visions in the Act that would empower the Secretary to require a person to provide information about his or her income from remunerative work and so no provisions of the type to which reference is made in s.630AA(1). Since that date, all such provisions are found in the Administration Act. The section would have effect if it were given the meaning I have set out in paragraph 29 above. That is to say, it would have effect if s.630AA(1) were taken as a provision of a law of the Commonwealth enacted prior to 20 March, 2000 (as it is) referring to provisions of the 1991 Act (as it does by reference to their requiring a person to provide certain information) that have been repealed (as they have been). The effect of s.244 is that those provisions then be read as referring to corresponding provisions in the Administration Act. That interpretation accords with the purposes revealed by the social security law even though, in its application in a particular case, it may be thought to lead to the imposition of unbearable hardship.

For these reasons the AAT concluded that in the circumstances of this case, s.630AA(1) should be read as applying in a situation in which Quinn has refused or failed without reasonable excuse to provide information in relation to his income from remunerative work as required by a notice given under s.68 of the Administration Act. As there was no dispute between the parties that such a notice was given and that he did fail without reasonable excuse to provide the information, it follows that his failure was an activity test breach. Again, there was no dispute between the parties as to the consequences of that activity test breach, namely that he is subject to a NSA activity test rate reduction amount of 18% for the NSA rate reduction period.

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that the original decision be affirmed.

[K.deH.]

Farm Family Restart Grant: definition of farmer

HERRICK and SECRETARY TO THE DFaCS (No. 2002/0091)

Decided: 15 February 2002 by J. Handley.

The issues

The applicant applied for a Farm Family Restart Grant under the Farm Household Support Act 1992. This was rejected by the delegate of the Secretary, and the rejection was affirmed by the SSAT. The issue was whether Herrick was a farmer as defined by that Act.

The facts

Herrick and his wife were share farmers. There was an agreement between Herrick and the owners of the property that the property was to be run as a dairy farm. The agreement set out what was to be provided by the owners of the property and what was to be provided by Herrick. The owners provided the land and stock, milking facilities, a house, machinery and vehicles. Herrick provided management and labour to milk and manage the farm, his own four-wheel all-terrain vehicle (ATV) and trailer, hand tools and computer and software. Further, all costs were paid by the owners except for a limited list which were shared. Herrick obtained an overdraft of $5000 in the first year and up to $11,000 in the second year to meet his obligations.

The law

The Act defines 'farmer' as:

> ... a person who
>
> (a) has a right or interest in the land used for the purposes of a farm enterprise; and
>
> (b) contributes a significant part of his or her labour and capital to the farm enterprise; and
>
> (c) derives a significant part of his or her income from the farm enterprise.

'Farm enterprise' is defined by the Act as:

> ... an enterprise carried on within any of the agricultural, horticultural, pastoral, apicultural or aquacultural industries.

The issue for the Tribunal was whether Herrick had contributed a 'significant part of his ... capital to the farm enterprise'. There was no dispute that Herrick had contributed a significant part of his labour to the enterprise.

Discussion

The Authorised Review Officer decided that Herrick's contribution did not amount to a significant contribution to the capital of the farm enterprise, because he did not own the land, the cows or the machinery. The SSAT held that taking out an overdraft to pay expenses did not amount to a contribution of capital.

The Tribunal decided that a contribution to the running of the farm should be considered in the context of the expenses of Herrick, not the cost of running the farm as such. Moreover, monies derived from an overdraft amount to 'capital' for the purposes of the Act.

> I am satisfied that those expenses were significant, in the context of the [applicant's] total expenses and also in the context of the [applicant's] total income derived from the farming enterprise. In order to meet his obligations under the share farming agreement the applicant was required to incur certain items of expenditure which on his evidence could only be achieved by obtaining or having access to monies secured by the overdraft.

(Reasons, para. 32)

Formal decision

The Tribunal set aside the decision under review and decided that Herrick was a 'farmer' as defined under the *Farm Household Support Act 1992*.

[A.B.]

Family allowance: notice incorrectly given

TRIEU and SECRETARY TO THE DFaCS No. 2002/0143

Decided: 7 March 2002 by G. Ettinger and Isenberg.

Background

Trieu's claim for family allowance was rejected because information, in particular Trieu's 1997/98 tax returns, which had been considered necessary for consideration of her entitlement and had been requested, had not been provided.

Issues

The issue before the Tribunal was whether Trieu was entitled to family allowance for the period from her claim in October 1999. In order to decide the above issue the AAT was required to consider: whether the Department had validly issued a notice under s.1304 of the *Social Security Act 1991* (the Act); if the Department had not issued a valid notice under s.1304 of the Act, whether it was entitled to rely on the Trieu's failure to comply with that notice in rejecting her claim for family allowance

Legislation

The relevant legislation is contained in ss.838(1)(d) and 1304 of the *Social Security Act 1991*. The relevant parts include:

> **1304(1)** The Secretary may require a person to give information, or produce a document that is in the person's custody or under the

person's control, to the Department if the Secretary considers that the information or document may be relevant to the question of:

(a) whether a person who has made a claim for a social security payment (other than pension bonus) under this Act is or was qualified for the social security payment; or ...

1304(2) A requirement under subsection (1) must be by notice in writing given to the person.

1304(3) The notice must specify:

(b) the period within which the person is to give the information, or produce the document, to the Department; and ...

1304(4) The period specified under paragraph (3)(b) must end at least 14 days after the notice is given.

...

1304(7) A person must not, without reasonable excuse, refuse or fail to comply with a notice under this section to the extent that the person is capable of complying with it.

Invalid notice

There was no dispute between the parties as to the facts. The Tribunal noted that Trieu felt aggrieved and discriminated against in her dealings with Centrelink.

The refusal to grant family allowance arose because the Department identified from a cross-matching of Commonwealth records, information which suggested that Trieu had assets which had not been disclosed in the course of her application for various benefits, including family allowance. The Department then sought tax returns and Notices of Assessment for the financial year 1997/98 from the Trieus. The request was made verbally and on the same day a Notice under s.1304 of the Act (the Notice) was sent to Trieu. The notice requested the information be provided within seven days.

Trieu provided the requested 1997/98 Notices of Assessment but not the requested tax returns. In the letter enclosing the Notices of Assessment Trieu noted that the legislation allowed 14 days. The Department rejected the family allowance application because Trieu had not provided all the requested information

The Department accepted that the notice should have given 14 days for compliance but notwithstanding the provisions of s.1304, the Department submitted it was the responsibility of claimants to justify their entitlements and to support their assertions with evidence so that the claim could be accurately determined. Where claimants failed to produce relevant information, their claims were liable to rejection. The Department also submitted that the issuing of a valid notice and failure to comply were not prerequisites to a decision to reject a claim and the evidence required by the Department to determine the claim was clearly made known to Trieu.

The AAT accepted as a general proposition that the issuing of a (valid) notice under s.1304 and failure to comply with such a notice, are not prerequisites to a decision to reject a claim. However, in this matter, the Department decided not to make a decision on the information provided by Trieu in support of her claim, but to seek further information 'bolstered' by the issue of a notice under Section 1304. It was entitled to do so, but clearly not entitled to alter the legislatively determined 14-day response time to seven days.

The AAT further accepted that a copy of Trieu's taxation return and group certificate for the relevant period could reasonably be considered to be relevant in determining the appropriate rate of payment of the pension. The AAT stated that section 1304(4) of the Act is clear in its terms that the notice allow at least 14 days after the notice is given, for compliance.

The AAT considered that because the oral requests for the tax returns were not complied with, the Department adopted a more formal course of issuing a Notice under s.1304 of the Act. The Tribunal found that Notice was patently invalid and Trieu had no obligation to comply with such a Notice. Consequently, the AAT found that the decision by the Department that Trieu was not entitled to family allowance on the basis of failure to comply with the defective Notice was flawed.

Furthermore, having adopted the course that information was to be provided in response to the Notice, rather than by way of response to a verbal request, the DFaCS was not then entitled to rely on the failure to provide information which had been requested verbally to disentitle the applicant to family allowance.

Accordingly, although the inspection and study of the applicant's tax returns for 1997/98, if she eventually supplies them in response to a correctly given notice may either indicate Mrs Trieu is eligible for Family Allowance, or in the alternative that she is not, Mrs Trieu will have been provided every opportunity of pursuing her case in accordance with the legislation. Therefore the decision which must follow for the moment is as follows (Reasons, paras 35 and 36).

Formal decision

The AAT set aside the decision of a Centrelink delegate of DFaCS, dated 16 November 1999 as affirmed by an Authorised Review Officer of the DFaCS on 20 January 2000, and the Social Security Appeals Tribunal on 2 June 2000 to reject Trieu's claim for family allowance. The AAT remitted the matter to the DFaCS to be reassessed taking the findings made in the Reasons for Decision into account.

There was no application before the AAT with regard to the health care card, and the Tribunal did not make a decision in that regard.

[M.A.N.]

Opinion continued from front page

Both Jill Huck and Rieteke Chenoweth, were first appointed as part-time members in 1986. By their interest and knowledge they ensured that the concept of multi-member panels at the SSAT was a reality, and not, as has been stated elsewhere, a matter of providing 'bookends'.

The decision not to have directors in the smaller States will make it more difficult for members in these States to ensure consistent and high quality decision making. The directors acted as foci for discussion and as the repository of the organisation's memory.

These members have not only contributed to the jurisprudence of the SSAT, but to the strength of administrative review in the Commonwealth. Members on most administrative review tribunals throughout the Commonwealth would have had the benefit of their input in the training and procedure of their tribunals.

The loss of the accumulated organisational memory of these members must be seen as a loss to the ability of the SSAT to go forward with full knowledge and awareness of its history, its aims and its possibilities.

I wish all of them the best in any future careers. I hope that their knowledge and experience is not totally lost to the administrative review system. I hope the SSAT will continue to be the successful efficient and accessible tribunal that it has been to date.

[A.B.]