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# Lecture 1 - Social Welfare Law

- Income - defined differently in Social Security legislation and other tax.
- Covered in *Social Security Act 1991* (Cth) -> New Start Allowance (dole), Old Age Pension.
  - Other benefits: carers, disability etc.
  - Disability not part of certain tests e.g. reporting each week and having to show your trying to get work.
- **Exclusions from Income tests:**
  - Home is excluded from income tests - Only 1 house.
  - can have up to \$250 000 in the bank account as well.
  - Couple can have up to \$375 000 in investments as well.
- Pension is means tested.
- Union funds - started by unions - give people choice of funds.
- Scott Morrison - Social welfare is a revenue problem.
- Up to 1980s - welfare was available to everyone.
- Hawke government - implemented means testing.
- Farmers complained -> asset rich, sought concessions.

One man's tax liability is another man's welfare.

Steps to getting income:

1. Prove you're not getting an income under s 8 *Social Security Act 1991*
    - earned, derived or received - encompasses all forms of money.
    - periodic pay
    - narrow test = government wants to stop paying out as much money as possible.
- **One off payments can still be income** - does not have to be periodic.
  - Money from an estate or property can still be income for social security purposes.

## ***Social Security Act 1991 (Cth) s 8***

***Income*** in relation to a person, means:

- (a) an income amount earned, derived or received by the person for the person's own use or benefit; or
- (b) a periodical payment by way of gift or allowance; or
- (c) a periodical benefit by way of gift or allowance;

### *McLaughlins case*

- milk industry; gave amount of money.
- non-genuine loan as they didn't have to pay it back.
- defined as income.
- to receive income - you don't actually have to do anything.

### *Coleman's case* (1996) 45 ALD 784

- Bond's case in UK
- Invest in this fund, each dollar has a number.
- Every month, they draw a lot and if you have winning number you get an amount of money.
- Person on welfare won money.
- Income - received, winnings irregular, and unpredictable but were earnings.

Russ case (1977) AAT 11754	<ul style="list-style-type: none"> <li>- Police officer medically unfit, received pension.</li> <li>- Divorced - superannuation subject to family court order.</li> <li>- Wasn't income in his hands because he didn't have it in his house.</li> <li>- Didn't receive the money</li> </ul>
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### New Start Allowance

Larders case 1996 AAD decisions 49	<ul style="list-style-type: none"> <li>- Studying for diploma.</li> <li>- Can you be unemployed and still doing a course?</li> <li>- Architect, full time student.</li> <li>- Could not be unemployed as course would cut across his working hours.</li> </ul>
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- Move to an area less industrialised - deemed to be squelching out of obligations to be looking for work and getting advantage- less benefits.
- **Benefits are transportable** - its to your advantage of going to a lower unemployment area - housing is usually cheaper.
- Look at rate of unemployment in certain areas.

### Unemployment

<p><b>Re McKenna and Director of Social Services (1981) 3 ALD 219</b></p> <ul style="list-style-type: none"> <li>- M sought review of a decision of D-G to cancel payment to him of unemployment benefits.</li> <li>- s 107(1)(c) - person must satisfy criteria - unemployed but willing to undertake paid work, had taken reasonable steps to obtain such work</li> <li>- Evidence showed M ceased salaried employment and joined a workers' co-operative - unwilling to seek other employment because he felt an obligation to assist the co-operative and was actively engaged in the development and running of what was a labour intensive business.</li> </ul> <p><b>Held</b></p> <ul style="list-style-type: none"> <li>- Onus on M to demonstrate he satisfied conditions of s 107(i)(c).</li> <li>- M did not come within act - did not appear that M was willing to undertake paid work.</li> <li>- D-G's decision should be affirmed.</li> </ul>
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### Administrative Issue

<p><b>Green (1977) 51 ALR 463</b></p> <ul style="list-style-type: none"> <li>- High Court case</li> <li>- After christmas, number of unemployed younger people apply for benefits.</li> <li>- Green applied for benefit - refused.</li> </ul> <p><b>Held</b></p> <ul style="list-style-type: none"> <li>- Policy is not law. Law must be in legislation. <b>She couldn't be refused unemployment benefit on grounds of policy.</b></li> </ul>
<ul style="list-style-type: none"> <li>- Person had to attend Centrelink, never did and claimed he never got the letter.</li> <li>- Audit report from KPMG from govt -&gt; 93.9% of letters arrive.</li> <li>- Centrelink could be 95% sure the letter would arrive on time and hence no excuse.</li> </ul>

### Disposing of Issues

- More than \$20 000 given away, deemed to still have it and its included in the assets test for social security.
- For the purpose of test, disposing or destroying -> dominant purpose was to claim social security = benefit still exists as you still have these assets.

### ***Frendo v SDSS (1987) 13 ALD 681***

- Appeal from Administrative Appeals Tribunal - Tribunal decided payments of \$30 000 made by F to each of her 2 kids were dispositions of property within s 6 AC (10) of the SSA and should be included in the value of her property for the purposes of the assets test.
- **s 6 AC (10)** - person disposes of property if person diminishes value of her property where the person receives no consideration in money or money's worth.
- F had paid \$30 000 to son to compensate him for his willingness to provide a home for F and her husband, and \$30 000 to her daughter to provide her with a dowry (matter of obligation in Maltese community) -> made without consideration as recognised by the law of contract.

#### **Held**

- payments made for no consideration, fell with s 6AC (10) of SSA - appeal dismissed.
- Was merely a family arrangement - not a legally enforceable agreement.

### ***Re Secretary, Department of Social Security and Tripolino (1998) 51 ALD 748***

- T aircraft maintenance engineer; airport and aircraft maintenance offered for sale in 1995.
- 1996 July - T established discretionary trust and transferred real property worth \$312 000.
- 1996 - service contract held by T's employer expired, and despite sufficient work for short-term future - firm closed, T's employment terminated on 25 September with less than a day's notice.
- Following termination, T transferred \$10,056 to trust.
- 5 December 1996 - T lodged a claim for newstart allowance and an application for consideration under s 1127(b) SSA which excluded operation of the disposal of assets provision, s 1126, where a person disposed of an asset before the time that the person could reasonably have expected that the person would become qualified for a social security payment.
- Claim rejected.
- Reviewed by Social Security Appeals Tribunal - decision set aside.

#### **Held**

- Time of transfer - respondent could not reasonably have expected he would become qualified for newstart allowance by end of September 1996 -> disposal of those assets disregarded pursuant to s 1127(b).
- Transfer of \$10,056 to trust made at a time when respondent could reasonably have expected he would become qualified for newstart allowance and could not be disregarded.

### ***Re Galea and Secretary, Department of Social Security (1994) 34 ALD 673.***

- G claimed job search allowance on 16 November 1992.
- G informed the Department of Social Security that she had made two payments in September 1992 (\$188,734.78) to a family trust which had been established in April 1992.
- Delegate of secretary decided G had disposed of assets and amount of disposition in excess of \$10 000 should be included in G's assets for purpose of determining entitlements.
- Decision affirmed by SSAT.
- G appealed to AAT.
- G produced evidence that money derived from G's savings came from account 'G as trustee for (G's adult children)  
-> lawyer, accountant, children were not aware of trust before denial of allowance.

#### **Held**

- Designation of applicant's bank account as one held in trust for children not sufficient to create a trust  
- intention to create trust not communicated till after rejection of claim for allowance.
- Money withdrawn from account and interest treated in inconsistent manner to creating trust.
- = applicant disposed of assets.
- **Mere intention to create trust does not create trust** - must have transfer of property.

***Kintominas v Secretary, Department of Social Security (1991) 23ALD 573-583***

- Appeal to FC - AAT decided item of real property legally owned by applicant should be taken into account in determining value of her assets and rate of age pension, after deducting from property's value amount spent by son to improve property.
- Applicant agreed with son that he and family could live in subject property rent-free in return for paying outgoing and maintaining property - he borrowed \$35,000 to improve property and he would get property in will.
- Tribunal accepted respondent's concession that applicant's son had equitable charge over property to extent of his expenditures on improvements to property but not equitable entitlement to whole property.

**Held**

- Appeal should be allowed.
- Applicant's conduct had given rise to expectations on the part of her son.
- Equity would intervene to enforce the applicant's voluntary promise to her son in respect of the subject property
- Subject property beneficially the property of the applicant's son and was not property with a value in applicant's hands capable of being converted into an assessable basis for reducing her pension.

## Social Security Advantage

***Secretary, Department of Employment, Education and Youth Affairs v Ferguson (1997) 147 ALR 295.***

**Facts**

- F applied for and received Newstart allowance from Nov 1993 to July 1995 - condition that F entered into case management activity agreement and attend interviews with case officer.
- F received correspondence notifying time and place of meeting but F failed to attend as was in WA and forgot.
- Newstart allowance cancelled pursuant to s 45(5) of *Employment Services Act 1994* (Cth) - that recipient of newstart must satisfy the secretary that person is taking reasonable steps to comply with agreement.
- Person is taking reasonable steps to comply, unless the failure to comply involved a matter within their control or circumstances that were reasonably foreseeable.
- Argued forgetting to contact the case manager was within his control.

**History**

- Application to review = affirmed
- Appeal to SSAT - affirmed
- AAT - reversed decision to cancel allowance
  - not reasonably foreseeable - allowed to not report.

**Held**

- appeal allowed.

***Hodson v Secretary of State for Work and Pensions [2014] UT CJS/3466/2013*** , available at <http://www.lawandreligionuk.com/2014/08/08/the-book-of-common-prayer-jobseekers-allowance-and-article-9-echr/>

- H claimed job seeker allowance in August 2012 after his student related job at University came to an end.
- Required to attend an interview with personal adviser on 27 September - received notice on 25 September - told them he was unable to attend because he was at a service of Holy Communion that day.
- Asked to rearrange interview - refused and hence did not attend interview.
- Was not paid benefit under regulation 12(2)(a) of Social Security Regulations 2002.
- Appealed - dismissed and was not entitled to back dated payment.
  - Reasoning - if employed he would have made alternative arrangements to attend Holy Communion - attending communion on that day was a preference not an established practice or custom.
- Appealed to Upper Tribunal - dismissed
  - customs and religions did not prevent him from attending the interview that day.
  
- Stuck to the rigid rules.
- Human Rights course - human right to manifest our religion - he could have gone to another service so couldn't express that right.

Required Reading: Bourdieu 'The essence neoliberalism' find article in le monde via google at : <http://mondediplo.com/1998/12/08bourdieu>

#### Marriage-like relationships

- Two singlet people get more social security than a couple.
- Living in marriage type relationship, claiming item but trying to claim single independent.
  - Are they sharing accounts, telephone, sex?
  - Centrelink will check.

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## Week 2 - Residency and Source, International Taxation

### Residency and Source

- If a person is an Aus resident for income tax purposes, that person is liable for tax in Aus for all income derived - including from sources outside Aus.
- Non-Aus resident - liable to tax only on income having an Aus source.

#### Exceptions:

1. Certain income of a non-resident may be subject to withholding tax regardless of its source
2. Capital gains tax on non-residents not imposed based on source principle

#### Assessable Income and Residence

- Two types of income: ordinary, and other assessable 'statutory'

### ***Income Tax Assessment Act 1997 (Cth) s 6(5) - Ordinary Income***

1. Your ***assessable income*** includes income according to ordinary concepts, which is called ***ordinary income***.
2. **Australian resident** = your assessable income includes ordinary income you derived directly or indirectly from all sources, whether in or out of Australia, during the income year.
3. **Foreign resident** = your assessable income includes:
  - (a) the ordinary income you derived directly or indirectly from all Australian sources during the income year; and
  - (b) other ordinary income that a provision includes in your assessable income for the income year on some basis other than having an Australian source.

### ***Income Tax Assessment Act 1997 (Cth) s 6(10) - Other Assessable Income ('Statutory income')***

1. Your ***assessable income*** also includes some amounts that are *not* ordinary income.
2. Amounts *not* ordinary income, but included are called ***statutory income***.
3. If an amount would be statutory income apart from the fact that you have not received it, it becomes statutory income as soon as it is applied or dealt with in any way on your behalf or as you direct.
4. **Australian resident** = your assessable income includes your statutory income from all sources, whether in or out of Australia.
5. **Foreign resident** = your assessable income includes:
  - (a) your statutory income from all Australian sources; and
  - (b) other statutory income that a provision includes in your assessable income on some basis other than having an Australian source.