[2013] AATA

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number | 2013/1244 |
| Re |  |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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| Tribunal | **Senior Member N A Manetta** |
| Date | **16 December 2013** |
| Place | **Adelaide** |

The decision under review is affirmed.

.....................[Sgd]...................................................

**Senior Member N A Manetta**

# Catchwords

DEFENCE HOME OWNERSHIP ASSISTANCE SCHEME – eligibility as "separated member" – requirement that application for subsidy certificate be lodged within two years of deemed cessation of service – lodgement of application after expiry of two year period – whether power to grant certificate – no power to grant certificate outside two year period – applicant's ignorance of two-year limitation irrelevant to statutory power – apparently inadequate dissemination of information to personnel noted.

# Legislation

Defence Home Ownership Assistance Scheme Act 2008 ss 5, 17(1) and (3)

# REASONS FOR DECISION

**Senior Member N A Manetta**

**16 December 2013**

1. Mr O’Malley has applied to the Tribunal for a review of a decision to deny him a “subsidy certificate” under the *Defence Home Ownership Assistance Scheme Act 2008*. Subsidy certificates are issued to eligible Defence Force personnel. They assist personnel in the purchase of a home.
2. Mr O’Malley had sought a certificate, was refused one, and then applied for an internal review of the decision. The internal review officer affirmed the refusal. Mr O’Malley’s challenge in this Tribunal to the internal review officer’s decision was properly made under s 76(1) of the Act.
3. Neither party wished to present submissions in person. Under s 34J of the *Administrative Appeals Tribunal Act 1975*, the Tribunal is empowered to embark on a review without holding a hearing where the parties consent to this course and where the Tribunal is satisfied that the issues arising on the application can otherwise be adequately determined. I am satisfied this is the case, and so I have conducted the review without proceeding to a hearing. I note that some information was provided to me at a telephone directions hearing; otherwise, I have had regard to the documents filed by the Respondent under s 37 of the AAT Act and the parties’ written submissions.
4. I have decided to affirm the internal review officer’s decision. My reasons follow.

# BACKGROUND FACTS

1. Mr O’Malley has served in the Defence Force since the 1980s, more recently as a reservist. It is agreed that Mr O’Malley did not complete a minimum of 20 days’ service in the year ending 30 June 2011. For the purposes of the Act, he did not perform “effective service” as a reservist in that year[[1]](#footnote-1). This had an important consequence for Mr O’Malley. Sections 5(1) and (2) of the *Defence Home Ownership Assistance Scheme Act 2008* provide, in effect, that for the purposes of the Act, Mr O’Malley’s service as a reservist was deemed to have ceased immediately after the end of the preceding year (namely, immediately after 30 June 2010). For the purposes of the Act, he had become what is referred to as a “separated member” and his eligibility for a certificate was to be assessed on this basis: see section 12.

# KEY LEGISLATIVE PROVISIONS GOVERNING ELIGIBILITY

1. Section 17 specifies certain conditions governing the grant of a certificate. In my opinion, sections 17(1) and (3) are decisive of Mr O'Malley's application for a certificate as a “separated member”. Sections 17(1) and (3) provide as follows:

“**Decision to give subsidy certificate – eligible applicants**

1. Subject to this section, the Secretary must give a subsidy certificate to the applicant if the Secretary is satisfied that the applicant:
   1. is eligible; and
   2. does not hold a subsidy certificate that is in force; and
   3. if the applicant is not a member of the Defence Force – has not previously applied for a subsidy certificate since he or she stopped being a member of the Defence Force.

…

1. If the applicant is eligible as a separated member, the Secretary may give a subsidy certificate to the applicant under subsection (1) only if the application for a subsidy certificate is made within 2 years after the applicant stopped being a member of the Defence Force.”
2. Although the Respondent had an obligation under subsection (1) to grant eligible applicants a certificate, the obligation was made subject to the remaining subsections, including subsection (3). It is clear that in respect of separated members, subsection (3) qualifies substantially the Respondent’s obligation under sub-section (1). Subsection (3) provides that the Respondent may grant a subsidy certificate to a separated member “only if the application for a subsidy certificate is made within 2 years after the applicant stopped being a member of the Defence Force”.
3. Mr O’Malley filled out his application on 4 September 2012 and it was received in the Respondent’s department the following day: see T Documents T6, pages 32-39. Mr O’Malley’s application was made, therefore, more than two years after 30 June 2010 (when his service was deemed to have ceased). When the application was made, the Respondent no longer had statutory authority under section 17 to grant him a certificate.
4. The drafting of sections 17(1) and (3) is, in my opinion, quite clear. The Respondent’s statutory authority to grant Mr O’Malley a certificate could only have been enlivened by an application made within the stipulated two-year period. This follows from the expression “only if”, which was deliberately chosen, in my opinion, to remove the Respondent’s power to issue a certificate to separated members at the end of the two-year period. I do not think any other reading of section 17 is reasonably open. In my opinion, the Respondent lacked statutory authority to grant Mr O’Malley a certificate when he applied for one as a separated member in September 2012. This Tribunal, re-exercising the decision-maker’s powers afresh, is similarly constrained and also lacks statutory authority to grant Mr O’Malley a certificate.

# MR O’MALLEY’S LACK OF KNOWLEDGE

1. Mr O’Malley maintains that he was unaware of this limitation. I do not think Mr O’Malley’s lack of knowledge affects the legal result. Put simply, the Respondent’s authority to grant Mr O’Malley a certificate ceased at the end of the two-year period whether or not he understood that to be the case. Again, I do not think the Tribunal, re-exercising the decision-maker’s powers afresh, has any wider authority.

# ADMINISTRATIVE PRACTICE IN THIS CASE

1. Whilst this is the legal answer to Mr O’Malley’s application to this Tribunal, his claim of lack of knowledge concerned me. I requested the Respondent to provide a summary of the steps that had been taken to notify members of the rules governing their eligibility for a subsidy certificate under the Act, which was passed in 2008. The Respondent filed a detailed written submission in which reference is made to presentations, called “road shows”, advertisements in defence force publications, and information available online. The Respondent accepted that Defence Force personnel were not contacted individually about the Act when it came into force. As I understand matters, the scheme under the Act superseded and replaced an earlier scheme set up under the *Defence Force (Home Loans Assistance) Act 1990*.
2. Mr O’Malley said at the directions hearing that he was unable to attend the road shows due to his regular work commitments. He indicated that he would not have thought to check his eligibility until he was ready to apply, by which time it could well have been too late. His application for review (T1, p1) records his belief that the 1990 scheme had changed a number of times, but, so far as he was aware, it had never contained a cut-off date for reservists who had become inactive.
3. I am somewhat concerned that the Department decided not to advise personnel individually of the existence of the new 2008 scheme and, in particular, of relevant scheme limitations. I have no information concerning global *e*-mail address lists but I note that these are commonly maintained in Government departments for the mass dissemination of information to employees. It may have been possible for the Respondent to *e*-mail a summary of the 2008 scheme (including its limitations) to all personnel.
4. If, for whatever reason, *e*-mail was not feasible, the question arises whether personnel should have been notified individually in some other way, including by letter. The Respondent submitted that contacting 54,000 permanent Defence Force members and 47,000 Reservists individually would have been too onerous.
5. In my opinion it is important to bear in mind that Defence Force personnel would consider a subsidy certificate to be an important benefit they enjoy as a result of their service. Limitations on remuneration (including important fringe benefits) are no doubt of vital interest to Defence Force personnel as they are to the community at large. I think in matters of this type, where the benefit may be of real financial importance to Defence Force personnel, individual notification is preferable even though the numbers involved are very large.
6. Whilst conscious that I may not have all relevant information, I do wish to alert the Respondent to a situation where it would appear better communication methods could have been employed. The essence of Mr O’Malley’s grievance is that he is a long-standing member of the Defence Force who has forfeited eligibility for a valuable benefit simply because he was not aware of a critical time limitation. He asserted in a directions hearing that the subsidy certificate would have been worth many thousands of dollars to him. I cannot verify that assertion on the papers, but if he is correct, he will no doubt feel poorly treated.

# CONCLUSION

1. I have already indicated that Mr O’Malley’s ignorance of the legal criteria governing an application for a subsidy certificate does not give the Tribunal statutory authority it otherwise lacks to grant him a certificate. Mr O’Malley did not seek to establish an entitlement to a certificate otherwise than as a separated member. The Respondent’s decision will be affirmed on the basis that in the circumstances there is no statutory authority to grant a certificate to Mr O’Malley as a separated member.

# DECISION

1. The decision under review is affirmed.

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| I certify that the preceding 18 (eighteen) paragraphs are a true copy of the reasons for the decision herein of Senior Member N A Manetta |

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Administrative Assistant

Dated 16 December 2013

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| Date(s) of hearing | **9 September 2013 (On the papers)** |
| Date final submissions received | **29 October 2013** |
| Applicant | **In person** |
| Advocate for the Respondent | **Mr Will Sharpe** |
| Solicitors for the Respondent | **Sparke Helmore, Canberra** |

1. “Effective service” for reservists is defined in regulation 8(2) of the Defence Home Ownership Assistance Scheme Regulations, 2008. [↑](#footnote-ref-1)