The legislation

Section 644(1) of the *Social Security Act* 1991 declares that person who is receiving a newstart allowance and undertaking a CES-approved course of vocational training is to have her or his rate of allowance increased by a newstart training supplement, to be paid at the rate considered appropriate by the Secretary.

According to s.644(2), the Secretary is to calculate the amount of the supplement by having regard to a person's expenses while undergoing the training. Section 644(3) fixes the maximum amount of the supplement as $87.50.

Government policy

The DSS argued that the newstart training supplement should not be paid to anyone under 21 years of age. It was said that the training supplement system had initially been paid outside the social security system, without any legislative base. The supplement had only been paid, as a matter of government policy, to persons aged at least 21 years.

Evidence was given to the AAT by a senior officer in the DEET, that the inclusion of the supplement in the *Social Security Act* 1991 had not been intended to disturb the existing policy.

The DSS argued that the AAT should apply the Government policy on a minimum age for the supplement, as recognised by the leading decision in *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634. However, the AAT pointed out that in discussing whether the AAT should take account of government policy, as outlined in *Drake (No. 2)*, Brennan J (at 641) had distinguished between a lawful policy which guided the exercise of a discretion and 'an unlawful policy which creates a fetter to limit the range of discretion conferred by a statute'.

The discretion available to the Secretary and the AAT under s.644, the AAT said, was limited. It related only to the amount of the supplement, and the factors to be taken into account in exercising that discretion were set out in s.644(2).

This case, the AAT said, was more like the situation in the school leavers' case, *Green v Daniels* (1977) 13 ALR 1, than the cases applying policy statements to broad discretions. The AAT concluded:

> 'What has happened in this case is that the criteria contained in s.644(2) have had superimposed upon them an additional criterion relating to age. Under s.644(2)(a), (b) and (c) the Secretary is to have regard to 3 factors in determining the amount of increase in NSA. As stated above, no broad discretion is conferred on the Secretary. The Secretary must have regard to specific factors in considering the amount of increase which is appropriate. It is not open to the Secretary to import other criteria which limit the exercise of the discretion. Age is not a factor which may be taken into account when determining the amount of the increase in NSA.'

(Reasons, para. 22)

Reference to extrinsic materials

The AAT also rejected a DSS decision that the relevant second reading speech and explanatory memorandum showed that s.644 should be read as excluding persons under 21.

The AAT described these documents as introducing an element of ambiguity and conflict which was not found in s.644. The AAT said:

> 'The *Social Security Act* 1991 is intended to be the "plain English" version of the Act. It is intended to be accessible so that ordinary Australians can understand it. These considerations reinforce my view that the meaning of s.644 is clear on the face of the Act and that factors not expressly stated ought not to be included in its meaning.'

(Reasons, para. 18)

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Unemployment benefit: liquid assets test

JACOBSEN and SECRETARY TO DSS

(No. 7846)

Decided: 20 March 1992 by W.J.F. Purcell, D.J. Trowse and J.Y. Hancock.

The DSS decided to impose a 4-week deferment period for payment of unemployment benefit to Jacobsen on the basis that on the day on which he lodged his claim, the value of his liquid assets exceeded $10 000, the maximum reserve applicable to him under s.116C of the *Social Security Act* 1947.

Jacobsen appealed unsuccessfully to the SSAT and then to the AAT.

The legislation

The 'liquid assets' test for unemployment benefit came into effect from 1 February 1991. Section 116C(2) of the 1947 Act provided that, where on the date of claim a person's liquid assets exceeded the person's maximum reserve ($10 000 in Jacobsen's case), the person was not qualified to receive a benefit during the 4 weeks commencing on the day on which the person became unemployed.

The Secretary had a discretion to waive the 4-week deferment period if satisfied that to apply it would cause undue long-term disadvantage or significant hardship to the person.

The assets

At the date of claim, 18 February 1991, Jacobsen disclosed liquid assets totalling $15 398. Between 19 and 21 February 1991 he received a further $2278 by way of lump sum severance pay.

Family financial commitment

After the application for review by AAT was lodged, the DSS acceded to Jacobsen's request to disregard, for the purpose of assessing his level of liquid assets, a sum of $4728 which he had set aside to buy a car for his son and to pay the insurance excess.

The AAT was troubled by this concession, stating the assessment of the level of liquid assets is not to be influenced by the possible existence of liabilities. The AAT concluded that Jacobsen's prior commitment, incurred before he became unemployed, could however be recognised as a 'one-time' payment under DSS guidelines (*Guide*, paras 10.270 to 10.271) for the purpose of the exercise of the waiver discretion in s.116C(4A).

Bank account

The AAT rejected a submission by Jacobsen that $11 994 in a Mortgage Interest Saver Account (MISA) should not be included in liquid assets because it was part of his mortgage. The AAT found that the MISA was simply a special savings account where the balance was off-set daily against the home loan balance. It was an amount deposited with a bank as defined by s.116C(9)(b).

The lump sum severance payment was found to be a 'qualifying eligible termination payment' and accordingly excluded from his liquid assets under s.116C(9).

Debt repayments

The applicant argued that lump sum payments of Bankcard totalling $2122 and mortgage instalments amounting to

$1284 paid during the deferment period ought to be recognised in exercising the discretion in s.116C(4A).

Applying the DSS guidelines, the AAT held that the mortgage instalments and Bankcard payments falling due in the deferment period did not cause undue long-term disadvantage or significant hardship to the applicant. The lump sum Bankcard payments were voluntary and part of his regular expenditure. The mortgage instalments, even if recognised in addition to the sum set aside for the provision of the son's car, did not reduce his liquid assets below $10 000.

Formal decision

The AAT affirmed the decision under review.

[P.O'C.]

Overpayment resulting from criminal activity

SECRETARY TO DSS and KALWY

(No. 7818)

Decided: 13 March 1992 by M.D. Allen.

The DSS raised an overpayment of $19 570.86 against Michael Kalwy. This represented the proceeds of an alleged conspiracy in the course of which false unemployment benefit claims involving fictitious persons were processed by the DSS. At the time of the alleged fraudulent scheme Kalwy was an employee of the DSS and one of the alleged co-conspirators was employed by the CES.

The DSS issued garnishee notices under s.162 of the *Social Security Act* 1947 to recover the overpayment. The decision to issue those notices was set aside by the SSAT. (Unfortunately the AAT did not state why the SSAT set the decision aside so it is not clear what the SSAT decided about the overpayment. Also, no indication is given of what, if any, order was made by the SSAT upon setting aside the decision under s.162.)

The DSS applied to the AAT for review of the SSAT's decision.

Legislation

Section 246(1) of the *Social Security Act* 1947 provided that:

> 'Where in consequence of a false statement . . . an amount has been paid by way of . . . benefit under this Act which would not have been paid but for the false statement . . . the amount so paid is a debt due to the Commonwealth.'

The AAT decided that if the alleged conspiracy was proved 'then s.246 . . . clearly permits an overpayment to be recovered from the applicant [sic]' Reasons, para. 6.

Section 162 of the Act empowered the DSS to recover a debt due to the Commonwealth from third parties who held or owed money to the debtor. This involved the issuing of garnishee notices.

Result of criminal proceedings

Kalwy was discharged at the conclusion of committal proceedings under s.41(6) of the *Justices Act* (NSW), which empowers a magistrate to discharge if satisfied that a reasonable jury properly instructed would not be likely to convict. (Although not stated by the AAT, it seems that the DSS was seeking to rely upon the same conspiracy in respect of which Kalwy had been discharged.)

AAT's evaluation of the evidence

The great bulk of the AAT's reasons was taken up by an evaluation of the evidence before it.

The main pieces of evidence implicating Kalwy involved Michael Shaloub, who was not directly involved in the conspiracy with Kalwy. The evidence relied upon by the AAT included an apparent admission by Kalwy to Shaloub and a taped conversation between Shaloub and one of Kalwy's alleged co-conspirators.

The AAT was not convinced by Kalwy's explanations as to how he managed to effect a marked increase in his bank account balances over the period of the alleged fraudulent scheme.

Accordingly, the AAT decided on the whole of the evidence before it that it was satisfied on the balance of probabilities that Kalwy had participated in the alleged fraud involving the making and processing of false unemployment benefit claims in 4 fictitious names (Reasons, para. 43).

Joint and several liability?!

The AAT accepted the DSS submission:

> 'that where two or more have conspired together to defraud they are each jointly and severally liable for the amounts wrongly paid out to the conspirators. Cf Halsbury 4th Ed. Vol. 12, para. 1210 and *R v Darby* 40 ALR 594'.

(Reasons, para. 6)

However, when it came to making its decision the AAT said:

> 'I note that the Department has regarded the respondent as liable to refund only one half of that sum and I see no reason to interfere with this determination.'

(Reasons, para. 44)

(Even more mysterious is how the AAT ended up with an overpayment amount of $27 099.99 when the DSS had originally raised a $91 570.86 overpayment.)

'No case' submission not permitted

One procedural matter of interest was the AAT's refusal to entertain a 'no case' submission on behalf of Kalwy before he was called to give evidence. The AAT said:

> 'To my mind a submission of no case to answer is not consistent with proceedings in administrative law where the task of this Tribunal is to make the correct or preferable decision on the material before it. Cf *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 68. This of necessity implies that the Tribunal must decide questions of fact as well as questions of law and questions of fact should be decided only after all available admissible evidence is in. Cf *Tate v Johnson* (1953) 70 WN (NSW) 302. This is not to deny the respondent's right not to elect to go into evidence.'

(Reasons, para. 30)

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS 'in order that it might take such action as it deems meet, including the issue of notices pursuant to s.162 of the *Social Security Act* 1947 or any provision in substitution thereof, to recover the sum of $27 099.99 from the Respondent'.

[D.M.]

SECRETARY TO DSS and PONSFORD

(No. 7844)

Decided: 20 March 1992 by K.L. Beddoe.

On 11 August 1988 the DSS issued a notice under s.162 of the *Social Security Act* 1947 to a bank at which Gary Ponsford held an account, requiring it to pay $5317.60 to pay off an overpayment of the same amount raised against Ponsford. The SSAT set aside the DSS decision claiming the