Section 205(1) provided that, where a decision had been reviewed by the SSAT, application could be made to the AAT for review of that decision.

The decision under review

The DSS argued that the delegate's action of 28 June 1989 could not be characterised as a 'decision' because it was of an inchoate nature which had no operative effect. The AAT accepted this submission. After considering discussions of the meaning of 'decision' in *Chaney* (1980) 31 ALR 571, *Hales* (1983) 47 ALR 281; 13 *SSR* 136; *Taylor* (1984) 6 ALD 500; 21 *SSR* 238; and *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, the AAT said:

> Having regard to what was said in Hales . . . the Tribunal is of the view that in fact there was never a reviewable 'decision' made in the circumstances of this case. There was nothing final or effective about [the delegate's] action. That approval may have been executory in the sense that it was a step towards recovery but it has no executive effect until implemented. It was merely a preparatory departmental procedure which had no practical effect upon the rights and liabilities of Mrs Sinclair until and unless implemented by way of actually seeking recovery from her. Accordingly, there was no decision made by an officer under the Act that was capable of being reviewed by the SSAT, nor is there any decision reviewable by this Tribunal under s.205 of the Act.

The AAT distinguished the situation in the present case from the circumstances in *Pomersbach* (1992) 65 *SSR* 912 and *Campbell* (1992) 65 *SSR* 914; in the latter cases DSS had taken action to recover the debt by withholdings.

The AAT further decided that the delegate's conscious decision not to recover pending the outcome of the DPP's action could not be said to be a 'decision' under the Act. While in some cases a refusal to make a decision under the Act may constitute a reviewable decision (s.3(3) of the *AAT Act*) this was not such a case.

Although the SSAT's decision was beyond power because there was no relevant reviewable decision, applying *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 2 ALD 1 the AAT has jurisdiction to review an SSAT decision even if that decision is a nullity.

The decision

The AAT decided that it had jurisdiction to review the SSAT's decision of 2 January 1991, and proceeded to set that decision aside on the basis that it was a nullity.

Jurisdiction following a reparation order

Although not necessary for the purpose of disposing of the application for review, the AAT made further comments upon the parties' arguments. It said that the SSAT could not review an order made under s.26 of the *Proceeds of Crime Act* because the decision was not made by an officer under the Act. A decision to waive the debt arising under or recognised by s.246 *Social Security Act* did not amount to a review of the s.26 PoC order (see *Pomersbach*).

The AAT rejected the argument that there were two separate debts, one arising under s.246(1) and one under s.26 of the *Proceeds of Crime Act*, even though the debts had different characters in that one arises by reason of loss to the Commonwealth while the other is quantifiable by reference to the gain to the wrongdoer, and the two liabilities may be different in amount.

[P.O'C.]

Unemployment benefit – date of effect of SSAT decision

SHELLEY and SECRETARY TO DSS

(No. 7575)

Decided: on 11 December 1991 by Deputy President R.C. Jennings, QC.

On 2 March 1990 the applicant applied to the SSAT for review of a decision of the Secretary made on 26 February 1990 to impose a non-payment period for unemployment benefit of 12 weeks from 26 February 1990 because he was found to have moved his residence without sufficient reason. On 21 May 1990 the SSAT dismissed his appeal. On 12 February 1990 he lodged a new application for review of the DSS decision of 26 February 1990.

On 21 February 1991 the SSAT decided to set aside the DSS decision and substitute a new decision that Mr Shelley had not reduced his employment prospects by moving to a new place of residence. The Tribunal added that no arrears were payable to Shelley because his second appeal had been lodged more than 3 months after notification to him of the DSS decision.

Shelley sought review of the SSAT's decision, indicating that he was content with the conclusion on the merits but was not content with the SSAT's notation regarding the date of effect.

Legislation

Under s.198(1) of the *Social Security Act* 1947 the National Convener was empowered to dismiss an application if satisfied that the person did not intend to proceed with the application. That power had been delegated to a Member for the time being performing the duties of a Presiding Member. (Section 1275 of the *Social Security Act* 1991 is an exact counterpart to s.198.)

Section 183(4) of the 1947 Act provides that where the SSAT sets aside a decision under review and substitutes a new decision, the new decision has effect from the day on which the decision under review had effect. This is subject to s.183(5); in certain circumstances, where a person applies for review of a decision more than 3 months after having been given written notice of the decision, sub-section (4) is modified so that the date of effect of the SSAT's decision is the date on which the appeal to the SSAT was made. This is subject to sub-section (6) under which the Tribunal may order that sub-section (4) not apply. If the Tribunal exercises the discretion under sub-section (6) the operative date will then be either the day the SSAT gives its decision (s.183(1)) or a later day specified in the decision (s.183(2)).

Was the dismissal valid?

The AAT expressed doubts concerning the validity of the SSAT's decision to dismiss the application of 2 March 1990. The applicant gave evidence that he had telephoned an SSAT officer at the end of March 1990 to seek a delay, and had written to the SSAT on 30 March stating that he would make contact in late May to arrange a suitable time for a rescheduled hearing. The AAT found that the SSAT's decision to dismiss Shelley's appeal was not made by the National Convener or her Delegate, and that there was no evidence before the Tribunal to justify satisfaction that the applicant did not intend to proceed with the application.

However, the AAT did not proceed to determine whether the decision to dismiss was valid. It did not find it necessary to rule upon a submission by the respondent that the powers of the AAT were confined to reviewing decisions of the SSAT which affirmed, varied or set aside a decision and substituted a

new decision (s.205 of the *Social Security Act* 1947), and could not review a decision of the SSAT dismissing an application for review.

Discretion regarding date of effect

In its Reasons for its decision of 21 February 1991, the SSAT had said that because the applicant's appeal of 2 March 1990 had been dismissed the only application for review on foot was the one lodged on 12 December 1990. Since that application was lodged more than 3 months after notification of the decision under review, the date of effect of the SSAT's decision was the date of application, that is 12 December 1990.

In effect the SSAT was saying that by virtue of sub-section 183(5), the date of effect is determined in accordance with sub-sections (4) and (5) and is the day on which the application was made to the Tribunal for review of the decision.

The AAT said that the SSAT had failed to consider whether to exercise the discretion in s.185(6) to order that s.185(4) not apply. In considering that discretion, it would be relevant to take account of the facts and circumstances surrounding the dismissal of the applicant's earlier appeal. The AAT said that –

> 'in the light of the admitted facts the decision to proceed in the absence of the applicant on 21 May could hardly be described as fair. Indeed it has resulted in financial loss to the applicant'.

It was also relevant to consider that the decision to deny him 12 weeks' unemployment benefit was made at a time when he had arrived in Tasmania with very little money and a pregnant wife in the expectation of receiving benefits.

The AAT's decision

The SSAT's decision setting aside the decision of the Delegate of 21 February 1991 was affirmed, but the decision to impose a non-payment period for unemployment benefit of 12 weeks was set aside and in substitution therefor it was directed that Shelley be paid unemployment benefit for that period at the rate appropriate as at 26 February 1990. The AAT also directed, pursuant to sub-section 183(2), that the AAT's decision come into operation on or before the expiration of 30 days from the date of the decision.

[P.O'C.]

[Editorial note: The AAT's reasoning seems to have been premised on the assumption that it would be to Shelley's advantage if the discretion in sub-section 183(6) were exercised. This is incorrect, because an order under sub-section 183(6) can only result in a *later* date of effect than if sub-section (4) had been allowed to operate. The AAT's decision is currently under appeal to the Federal Court.]

Unemployment benefit: late claim

MORSE and SECRETARY TO DSS (No. 7652)

Decided: 10 January 1992 by R. A. Balmford, P. Burns and R. C. Gilham.

Russell Morse asked the AAT to review a DSS decision (affirmed by the SSAT) to grant unemployment benefit from no earlier than 21 January 1991.

Morse became unemployed on 15 August 1990 and registered with the CES on 16 August. He was asked whether he wished to claim unemployment benefit but declined as he intended to live on his savings until he found another job. However, he found it harder than he had expected to find work and finally, on 14 January 1991, he lodged a claim for unemployment benefit, which was granted from 21 January 1991.

Morse requested that his claim be granted from 16 August 1990, i.e., the date he had registered with the CES, in accordance with s. 125(2) of the *Social Security Act 1947*.

The legislation

The AAT first considered which legislation should govern the determination of this application.

After referring to the repeal of the *Social Security Act 1947* and its replacement from 1 July 1991 with the *Social Security Act 1991*, and the transitional provisions in Schedule 1A of the 1991 Act, the AAT determined that, while the application was to be dealt with under the 1991 Act, the substantive question at issue was to be determined in accordance with the 1947 Act, as the matter involved a period prior to 30 June 1991.

Therefore the relevant provision was s. 125(2) of the 1947 Act which provided that, where a person becomes registered with the CES and within 14 days (or 'within such further period as the Secretary considers reasonable') makes a claim for unemployment benefit, the date of registration shall be treated as the day on which the person lodged his or her claim.

Section 125(1) provided that unemployment benefit was payable from the 7th day after a claim was lodged, while s. 116 of the 1947 Act governed qualification for unemployment benefit, including the 'work test'.

'Reasonable period'

The sole issue for the consideration of the AAT was whether the period from 16 August 1990 to 14 January 1991 was 'reasonable' within the meaning of s. 125(2)(b), so that Morse's unemployment benefit could be paid from the date of his registration with the CES.

After considering a number of authorities on the term 'reasonable', the AAT agreed with a statement of the High Court that 'unreasonableness is a relative concept and its application requires the consideration of all the relevant circumstances' (*Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678).

The AAT went on to consider extrinsic materials, in particular, the 2nd Reading Speech to the amending legislation which introduced s. 125(2) into the Act in 1982. This suggested that 'if there are specific reasons for delay, the date of payment will refer back to the date on which the applicant registered with the CES'.

The Tribunal noted that there were no authorities on which it could rely, and referred to the policy evident in s. 158 of the 1947 Act, that payments were generally available only from the date of a claim. In addition, the AAT noted the recent trend of restricting or abrogating provisions which previously had permitted the payment of arrears, and referred to clear policy reasons for this, notably the difficulty of accurately ascertaining past entitlements and the undesirability of paying out large amounts of arrears.

The AAT concluded:

> 'It may be regarded as the general policy of the law that where a statute confers power to extend a time limit imposed by that statute, prima facie the time limit should be observed.'

(Reasons, para 21)

The AAT found that Morse had made a conscious and informed decision not to apply for benefit as his preference was to live on his savings, rather