because you withdrew your application'.

Two weeks later, Mecozzi went to the Haymarket DSS office to complain about his initial treatment but was sent back to West Ryde and he made no further attempt to obtain sickness benefit until further visits to West Ryde on 19 and 20 November 1990. There he was advised to reclaim sickness benefit as he was outside the 3 months review period to have full arrears paid, but he refused to fill in any more forms. He then 'appealed' to the SSAT.

The SSAT found that the visit to the Haymarket office did not constitute a request for a review of the decision to reject his claim. However, the SSAT apparently varied the DSS 'decision' to reject the claim by treating his 19 November 1990 visit to West Ryde as a request for review of the decision and decided that he should be paid sickness benefit from that date.

As the AAT put it, because of the withdrawal, it was —

> 'difficult to see how there could be said to be an "application" for sickness benefit before the Department to support a "decision" . . . Nevertheless, the applicant, the Department and the SSAT all regarded the letter of 9 February 1990 as constituting a "decision".'

(Reasons, para. 9).

The matter had been reviewed by an Authorised Review Officer prior to the SSAT and had also been treated there as a 'decision' for which a request for review had taken place more than 3 months later.

**The legislation**

Section 158(1) of the *Social Security Act* provided at the relevant time that the grant or payment of a benefit 'shall not be made except upon the making of a claim for that . . . benefit'.

Section 159(1) provided that a claim shall be made in writing in accordance with a form approved by the Secretary and shall be lodged at an office of the Department or at a place approved for the purpose by the Secretary.

Without referring to these provisions, the AAT decided that the Mecozzi's visits to the DSS on 19 and 20 November 1990 should have been treated as an application for sickness benefit. Since the original claim was withdrawn, there was nothing for the SSAT to review and the 'only role for this Tribunal therefore is to pronounce a decree of "nullity"': Reasons, para. 14.

**Are arrears of sickness benefit payable?**

The AAT then considered the issue of whether the applicant had a claim for arrears and if so for what period.

Section 125(3) of the *Social Security Act* provided that a claim is payable from the 7th day after the commencement of an incapacity if it is lodged within 5 weeks after the person becomes incapacitated.

Section 125(4) provided that if a claim is not lodged within that 5-week period, the Secretary may pay benefit from a date no earlier than 4 weeks prior to lodgment of the claim, if the 'sole or dominant cause of the failure to lodge the claim' in time was the incapacity concerned.

Having apparently found that a claim was 'lodged' on 19 November 1990, the AAT then considered whether Mecozzi's incapacity was the sole or dominant cause of his failure to claim earlier.

The AAT concluded, both from Mecozzi's demeanour (in particular, his hostility to the DSS and to the AAT), and from evidence given by his brother, that the accident had brought about a significant personality change. The AAT said that 'the main or dominant cause of the applicant's failure to lodge a valid claim for sickness benefit before 19 November 1990 was due to mental stress attributable to his accident in 1989 . . .'.

Because of the provisions of s.125(4), the earliest date from which Mecozzi could be paid was 22 October 1990. The AAT went on to express surprise at the limited arrears payable, from the vantage point of '. . . a comparative "stranger" in this jurisdiction . . .': Reasons, para. 21.

**Formal decision**

The AAT set aside the decision under review and remitted the matter to the DSS for reconsideration in accordance with the recommendation that (i) the applicant's visit to the Department on 19 February [sic] be treated as an application for sickness benefit; and (ii) that he be paid arrears as from 22 October 1990.

**[R.G.]**

# SSAT jurisdiction: reviewable decision

**SEBARATNAM and SECRETARY TO DSS**

**(No. 6936)**

**Decided:** 14 May 1991 by P. Gerber.

Christopher Sebaratnam migrated to Australia on 13 July 1989.

At the time of his migration, Sebaratnam's son gave an assurance of support under sub-reg 22(1) of the Migration Regulations.

Seven weeks later, Sebaratnam lodged a claim for special benefits. He was advised by a DSS officer, if special benefits were granted to him, the amount paid would be recovered from his son under the assurance of support. The officer then made a file notation that Sebaratnam had withdrawn his claim for special benefits.

On 31 October 1989, Sebaratnam wrote to the Department, saying that he was entitled, under the *Social Security Act*, to unqualified special benefits. On 17 November 1989, a DSS officer wrote to Sebaratnam, advising him that, if Sebaratnam were granted special benefits, the amount paid to him would immediately be recoverable from his son; and that it was 'not acceptable' for his son to defer paying off any debt.

On 11 December 1989, Sebaratnam wrote to the DSS, advising that he had not withdrawn his earlier claim.

On 20 January 1990, Sebaratnam again told the DSS that he objected to the Department immediately recovering from his son any special benefit paid to him; and, on 9 February 1990, he advised a DSS officer that 'he wished to appeal the decision that the benefit is recoverable and should be repaid [by his son] each fortnight'.

On 14 February 1990, a DSS officer decided to grant special benefits to Sebaratnam, subject to immediate recovery of the amount paid each fortnight from Sebaratnam's son.

On 20 February 1990, Sebaratnam lodged an appeal with the SSAT. This application identified the decision, of which Sebaratnam sought review, as a decision communicated to him on 17 November 1989 and 12 January 1990.

The SSAT then dismissed Sebaratnam's appeal. The SSAT noted that Sebaratnam was seeking review of the question whether special benefits

paid to him were immediately recoverable from his son; and decided that, although DSS officers had expressed the opinion that special benefit paid to Sebaratnam would be immediately recoverable from his son, no decision on that issue appeared to have been made.

Accordingly, the SSAT decided that it had no jurisdiction to entertain the applicant's application for review.

The AAT decided that, at the time of Sebaratnam's appeal to the SSAT, there had been a reviewable decision within s.177(1) of the *Social Security Act*, namely the decision made in February 1990, this being a decision which raised the very issues which Sebaratnam wanted clarified. The AAT pointed out that there was no limitation in the Act on applicants amending the grounds of their appeal.

**Formal decision**

The AAT directed that the application to the SSAT lodged by Sebaratnam should be amended to include a reference to the decision of February 1990 and remitted the matter 'to SSAT to deal with the appeal according to law'.

**[P.H.]**

# AAT review and criminal proceedings

**SKINNER and SECRETARY TO DSS**

**(No. 2425)**

**Decided:** 4 June 1991 by B.M. Forrest.

The applicant had applied to the AAT to review a SSAT decision that she was married for the purposes of the *Social Security Act* and so was not entitled to sole parent's pension. An overpayment of this pension had been raised against her.

At a preliminary conference before the AAT the DSS indicated that criminal charges were to be brought against the applicant. The DSS then sought to have the AAT proceedings adjourned pending the outcome of the criminal proceedings.

**Should the proceedings be stayed?**

The DSS, in seeking the stay, relied on the AAT's decisions in *Lane and Conservator of Wildlife* (1984) 5 ALN 429, *Gruzman and Secretary, Department of Aviation* (1986) 9 ALN 111 and *Re Commissioner of Taxation* (unreported decision No. 3500). The applicant opposed the stay and relied on *Philippine Airlines v. Goldair (Aust.) Pty Ltd* [1990] VR 385. The principles in that case stated that the DSS was not entitled as of right to have the matter adjourned until the outcome of the criminal proceedings. The AAT had to decide each case on its merits 'balancing justice between the parties'.

The applicant argued that no question of privilege against self-incrimination should enter into the consideration of the matter as it was the applicant who was seeking to have the case heard. The AAT commented that the privilege was still available in the Tribunal.

The AAT also referred to the length of time taken to initiate criminal proceedings and expressed concern. But, in the absence of any explanation from the Director of Public Prosecutions, the Tribunal did not take the matter further.

The AAT decided that the matter should be adjourned. It was not persuaded that to do so would render an injustice to the applicant. If the allegations against the applicant were not proved in the Magistrates' Court there would be no injustice done to her by staying the AAT proceedings.

The Tribunal also referred to the comments in *Lane* that the AAT should not act in a way which might prejudice the conduct of proceedings before a Court. Reference was also made to the possibility that the AAT continuing with a review could constitute contempt.

**Formal decision**

The AAT adjourned the matter until the outcome of the Magistrates' Court proceedings involving the applicant.

**[B.S.]**

**SECRETARY TO DSS and PLUTA**

**(No. 7061)**

**Decided:** 20 June 1991 by D.F. O'Connor, J.D. Horrigan and H. Pavlin.

Renata Pluta had her sole parent's pension cancelled in May 1990. She applied to the SSAT for review of the decision and that Tribunal set aside the decision in September 1990. In October 1990 the DSS asked the AAT to review the decision of the SSAT. In addition the DSS sought a stay of the decision of the SSAT. This was granted for the period between the original decision to cancel and the date of the SSAT decision.

In April 1991, the AAT became aware that there was the possibility of criminal charges being brought against Pluta in respect of an overpayment which would flow from a decision that she was not qualified for the payment she had received. The AAT proceedings were set down for hearing in May 1991. Pluta then applied for an adjournment of the AAT proceedings because of these likely criminal proceedings. Pluta referred to the DSS using the AAT hearing to gather evidence for any subsequent criminal proceeding and argued that this would unduly prejudice her.

**Were criminal proceedings under way?**

The DSS said that no prosecution against Pluta was in fact on foot. The policy of the DSS was not to apply to the AAT for review where a prosecution had been commenced. In Pluta's case, said the DSS, a prosecution was purely hypothetical. Given the decision of the SSAT, the DSS argued that it would be improper for it to pursue the overpayment. It was also submitted by the DSS that the availability of the privilege against self-incrimination in the AAT would adequately protect Pluta.

Pluta replied that if reliance was placed on this privilege then she might not be able fully to present her case.

The fact that no prosecution had been initiated weighed heavily on the Tribunal:

> 'The Tribunal would have no difficulty in granting the adjournment sought by the respondent if criminal proceedings were under way. Indeed, in a case where the issues in the criminal proceedings are the same as those before the Tribunal, it may well be a contempt of court for the Tribunal to proceed. Again, if matters had got to the stage of consideration by the Prosecutions Section of the Department before referral to the Director of Public Prosecutions, that is, if a criminal prosecution was actively contemplated, the Tribunal would have little difficulty in adjourning proceedings until the matter had been dealt with. In this case, however, criminal proceedings have not been instituted, the matter has not been referred to the Prosecutions Section and the issue is not under active consideration by the Department. It is difficult to see on what basis the adjournment sought by [the respondent] could be granted.'

(Reasons, p.4)

**Need for administrative reform**

The AAT was sympathetic with the position of the respondent. As the proceedings could produce a decision that