The AAT found that, even though the payments made by Haddon's husband were spasmodic, by the final pre-amendment period, they were being enforced by the Child Support Agency. Therefore a payment was made in the final pre-amendment period and Haddon 'had maintenance income' at that time.

Haddon had received a general letter from her local office under s.163 of the Act, which informed her that she was required to notify the DSS of any income received, including maintenance. The AAT found that the notice referred to income 'received', whereas the savings provision depended on whether she 'had maintenance income'; and so the AAT was unable to find that she had failed to notify the DSS in accordance with the s.163 notice.

However, with regard to the sole parent review form, the Tribunal held that she had failed to notify of maintenance income for the relevant period until 4 August, even though the form was due to be returned by 18 July. Accordingly, her notification was outside the period specified in s.163(2).

Because she had not notified her income as required, the AAT held that s.21 did not apply to her.

No jurisdiction to review

Moreover, after considering this matter in detail, the AAT went on to note that the SSAT did not have jurisdiction to review this decision.

This was because the SSAT's jurisdiction is limited to review of decisions made by an officer under the *Social Security Act* (s.177) and the transitional provisions in s.21 of the 1988 Amendment Act do not form part of the *Social Security Act*.

However, relying on *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307, the AAT held that it had power to review a decision made in the purported exercise of powers conferred by an enactment.

Decision

Although the AAT reached the same decision in substance as had the SSAT, the formal decision of the AAT was to set the decision aside and remit the matter to the Secretary for reconsideration in accordance with the direction that the SSAT did not have power to review the decision of the delegate.

[R.G.]

Overpayment: recovery

SMITH and SECRETARY TO DSS (No. 6668)

Decided: 14 February 1991 by P.W. Johnston.

James Smith asked the AAT to review a DSS decision to recover an overpayment of $9999.08 in unemployment benefit.

The facts

Smith lodged a claim for unemployment benefit in November 1988. He continued to receive this benefit during 3 periods of employment which were not disclosed to the DSS. In December 1988 he separated from his wife. Although she did not apply for sole parent's pension, he continued to receive his payment at the married rate. His wife had access to the account into which it was paid.

During the periods of employment, Smith was involved as a union representative in industrial disputes related to risks from asbestos fibres. He claimed to be depressed at times because he thought he might die from a asbestos related disease. He also claimed that this depression was aggravated because of his marital problems and health problems experienced by his wife. He also entered a relationship with another woman who became pregnant. All these circumstances were advanced as reasons why he did not disclose his employment while receiving benefits.

The AAT noted that Smith's employment prospects were good. He was at present in work and looked likely to remain employed. His financial circumstances were not good. He had maintenance commitments of $50 per week and debts relating to credit cards and a car loan. He owned a car and some land, although he owed some money on the land to his father.

Exercise of discretion to vary or waive recovery

The only matter to be determined by the Tribunal was whether the discretion to vary or waive recovery of the overpayment contained in s.251 of the *Social Security Act* should be exercised in Smith's favour. The AAT concluded that the stress suffered by Smith during the relevant period was not a satisfactory explanation for failing to notify the DSS of his employment.

Smith put to the Tribunal that there should be some discount of the overpayment because, if he had disclosed his circumstances to the DSS, then his wife would have been entitled to sole parent's pension. Thus the amount saved by the DSS in not paying Smith's unemployment benefit would have been offset by payments of sole parent's pension to his wife.

The AAT referred to the criteria set out in *Hales* (1983) 13 *SSR* 136 with respect to the exercise of the discretion to waive recovery in s.251 of the *Social Security Act*. The AAT said that the criteria worked against Smith:

> 'He has received a large amount of public moneys through his own deception and whilst on a day-to-day basis his financial situation is precarious, he has substantial assets at his disposal in the form of the block of land and a motor vehicle. It is true that he has been subject to a degree of stress and remorse but this is not of such magnitude to cut much ice with this Tribunal.'

(Reasons, p.4)

As far as the 'discount' was concerned, the AAT decided that it should not consider a hypothetical situation. The applicant continued to receive unemployment benefit at the full married rate. The fact that his wife received the full benefit paid and Smith did not directly benefit during his periods of employment did not affect this conclusion. The applicant did benefit in the sense that during those periods his wife was no direct burden on him.

Formal decision

The AAT affirmed the decision under review.

[B.S.]

Assets test: financial hardship

GATES and SECRETARY TO DSS (No. S89/218)

Decided: 12 March 1991 by B.H. Burns.

Mr and Mrs Gates sought review of a decision of the SSAT not to apply the hardship provisions of s.7 of the *Social Security Act* for their benefit.

The facts

The Gates owned a farm which had been their primary source of income and which had been in the family for 3 generations. They also conducted a small scale tractor repair business. Their son

helped them in each of these enterprises.

Mr Gates began to suffer ill health around 1980 and he increasingly relied on his son to manage the farm and tractor business. In 1985 the Gates transferred the tractor business to their son at no cost. (The business transferred was valued at $50 000.) By the middle of 1988, the farm was no longer viable and had been sub-divided and sold. The nett proceeds were given by the Gates to their son, who used the proceeds to purchase another farm in a more viable farming area.

On 30 May 1988, Mr Gates applied for an invalid pension and Mrs Gates applied for an age pension. These pensions were reduced by the DSS under s.6 by reason of the dispositions of property from them to their son. (This decision was affirmed by the SSAT and AAT in other proceedings.) On 8 March 1989, the Gates applied to the Secretary to exercise his discretion under s.7 (hardship provisions) to disregard the dispositions of property.

The legislation

Section 6 of the 1947 *Social Security Act* includes in the assets of a pensioner, for assets testing purposes, property disposed of for inadequate consideration.

Section 7 of the 1947 Act, *inter alia*, permits the Secretary to disregard s.6 and to assess a person's entitlements under the more beneficial provisions of s.7(3)-(6).

Before the Secretary can exercise his discretion, s.7(1) requires, *inter alia*, that the Secretary decide to disregard s.6 and that the Secretary be satisfied that 'the person would suffer severe financial hardship' if s.7 were not applied.

Disregarding the disposition

The Tribunal noted an agreement between the parties that the relevant date for assessing hardship was the date on which the hardship application is made, in this case 8 March 1989.

The Tribunal identified the issues for determination:

(1) whether the disposition of property (s.6) should be disregarded by the Secretary under s.7(1)(b); and

(2) whether the Gates would suffer severe financial hardship within s.7(1)(e) if the hardship provisions of s.7 were not applied to them.

The Tribunal found the following facts:

- Families who have farmed for many years often take a communal approach to property and expect the farm to be handed on from one generation to another.
- The farm purchased by the son with the proceeds of the sale of the Gates' farm produced only sufficient income to support the son and his family. However, at the time of the sale of their farm, the Gates had expected that the son's farm would generate sufficient income to support them as well.
- The Gates were no longer physically capable of farming or other vocational activity.
- The son had done his best to economically support the Gates, albeit inadequately.

In relation to the discretion to disregard the disposition of property (s.7(1)(b)) the AAT said it would apply the 5 'Twelftree factors' (*Twelftree and Repatriation Commission* (1986) 10 ALD 34) namely:

> '(i) has the disposal of property deprived the grantor of income and thereby left him in circumstances of financial hardship;
>
> (ii) was the sole purpose or dominant purpose of that disposal to produce that result;
>
> (iii) did the grantor know or should he have known that his actions would produce that result;
>
> (iv) if the grantor had not disposed of that property in the manner and for the consideration what would have been the effect on his pension rate; and
>
> (v) were there circumstances which made it reasonable for the grantor to do what he did?'

In general terms the AAT found that the Gates' disposition of property was motivated by concern for their son's capacity to carry on farming in order to support himself, his family and them. The Tribunal expressly found that the Gates were not motivated by the desire to secure a pension. In relation to factor (v), the Tribunal noted that the Gates' disposition was reasonable and, but for the rural decline, they would have derived economic support from their son's farm.

In relation to the 'severe financial hardship' requirement of s.7(1)(e), the Tribunal said it would adopt the definition proffered in *Lumsden* (1986) 34 *SSR* 430 (albeit a somewhat tautologous definition). After analysing the Gates' financial reserves, both at the time of the application for hardship was made and at the time of the AAT hearing, the AAT was satisfied that the Gates were suffering severe financial hardship.

Formal decision

The decision under review was set aside and the matter remitted to the Secretary to calculate the Gates' entitlement without regard to the disposition of the proceeds of the farm, but having regard to the disposition of the tractor business.

[A.A.]

Assets test: valuation of debt

KING and REPATRIATION COMMISSION

Decided: 9 November 1990 by R.E. Watterson.

This was an application for review of a decision of the delegate of the Commission to treat a debt owing to a pensioner from a family company as an asset of the pensioner for the purposes of the assets test.

Facts

King had inherited $240 000 from a relative. He then incorporated D Pty Ltd to act as trustee of a family trust. King and his family members were the directors of D Pty Ltd and he and his daughters were the beneficiaries under the family trust.

King loaned the trust $240 000. The trust sustained losses in its investments. The trust also made some disbursements to the daughters over a number of years. By June 1988, the trust (and D Pty Ltd) were insolvent, having only approximately $70 000, insufficient to repay King's loan if he chose to call in the loan.

The Repatriation Commission cancelled King's service pension from 15 December 1988 on the basis that the value of the loan owed by D Pty Ltd to King brought his assets above the applicable assets limit. In making this decision the Commission valued the debt at its face value of $240 000.

In February 1990 King wound up the trust and D Pty Ltd, and took the assets of the trust, $66 850, in full and final satisfaction of the debt owed.

King argued that, for the period 15 December 1988 to February 1990, the value of the debt owed to him by the trust should not be taken on its face value but should be valued having regard to the insolvency of the trust.