'Estimate of Income for Family Allowance Supplement' and contained a statement to be acknowledged by Johnson that she understood that she might have to repay any FAS to which she was not entitled if her estimate was 'substantially wrong'. The Tribunal criticised the form in the following terms:

> 'It cannot be debated that the form in its final sentence puts recipients of benefit upon notice that they may be liable to repay the allowance if their "estimate is substantially wrong". That statement, however, falls well short of bringing to the minds of those who fill out and sign the form the stringent operation of s.74B(5). The vague expression "substantially wrong" could mean many things to different minds and it fails to convey what is in fact a fairly precise relationship between the estimated income and the figure that emerges, retrospectively, from the Commissioner's assessment.'

(Reasons, p.8)

The AAT asked Johnson and her spouse about how the form came to be filled in. It concluded that they had approached the matter openly and honestly. Their error was attributed to their misunderstanding of the legal requirements imposed by the *Social Security Act*. The Tribunal also concluded that the 'vague and inadequate phrasing' of the warning in the form in part induced the error that led to the overpayment.

When the Tribunal had regard to all of the above considerations, it formed the view that a fair result would be to terminate recovery from the family allowance paid to the applicant after 1 July 1991 and for recovery of the outstanding amount to be waived. This would result in about half of the overpayment being foregone by the Commonwealth. Although this was not a precise apportionment of responsibility for the overpayment, the AAT considered that it reflected the circumstances of the overpayment and had regard to the current financial circumstances of the family.

Formal decision

The Tribunal varied the decision of the SSAT to the extent that recovery of the overpayment by deduction from future payment of Family Allowance should cease after 1 July 1991 and that recovery of the balance be waived under s.251(1) of the *Social Security Act*.

[B.S.]

Family allowance arrears: decision under review

SHANAHAN and SECRETARY TO DSS

(No. Q90/353)

Decided: 4 March 1991 by S.A. Forgie.

The facts

Mrs Shanahan was receiving family allowance for two children. On 14 October 1989 the DSS sent an annual review form to her address which the DSS had on its records. Mrs Shanahan had moved from that address without notifying the Department, and did not receive the form until July 1990.

When the DSS did not receive the completed review form, it decided to cancel her family allowance from 29 December 1989 and notified her of this by letter dated 1 January 1990. That letter was also sent to her old address and she did not receive it.

When she noticed that family allowance had ceased to be paid, Mrs Shanahan contacted the DSS and notified it of her new address. She was sent a form by mail which she lodged on 10 April 1990. Payment of her family allowance resumed on 19 April 1990.

She applied to the SSAT for review of the decision 'not to pay arrears of family allowance from 11 January 1990'. The SSAT decided:

> 'that the decision to cancel the payment of family allowance and/or not to apply arrears of family allowance from 11 January 1990 to 19 April 1990 be set aside and that payment be made to Mrs Shanahan for this period.'

The DSS asked the AAT to review the decision, arguing that the SSAT was wrong in finding

> '1) that notification had not been given of decision to cancel, and
>
> 2) that arrears could be granted despite the appeal having been lodged more than three months after the cancellation'.

The legislation

Section 163(2) of the *Social Security Act* empowers the Secretary to give, personally or by post, to a recipient of an allowance, a notice requiring the person to furnish to the Department within a specified period a statement in an approved form. Failure to comply with such a notice is a ground for cancellation of the allowance: s.168(1).

Section 183 specifies the date from which a decision of an SSAT, determining an application for review, has effect. Where the SSAT makes a decision granting a person an allowance or increasing the rate of payment and the person applied to the SSAT more than 3 months after notice of the decision under review was given, the operative date of the decision is the date on which the application for review was made to the SSAT: s.183(5).

Section 82 sets out the qualifications for family allowance.

Section 158(1)(c) provides that the payment of the allowance shall not be made except upon the making of a claim for the allowance.

Section 159(4A) and (4B) make provision for deeming a claim to be lodged on a day earlier than the day of actual lodgment in specified circumstances.

Was the notice 'given'?

The AAT found that the review form sent to Mrs Shanahan's old address was a notice under s.163(2), since it required her to furnish information within a specified time and in accordance with an approved form.

Applying s.29 *Acts Interpretation Act* 1901 (and following previous decisions in *Todd* (1989) 52 *SSR* 691, *Dossis* (1989) 59 *SSR* 799 and *Pesu* (1990) 53 *SSR* 700) the AAT concluded that the notice had been 'given' as required by s.163(2) because it had been properly addressed and sent by prepaid mail to the last address notified by Mrs Shanahan. It did not matter that she did not receive it.

The DSS had therefore correctly cancelled her family allowance in accordance with s.168(1).

What was the decision under review?

The AAT did not find it necessary to consider whether s.183(5) operated to prevent payment of arrears on setting aside the cancellation decision of 1 January 1990, since it found that this was not the decision under review.

Mrs Shanahan had applied for review of the decision 'not to pay arrears of family allowance from 11 January 1990'. The AAT found that this was a decision made on 10 April 1990, in the course of considering her new claim.

Can arrears be paid on the grant of a new claim?

The AAT concluded that a person cannot be paid family allowance until a claim is lodged, and then only from the date of the claim or the date on which it is deemed to have been lodged by virtue

of s.159(4A) or (4B). This was the same conclusion as had been reached by the Tribunal in *Perkins* (1990) 56 *SSR* 754, but by a different line of reasoning. While the Tribunal in *Perkins* had relied on the cases of *Waterford* (1981) 1 *SSR* 1, and *Turner* (1983) 17 *SSR* 174, which concerned respectively widow's pension and unemployment benefit, family allowance differed from those and from all other payments in that neither its qualifications nor its payments are expressly linked to the date of claim.

Were it not for s.159(4A) and (4B), it would be open to conclude that family allowance is payable from when the person is qualified although it cannot be paid until the person lodges a claim. Upon lodgment of a claim, arrears to the date of qualification would then be payable. However, the Tribunal decided against this interpretation because it would 'render otiose' s.159(4A) and (4B).

[P.O'C.]

O'CONNELL and SECRETARY TO DSS
(No. W90/247)

Decided: 23 May 1991 by P.W. Johnston.

Brenda O'Connell was receiving family allowance in 1989, when she and her family moved their residence. She arranged for Australia Post to redirect her mail; but she did not (the AAT subsequently found) notify the DSS of her change of address.

The DSS had sent out review forms to family allowance recipients in 1987 and 1988. These forms had to be returned only if the recipient had excess income to report.

In October 1989, the DSS sent out a new form to family allowance recipients, requiring them to return the form within 3 weeks or have their allowances cancelled. This form was sent to 25 085 persons in Western Australia.

O'Connell did not receive this form, because of a break-down in the arrangements made with Australia Post to forward her mail. She and some 6000 other recipients of family allowance, having failed to return the form, were sent a letter in January 1990, stating that family allowance payments had been cancelled, but giving them 3 months to have payment reinstated.

O'Connell did not receive this letter but, when she noticed in August 1990 that family allowance was no longer being paid into her bank account, she sought reinstatement of the allowance and payment of the arrears since December 1989.

The DSS reinstated O'Connell's allowance but refused to pay the arrears covering the period between December 1989 and August 1990. The SSAT affirmed that decision and O'Connell appealed to the AAT.

Giving notice

The AAT noted that s.163(2) of the *Social Security Act* allows the Secretary to give a person, personally or by post, a notice requiring the person to furnish information to the DSS relevant to the person's pension, benefit or allowance.

Section 29 of the *Acts Interpretation Act* 1901 provides that service of a notice, authorised to be served by post, is deemed to be effected by properly addressing, prepaying and posting the notice as a letter, and (unless the contrary is proved) shall be taken to have been effected at the time at which the letter would be delivered in the ordinary course of post.

After referring to the decisions in *Todd* (1989) 52 *SSR* 691, *Pesu* (1989) 53 *SSR* 700, *Shanahan* (1991) 61 *SSR* 850 and *Dossis* (1990) 59 *SSR* 799, the AAT said:

> 'Posting to the last recorded address, in the absence of some clear fault on the part of the Department, or absent the notification by a beneficiary of an appropriate alternative point or means of contact . . . constitutes a proper addressing of the notice in terms of the Act read with s 29 of the Acts Interpretation Act.'

(Reasons, para. 22)

Cancellation: the correct or preferable decision?

Section 168(1) of the *Social Security Act* authorises the Secretary to cancel a person's pension, benefit or allowance where the person does not respond to a s.163(2) notice.

In the present matter, the Secretary's delegate had 'decided' to cancel some 6000 family allowances by signing a computer printout of the persons who had failed to return their review forms, with a notation to the effect that the delegate 'determined that payment of family allowance to the above persons is cancelled pursuant to s. 168' on the basis that their non-return of the review forms indicated that their incomes exceeded the allowable limit for family allowance.

The AAT said that the deemed delivery of the notice to O'Connell and her failure to respond to the notice did not mean that the subsequent cancellation of her family allowance must be affirmed, notwithstanding s.168(1):

> 'Even accepting that in present circumstances the conditions were fulfilled which would provide a basis for the respondent cancelling family allowance, the question remains whether in the instance in question the correct and preferable decision required such cancellation.'

(Reasons, para. 23)

When exercising the power under s.168(1), the Secretary must decide whether an allowance etc '*should* be cancelled or suspended':

> 'Under s.168 the determination to cancel is discretionary, though it could be described as a regulated or even mandated discretion in the sense that if that conclusion is reached, the discretion must be exercised to cancel.'

(Reasons, para. 25)

The AAT referred to the mass cancellation of some 6000 family allowances; and said this took place against a background: a change of legislative policy which required claimants to provide advice about their financial circumstances; and a former settled practice under which family allowance was paid into recipients' bank accounts, which lulled those recipients into relying on the regularity of the system.

It was against that background that 'the question arises as to whether there has been a proper exercise of discretion to cancel the allowance in [O'Connell's] case': Reasons, para. 27.

This raised the broader issue of the validity of 'bulk cancellation of entitlement by resort to computer'. The discretion in s.168(1) required the Secretary,

> 'if not to give individual consideration to the specific facts in each case, at least to have regard to wider circumstances that are relevant to establish a *proper and reasonable basis* for cancellation.'

(Reasons, para. 28)

The AAT expressly refrained from describing such a decision-making process as outside the power conferred by the *Social Security Act*; but concentrated on the question whether the process was a sound one:

> '[I]n reviewing a decision on its merits, this Tribunal may take the view that where material or information centrally relevant to the decision is fairly readily available or relatively easily obtainable, failure to make an attempt to take *reasonable* steps to obtain that information renders the decision open to the charge that it is not the correct and preferable decision in the circumstances.'

(Reasons, para. 29)

Given the reliance of recipients on regular family allowance payments, the purpose of family allowance (to benefit children) and the range of measures

available to the Department to contact persons who had not returned their review notices, 'good governmental practice' would have required the Department to attempt to alert O'Connell to her failure to return the notice before proceeding to cancel the family allowance:

> 'Such an approach could have been justified in terms of good governmental practice as both a *rational* and *proportionate* response to the failure to receive a response to the queries about qualifying income level, measured against the finality of action to cancel, and even allowing for the fact that persons like the applicant took some time to realise the allowance was not being paid . . . In that way, there would also be a stronger basis for treating failure to respond as founding an inference that the qualifying income level for entitlement had been exceeded. As it was, the mere fact of non-reply, being open to several equivocal explanations, forms no *rational* basis for drawing the conclusion actually stated as the basis of the decision.'

(Reasons, para.30)

Effect of setting aside the DSS decision

After noting that O'Connell had remained qualified to receive family allowance during the period of cancellation, the AAT said that it proposed to set aside the cancellation of her family allowance.

However, the AAT noted that it appeared that its power to substitute a decision, that O'Connell should receive family allowance, was limited by s.183(5) of the *Social Security Act*.

This sub-section provides that, where application for review of a DSS decision is made to the SSAT more than 3 months after the applicant was given notice of the decision under review, and the SSAT sets aside the DSS decision, the decision of the SSAT takes effect from the date of the application for review. It seemed reasonable to assume, the AAT said, that the AAT would be subject to the same limitation if it chose to set aside the DSS decision.

In the present matter, the DSS had posted the notice of cancellation to O'Connell in January 1990, and she had lodged her application for review in September 1990.

However, the AAT said, the DSS could not claim to have given O'Connell notice of cancellation merely by posting a letter to her last known address. In this context, s.183(5) was different from s.163(2). Section 183(5) did not specify any authorised means of communication, while s.163(2) specified service by post, thereby attracting the operation of s.29 of the *Acts Interpretation Act*. This had the effect of deeming a s.163(2) notice to be properly given if sent by pre-paid post to the last known address.

By way of contrast, a notice for the purpose of s.183(5) would be given, the AAT said, by the 'actual giving of notice in a way that in the ordinary course of events will be communicated to the intended recipient': Reasons, para. 37. That being the case, the AAT said, it found that O'Connell was not given notice of cancellation more than 3 months before she applied to the SSAT; so that the AAT's decision could take effect from the date of the DSS decision to cancel O'Connell's family allowance.

Formal decision

The AAT set aside the SSAT decision not to pay O'Connell arrears of family allowance and the Secretary's decision to cancel O'Connell's family allowance and substituted a decision that family allowance was payable to O'Connell for the period 28 December 1989 to 12 August 1990.

[P.H.]

Income test: setting off losses

TOSSWILL and REPATRIATION COMMISSION

(No. 6513)

Decided: 10 December 1990 by I.R. Thompson, T.R. Russell and G.R. Taylor.

Tosswill sought review of a decision of a delegate of the Repatriation Commission, *inter alia*, to deduct losses, carried forward for taxation purposes, from Tosswill's income for subsequent years for the purpose of calculating his entitlement for a service pension.

Facts

In the 1981 and 1982 financial years, Tosswill incurred substantial losses in an accounting business. He carried those losses forward in subsequent taxation returns.

In 1986, Tosswill dissolved his business and commenced a new partnership. There was a substantial sum outstanding in relation to the overdraft of the former business and Tosswill had to raise further capital to buy into the new partnership. He borrowed from a bank sufficient funds to cover these two expenses plus some additional funds which were ultimately used for personal expenses.

Tosswill sought to set off his carried forward taxation losses from earlier years against his income for the purposes of the *Veterans' Entitlements Act* 1986 and to set off, against his income for service pension purposes, the interest paid on the bank loan raised in 1986.

Legislation

The definition of 'income' was contained in s.35(1) of the *Veterans' Entitlements Act* 1986, identical to the definition in s.3(1) of the *Social Security Act*:

> '"Income" in relation to any person means personal earnings, moneys, valuable consideration or profits whether of a capital nature or not, earned, derived or received by that person for his own use or benefit by any means from any source whatsoever, within or outside Australia, and includes a periodic payment or benefit by way of gift or allowance . . . '

Decision

The AAT first noted that the part of the loan raised and used for personal expenses was income for the purposes of the *Veterans' Entitlements Act*, on the principles discussed in *Gowans and Repatriation Commission* (1988) 42 *SSR* 535 and more recently affirmed in *Hill and Repatriation Commission* (noted in this issue of the *Reporter*).

The AAT noted that Tosswill's counsel, and to some extent the Commission's counsel, had relied on Tosswill's taxation returns for the relevant period.

The Tribunal repeated the warnings found in numerous previous decisions, including the High Court in *Read* (1988) 43 *SSR* 555 and the Full Federal Court in *Garvey* (1989) 53 *SSR* 711, where the courts drew a clear distinction between the definition of income for the purposes of income tax legislation and the definition of income in the *Social Security Act* (which is identical to the one in the *Veterans' Entitlements Act*).

The Tribunal said that, whilst for taxation purposes it was possible to carry forward taxation losses from previous years, for the purposes of the *Veterans' Entitlements Act* this approach was not permissible.

The Tribunal noted that it might be possible in a later year to set off prior years' revenue losses if in that later year the amount of the debt accruing from the previous years was actually paid by the pensioner. But, unless and until a prior accrued loss was actually paid by a pensioner, then the pensioner was in fact not in a more onerous position in terms of his capacity to support himself