

Normal requirement for admission

In 1995, when Kruk was admitted to the Bachelor of Medicine course, there were 3 streams of entry: selection based on TER, for 30% of places; selection based on a previous degree, for about 20% of places; and Personal Qualities Assessments Results, including TER or previous undergraduate results, and psychometric testing. In 1998 the Uni-

versity council approved a special program for graduate entrants, a BMed (Graduate), and Kruk was enrolled in this course for her fourth year. There is no difference in the program of study.

The AAT referred to *Baker and Secretary to the DEETYA* (1998) 47 ALD 756, in which Justice Mathews held that Regulation 47 will only apply where the holding of a degree is the standard or

normal precondition for gaining entrance to a degree, rather than one of a number of possible preconditions.

Formal decision

The AAT set aside the decision under review and substituted a decision that Kruk was not qualified for AUSTUDY in 1997.

[A.B.]

Federal Court Decisions

Findings of fact: the AAT's responsibility

SECRETARY TO THE DSS v PAYNE
(Federal Court of Australia)

Decided: 12 February 1999 by Kiefel J.

The DSS appealed against a decision of the AAT that had waived a debt owed by Payne on the basis of administrative error and Payne receiving the payments in good faith.

The background

Payne had been receiving disability support pension since November 1993. She was given a notice by the DSS that she was to advise if her income exceeded a certain amount. Payne notified of increased income and her payments were duly adjusted. In September 1994 she commenced part-time employment but failed to notify of her income. Payne said she notified the DSS in November 1994 but there was no record of this on the DSS's file. The earliest advice the DSS received was a letter in April 1995. The DSS acted upon this advice and adjusted Payne's payments in July 1995.

In July 1997 the DSS raised a debt of \$4024 for the period 6 October 1994 to 29 June 1995. Because Payne had failed to provide information as required by the Act the debt was raised under s.1224 of the *Social Security Act 1991*.

The SSAT accepted that Payne had notified that she had returned to work in November 1994 and thus the debt ran from 6 October 1994 to 21 November 1994 only. The remainder of the debt was waived on the basis that it had been caused solely by administrative error and Payne had received the payments in good faith (s.1237A).

The AAT decision

The AAT affirmed the SSAT's decision and concluded:

'However, as the respondent's [Payne] credibility was not challenged at a lower level and as Mr Muir advised his client [Payne] not to give evidence before me, the Department had no way in which to impugn the credibility of the respondent. Thus, there is no basis whatsoever to justify the Administrative Appeals Tribunal disturbing the findings of fact of the Social Security Appeals Tribunal.'

(Reasons, para. 10)

The AAT observed that the DSS had ample opportunity to challenge Payne's credibility before the SSAT. The SSAT had accepted Payne's evidence that she had not been surprised when her payments were not reduced following her notification in November because her employment was for a brief period, and she assumed the DSS must have averaged her income. The SSAT noted in its reasons that the DSS had also expressed the view in the letter of the Authorised Review Officer that Payne had received the payments in good faith.

The findings of the AAT

The Court found that the AAT failed to analyse and assess the findings of the SSAT particularly after additional argument was put to it that Payne had a history of having adjustments to her pension payments as a result of being employed. Keifel J observed that:

'The question for the Tribunal (AAT) is not whether the decision was correct on the facts before it, or one reasonably arrived at. Its duty to review requires it to make its own assessment and determination.'

(Reasons, para. 15)

The AAT was obliged to consider whether the waiver provisions had been satisfied. The AAT appeared to have accepted that since Payne would not give evidence it had no alternative but to accept the evidence at the SSAT level. The Court found that there was other relevant and cogent evidence before the AAT that went to the credit of Payne that should have been taken into account. The AAT

had misunderstood its function by not considering the question of waiver itself.

Formal decision

The Federal Court set aside the AAT's decision and remitted it back to a differently constituted AAT for reconsideration according to law.

[C.H.]

Discretion to treat as not being a member of a couple

BOSCOLO v SECRETARY TO THE DSS
(Federal Court of Australia)

Decided: 18 February 1999 by French J.

Boscolo appealed against an AAT decision that there was no special reason for treating him as not being a member of a couple.

Background

Boscolo received the age pension. He married Rodrigo in January 1996 and was paid age pension at the married rate. For some months in 1996 and 1997 Boscolo had to live in Sydney to resolve and then finalise issues relating to the custody of his son from his first marriage.

Since migrating to Australia Boscolo has lived mainly in Western Australia with some periods in Sydney. In 1982 his first wife moved to Sydney to study. Boscolo remained in Western Australia and he and his wife officially separated in 1989 and proceedings were initiated in the Family Court. In the early 1990s they reconciled and in October 1991 Boscolo's youngest son David was born. Boscolo and his first wife separated once

again in 1993, and his first wife was granted custody of David. The marriage was dissolved in 1994 and in December 1995 Boscolo was granted custody of David by the Family Court. One of the terms of the custody order was that David remain a permanent resident of Sydney. After Boscolo married Rodrigo in 1996 the family returned to live in Western Australia. Boscolo received legal advice that he could return to Western Australia and David could be temporarily absent from Sydney. In Western Australia Boscolo commenced proceedings to allow David to remain permanently in Western Australia. He was forced to return to Sydney by the Family Court in June 1996, and in November 1996 the Family Court made further orders that David could reside in Western Australia with his father.

Whilst Boscolo was in Sydney his second wife remained in their home in Western Australia. Rodrigo had recently migrated to Australia and her friends and her support network were in Western Australia. She was actively seeking work in Western Australia and receiving new-start allowance. She was enrolled in English language courses in Western Australia and had obtained part-time work there. Rodrigo was also awaiting the arrival of her son from overseas.

In February 1997 Boscolo returned to Sydney to attend Family Court proceedings and in August 1997 he returned to Western Australia permanently with David. During the periods when he and his second wife were apart, Boscolo applied for them both to be paid their benefits at the single rate.

The law

Section 24(1) of the *Social Security Act 1991* provides:

'24.(1) Where:

- (a) a person is legally married to another person; and
- (b) the person is not living separately and apart from the other person on a permanent or indefinite basis; and
- (c) the Secretary is satisfied that the person should, for a special reason in the particular case, not be treated as a member of a couple;

the Secretary may determine, in writing, that the person is not to be treated as a member of a couple for the purposes of this Act.'

Special reason

The AAT had accepted that Boscolo took David away from Sydney for good reasons and that when ordered by the Family Court to return to Sydney there were also very good reasons for Boscolo to return. The AAT decided that Boscolo and Rodrigo were aware when they chose to live separately that this would increase their expenses. The Tribunal found Rodrigo's reasons for wanting to stay in Western

Australia were not special. Other arrangements could have been made.

The Court looked to the meaning of the words '*special reason*' and found that it is generally futile to search for a meaning for these words in terms of other words. The Court referred to *Beadle v Director General of Social Security* (1985) 60 ALR 225; (1985) 26 SSR 321 noting that the meaning of '*special*' comes from the context in which it is used. Circumstances or reasons may still be special even though they fall within a class that is widely defined, or because they can be foreseen before they arise.

'The core of the requirement for "special circumstances" or "special reasons" is that there be something unusual or different to take the matter the subject of the discretion out of the ordinary course.'

(Reasons, para. 18)

Section 24

French J decided that the decision making process under s.24 was in two stages. The first stage is to assess whether there is a special reason for treating the person as not being a member of a couple; the second stage is to make the determination that the person not be treated as a member of a couple. In making this assessment it is important that the decision-maker focus on the person and not the couple to assess whether the person should be treated as not being a member of the couple. The AAT erred in considering the circumstances of both Boscolo and Rodrigo. The Act requires the circumstances of the person who is claiming to be paid at the single rate to be considered. The issue was whether Boscolo should be treated as not being a member of a couple. It was then open to the AAT to decide that Boscolo had no choice but to go to Sydney to resolve the custody of his son David. This could well be a special reason. The Court concluded that the AAT had not applied the appropriate test in this case, which was to consider whether Boscolo should be treated as not being a member of a couple. When considering whether there was a special reason the AAT took into account the joint decision of Boscolo and Rodrigo to live separately, rather than Boscolo's decision alone.

Formal decision

The Federal Court allowed the appeal and remitted the matter to the Tribunal to determine according to law.

[C. H.]

Disability support pension: transitional provisions in 1991 Act

SECRETARY TO THE DSS v COSMANO
(Federal Court of Australia)

Decided: 23 December 1998 by Heerey J.

This was an appeal by the DSS against an AAT decision that Cosmano was entitled to be paid disability support pension from 28 July 1989. The DSS agreed that Cosmano was entitled to be paid the disability support pension, but from 28 July 1994.

Background

Cosmano lived in Australia from 1963 to 1983. In 1989 he claimed the invalid pension, and for some unknown reason the DSS did not make a decision on his claim until 24 April 1994. The claim was rejected. During the review process the DSS considered the medical evidence again and granted Cosmano disability support pension from 29 December 1994.

The AAT decision

The AAT decided that an invalid pension can be granted prior to 1 July 1991 pursuant to the transitional provisions in Schedule 1A of the *Social Security Act 1991* (the 1991 Act). The AAT found on the evidence that Cosmano was unfit for work as early as 4 January 1990, and thus it accepted that Cosmano had been unable to work from the date of his original claim in July 1989.

The transitional provisions

The Court considered the transitional provisions set out in Schedule 1A of the 1991 Act, and s.8 of the *Acts Administration Act 1901*. When Cosmano applied for the invalid pension the *Social Security Act 1947* (the 1947 Act) was in operation. However the DSS made its decision under the 1991 Act. Section 5(1)(a) of Schedule 1A provided that a claim lodged under the 1947 Act but not determined before 1 July 1991 had effect as if it were a claim under the 1991 Act. Therefore Cosmano's claim of July 1989 could be treated as a claim under the 1991 Act. The date of effect of any favourable decision on that claim could be before 1 July 1991, but Cosmano no longer had any rights under the 1947 Act. Section 8