scheme of unemployment benefits at the time of implementing the new arrangements, will be transferred to the new system. Transferees will then come under the obligations of the JSA/NSA scheme, as well as taking part in its "assistance" aspects. It seems quite clear that current benefit receivers will have no choice about whether or not they transfer to the new structure. It will be compulsory.

The following remarks can be made, by way of final comments. First, one cannot say that unemployment benefits, as such, have been abolished. They remain in being, but under new names. Second, the requirements for benefit receivers to actively engage in job searching and, where appropriate, work training, have been noticeably toughened up. Third, the

introduction of “contracts” between recipients and the federal government, outlining the former’s responsibilities under the new system, is a novel and interesting way of reinforcing obligations of those receiving benefits. Fourth, the overall design of the new scheme shows that the Federal government intends that recipients will no longer be merely passive receivers of social security (if that was ever a correct description of their situation). They must now take an enhanced role in planning their return to the work force as soon as possible.

(This update has been based on material provided by the Federal Department of Social Security. It is current as at August/September 1990. The writer would like to thank the Department of Social Security for their prompt and willing assistance in providing relevant material.)