failure to comply with the Act. Also, the cancellation of the benefit for 2 weeks by entry into the DSS computer program did not constitute a determination in writing under s.126(2), as it was found by the AAT that there had been no independent exercise of the DSS officer's mind prior to that entry.

Formal decision

The AAT affirmed the decision of the SSAT that unemployment benefit be paid to the respondent for the period 6 to 20 March 1990.

[B.S.]

Assurance of support debt

IBARRA and SECRETARY TO DSS (No. 6629)

Decided: 7 February 1991 by O'Connor J, H. E. Hallowes and J. McGirr.

Ibarra asked the AAT to review a decision of the SSAT, which set aside a DSS decision to recover an assurance of support debt and substituted for it a decision to write off the debt under s.251 of the *Social Security Act*, subject to recovery at a future date.

The facts

In 1988, while Ibarra was in receipt of unemployment benefit, he signed an assurance of support in respect of his parents' application to migrate to Australia. Although on benefit at the time, he stated on the assurance that his taxable income was $26 000 and his wife's $28 000.

When Ibarra's parents first arrived in December 1988, they lived with him and his wife and he supported them. However, as a result of conflict between his wife and parents, the parents moved out of the house shortly after their arrival.

Ibarra then completed an application for special benefit for them on which he stated 'our maintenance guarantor cannot give support to us because he is currently unemployed' and referred to heavy repayment commitments on their house.

Ibarra was then interviewed and signed a statement in which he acknowledged that he would have a debt to the Commonwealth if special benefit was granted to his parents.

Benefit was granted to Ibarra's parents at the hostel rate but shortly afterwards, his parents sought an increase on the grounds that since 2 January 1989 they had commenced paying rent. Ibarra was again contacted and informed that he might be liable to repay any amounts paid to his parents and would be contacted at regular intervals concerning his capacity to pay.

On 29 September 1989, Ibarra was informed that there was a debt of $7452.87, increasing at $225.40 per week. Ibarra asked the SSAT to review this decision.

The legislation

Section 246(2A) of the *Social Security Act* allows the Secretary to recover an assurance of support debt by withholdings from a person's pension, benefit or allowance; while s.251 provides the Secretary with a discretion to waive, write off or recover a debt by instalments, including, by s.251(4), an assurance of support debt.

Section 3(1) defines an assurance of support debt [see *Mathias* in this issue of the *Reporter: p.823*].

Jurisdiction to review

The AAT considered the central question to be whether there was a decision which was reviewable by the AAT.

Ibarra submitted that the primary decision maker had no power to make the decision but the AAT found that the officer had delegated to him the Secretary's power under s.246(2A).

It was also submitted that the delegate's powers were restricted by monetary limits under s.251 but the AAT found this not to be an issue as no action had been taken under that section.

After noting that the AAT's jurisdiction under s.205 of the *Social Security Act* was to review decisions which had been reviewed by the SSAT, the AAT considered which aspects of the decision were reviewable.

The AAT referred to the decisions of the Federal Court in *Hangan* (1982) 11 *SSR* 115 and *Hales* (1983) 13 *SSR* 136, the effect of which is that 'once the decision is made that the threshold legal and factual requirements are satisfied, then it is not necessary to wait until action occurs before the matter can be reviewed because at that stage there is a reviewable decision': Reasons, para. 22. The AAT accordingly held that the decision made under s.246(2A) was reviewable:

> 'While the tribunal is not saying that each of the conclusions of fact which the Secretary or his delegate must make in order to recover under s.246(2A) can be made the subject of separate and independent applications for review it is of the view that in the proper practice of administrative review, all components of the administrative decision must be assessed in reaching the final decision. Although under s.246(2A) of the Act the Secretary is compelled to take action if he declines to take action under sub-section 251(1), in our view that action must be founded on the Secretary or his duly authorised delegate being satisfied that the legal and factual elements of recoverability exist.'

(Reasons, para. 23)

In this case, the elements of which the Secretary was required to be satisfied were that —

- there was a valid and relevant assurance of support agreement;
- moneys had been paid to the person who was the object of the agreement;
- there was a current unsatisfied debt owed by the assurer;
- the debt was of a certain amount;
- action under s.251(1) should not be taken; and
- the moneys should be deducted at a particular rate from each instalment.

The discretion under s.251(1)

The AAT determined that each of the other preconditions had been satisfied and went on to consider the discretion in s.251(1).

Having found that the debt did not arise as a result of innocent mistake, there was no inordinate delay or error on the part of the DSS, there were no relevant compassionate circumstances, and Ibarra and his wife had assets in excess of $125 000, the AAT declined to exercise the discretion.

Also noted was Ibarra's youth, education and fluency in English, a recent workers' compensation settlement of $30 000 paid to the his wife and pending motor vehicle accident claims for both of them.

Formal decision

The AAT set aside the SSAT decision and remitted the matter to the Secretary to determine the appropriate deduction from each payment of the applicant's pension/benefit in accordance with s.246(2A).

[R.G.]

SECRETARY TO DSS and MATHIAS

(No. 6672)

Decided: 14 February 1991 by O'Connor J, H.E. Hallowes and J.A. McGirr.

The Secretary asked the AAT to review a decision of the SSAT which had set aside a DSS decision to recover an assurance of support debt. The SSAT had determined that there was no evidence of the debt and therefore there was no jurisdiction to recover the debt.

The facts

On 21 November 1986, Mathias signed an assurance of support for her mother who had arrived in Australia in May 1986.

In that document, Mathias agreed that any amount of special benefit paid to her mother 'shall be deemed to have resulted from a breach of this undertaking' and was a recoverable debt. The assurance was given for a period of up to 10 years, or when the person sponsored (her mother) became an Australian citizen.

On 1 November 1988, Mathias assisted her mother to lodge a claim for special benefit. The claim was granted in March 1989 with arrears to 1 November 1988; and, on 13 March 1989, Mathias was advised by letter that she might be liable to repay amounts of special benefit paid to her mother and that she would be contacted at regular intervals with a view to assessing her ability to repay the debt.

Mathias responded on 28 March 1989 that she would be unable to repay any amounts paid to her mother and was then advised that a decision about recovery would not be made until one year after date of grant (November 1988).

On 4 September 1989, Mathias was advised that she was currently accruing a debt which on 21 August 1989 stood at $5055.10 and was increasing at $130.65 per week. She was asked to contact the DSS about commencing a suitable repayment arrangement. The letter referred to moneys paid under s.162(11) of the *Social Security Act*.

On 6 October 1989, Mathias asked for a review of the decision to recover the amount of special benefit paid to her mother. A delegate affirmed the earlier decision 'under ss.162(11) and 246(2A)'. As the AAT noted, s.246(2A) authorises the recovery of assurance of support debts by means of withholdings from a current pension, benefit or allowance. Since Mathias was not receiving any form of support from DSS, s.246(2A) was not applicable to this decision.

Mathias then informed the DSS that her mother had been granted Australian citizenship from 30 November 1989 and the debt was recalculated as $6936.46.

Although Mathias then agreed to repay $40 per week, a decision was made to garnishee the sum of $2600 from Mathias' bank account under s.162 of the Act.

The SSAT set aside the decision to recover the debt and the Secretary applied to the AAT for review.

The issues before the AAT

The AAT set out the issues as being —

(a) whether it had jurisdiction in respect of the application for review; and, if so

(b) whether it was necessary for an officer of the Department to make a decision under the Act that the legal and factual elements of recoverability existed before a decision can be made under ss.162 and 251.

The central issue was, if the debt arose solely from the operation of ss.162(11) and 251(4) without an officer deciding whether the legal and factual elements of recoverability existed, whether the SSAT and the AAT had any power to review the decision of the officer under either s.162(1) or s.251(1). If the AAT did have jurisdiction under the latter section, should the AAT exercise the discretion in s.251?

The legislation

Section 162(1) of the *Social Security Act* gives the Secretary the power to require a person who is indebted to the Commonwealth, or holds money for a person who is indebted (e.g. a bank) to pay an amount specified in the notice. Under s.162(11) an assurance of support debt is included as a debt subject to the exercise of powers under s.162.

Section 251(1) gives the Secretary power to waive, write off or recover by instalments a debt arising under the *Social Security Act*; and by s.251(4) a debt includes an assurance of support debt.

Section 205(1) provides that the AAT has jurisdiction to review a decision that has been affirmed, varied or set aside by the SSAT, while s.177(1) provides that a person affected by a decision of an officer under the *Social Security Act* may apply to the SSAT for review of the decision.

While generally under s.182(4) the SSAT may exercise all the powers and discretions of the Secretary, s.182(5) excludes the SSAT from exercising powers and discretions conferred by a number of sections, including s.162.

Therefore, while both the SSAT and the AAT may review decisions made under s.162, neither body may exercise any of the powers and discretions of the Secretary under that section.

'Decision' is defined in s.3(1) of the *Social Security Act* as having the same meaning as in the AAT Act. And by s.3(1), 'officer' is defined as a person performing duties, exercising powers or functions, under or in relation to this Act' [the *Social Security Act*].

Applying *Collector of Customs v Brian Lawlor Automotive Pty Ltd* (1979) 2 ALD 1, the AAT decided that it was for the AAT to decide whether the SSAT decision was legally effective.

Assurance of support debt

The AAT noted 5 references to these debts in the Act, including a reference in the definition section, s.3(1). 'Assurance of support debt' means a debt due and payable by a person to the Commonwealth because of the operation of reg.22(1) [165(2)] of the *Migration Regulations* in respect of the payment to another person of special benefit under the *Social Security Act*.

Regulation 22(1) [now reg.165(2)] provided that where a maintenance guarantee [or assurance of support] was in force and a person had received support or maintenance from the Commonwealth, State, or a charitable body, 'the value of the maintenance provided ... is a debt due and payable to the Commonwealth ... by the person who gave the maintenance guarantee' [or assurance].

Review of garnishee decisions

The AAT next considered the power to review decisions made under s.162. It noted that, while the AAT cannot itself exercise the powers under s.162 (because of s.182(5)), it can review a decision made under that section, which, although expressed to apply to 'pensioners', is not limited to people in receipt of pensions (or other payments) under the Act. And, by s.162(11)(a), a reference to a person being indebted to the Commonwealth under or as a result of the *Social Security Act* includes a reference to a person owing an assurance of support debt.

Review of recovery decision

Section 251 gives the Secretary a power to waive, write off or allow pay-

ment of a debt by instalments. The AAT considered whether the exercise of the power under s.251 required that an officer must first be satisfied that a debt arose under the Act, that is, that the legal and factual elements of recoverability existed. After referring to the decision of the Federal Court in *Salvona* (1989) 52 *SSR* 695, the AAT suggested that had there been no decision made under either s.162 or s.251, the SSAT and AAT would have had no jurisdiction in relation to an assurance of support debt owed by a person not in receipt of pension, benefit or allowance.

The AAT further referred to comments by the Federal Court in *Hangan* (1982) 11 *SSR* 115, suggesting that a decision to recover money required some determination by a delegate that 'the conditions of recoverability exist'. After referring to the DSS submission that the terms of reg.22 of the *Migration Regulations* made it clear that, if there is an assurance of support and income support has been provided, there is a debt due to the Commonwealth, the Tribunal said:

> '[A]ction taken under s.162 or s.251 must be founded on the Secretary or his duly authorised delegate being satisfied that the legal and factual elements of recoverability exist. The Act of itself does not raise the debt. If the legal and factual elements of recoverability exist a person owes a debt to the Commonwealth for the purposes of those sections.'

(Reasons, para. 31)

The AAT's decision

Accordingly, the AAT found that a debt existed for the amount of $6936.46 paid between 21 February 1989 and 29 November 1989 and that a delegate had decided that the legal and factual elements of recoverability existed.

Although the AAT had jurisdiction to exercise the power under s.251(1), it was unable to exercise powers under s.162. It did, however, find that Mathias was a person 'indebted to the Commonwealth under or as a result of this Act' by virtue of s.162(11) of the Act.

After briefly considering s.246(2A) (which was not relevant since Mathias was not in receipt of a pension, benefit or allowance), s.246(3) (which was not in issue) and s.251(4) (which expressly provides that the reference to a debt in s.251(1) includes a reference to an assurance of support debt), the AAT considered whether there were any grounds for the debt to be waived, written off or paid by instalments. The AAT declined to exercise the discretion, principally on the ground that Mathias would not suffer financial hardship.

Formal decision

The AAT set aside the decision of the SSAT and substituted for it a decision that Mathias owed an assurance of support debt of $4336.46, the amount outstanding after the garnishee of $2600 from her bank account.

[R.G.]

Sole parent's pension: de facto spouse

SECRETARY TO DSS and AQUILINA

(No. 6662)

Decided: 14 February 1991 by J.R. Gibson.

On 5 March 1990 the DSS decided to cancel sole parent's pension on the basis that Aquilina lived in a marriage-like relationship with W. She was considered to be a *de facto* spouse and a married person within the meaning of s.3(1)(a) of the *Social Security Act* and, therefore, not qualified under s.44(1)(a). The SSAT set aside this decision as it was satisfied she was not living in a 'marriage-like relationship'.

The facts

Aquilina had 2 dependent children by her former husband. She obtained a divorce from him in 1987. On 11 February 1987 a third child was born, the father of whom was W.

Aquilina was granted supporting parent's benefit on 22 May 1984. The benefit became a sole parent's pension following amendments to the Act which came into force on 1 March 1989. Since 1984 Aquilina and her children lived in rented Department of Housing accommodation. The apartment was in her name.

On 4 March 19878, she claimed family allowance for her third child naming W as father but stating she did not see him any more.

On 8 September 1987 she signed a statement prepared by a DSS field officer, that she and W had lived together as man and wife for 2 weeks in May and for 3 weeks in August 1987 and that W was paying maintenance for his daughter.

On 10 April 1989 Aquilina was interviewed by a DSS field officer who noted she had said she received no maintenance from her former husband, but $35 a week from W. She had also said W paid for health insurance for her and her 3 children.

Documents obtained by the DSS from W's employer and the Electoral Office disclosed that W had given the same address as Aquilina. On 16 February 1989 Aquilina signed a statement prepared by field officers to the effect that she had lived in a situation similar to that of man and wife with W since February 1986.

Aquilina completed in her own handwriting a 'Review of Living Arrangements' dated 2 March 1989 but did not return it to the DSS until early March 1990. She disclosed in that document that she had started sharing accommodation with W when still married to her former husband.

In her evidence to the AAT Aquilina said she had never used W's name. She gave evidence of her former husband's violence towards her. After one particularly traumatic incident, which involved police being called, W had stayed overnight and subsequently assisted her in the face of further attacks. At that time W lived with his mother but stayed with Aquilina on Friday nights or weekends or when she had been involved in Family Court proceedings.

Aquilina said that, after W's mother left Sydney in late 1989, W stayed at her home most of the time but was often out at night and away for periods with his friends. He bought his own food but sometimes ate with her. He started to share the rent, had the telephone installed in his name and paid the account, covered Aquilina and the children in his health insurance and nominated Aquilina as preferred dependent for his superannuation rights. He had guaranteed some credit payments for her and minded the children for short periods of time.

Aquilina said she regarded W as a good friend, never as a possible husband or *de facto* husband, and had never discussed marriage with him. They did not go out together but she once stayed at a holiday resort where he and his friends went. He spent most of his spare time with his mates or with a woman friend. Aquilina said she had, on occasions, gone out with other men.

W moved out shortly before the AAT hearing because of problems with one of Aquilina's children but she expected he would continue to pay maintenance for his own child and to provide health