$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

overpayment and the DSS applied to the AAT for review.

**The legislation**

Where a person was indebted to the Commonwealth under or as a result of the *Social Security Act* 1947, s.162 empowered the DSS to issue a notice to a third party who held money for or on account of the person requiring payment of the amount of the debt.

Section 246 made an overpayment under the Act that was made in consequence of a false statement a debt due to the Commonwealth.

**The facts**

Butcher, an associate of Ponsford, devised and carried out a number of frauds on the DSS in which sickness benefits were obtained under false names and paid into accounts opened by Butcher. In return for assisting Butcher, mainly in the way of driving duties but also by leasing post office boxes, Ponsford was given automatic teller machine cards to 4 false name bank accounts, together with their identification numbers. Ponsford withdrew about $400 per week from these accounts.

The actual perpetration of each fraud on the Department was organised by Butcher and not Ponsford. Butcher also created all the false documents that were used. Ponsford did nothing directly to convince the DSS to pay benefits to the various false name accounts.

On 22 May 1988 Ponsford pleaded guilty to 4 counts of receiving money belonging to the Commonwealth. The money was obtained via automatic teller machines from the 4 false name bank accounts. (The AAT did not specify the law under which the respondent was charged but it does not appear to have been s.239 *Social Security Act* 1947.)

**Person indebted to the Commonwealth under the Social Security Act**

The AAT first considered that:

> 'It is not relevant to decide whether the 4 bank accounts belonged to the respondent. Clearly the funds in those accounts had been obtained by Butcher by fraud and therefore did not belong to Butcher or the respondent (*Johnson v R* [1904] 817 at 822 [sic]).'

(Reasons, para. 17)

It was then decided that:

> 'Given the eventual convictions, the respondent is a person indebted to the Commonwealth under or as a result of the [*Social Security*] Act. The money which forms the basis for the debt was obtained by a fraud against the [*Social Security*] Act so that it must be the case that the respondent is a person who comes within the terms of s.162(1). That is because false representations made by Butcher have resulted in payments under the Act which would not have been paid but for those false representations. The amount so paid becomes a debt due to the Commonwealth (s.249).
>
> ...
>
> In my view the fact that the respondent was not at the relevant time a pensioner is irrelevant to determining whether there is a debt due to the Commonwealth. It seems to be inescapable to me that each time the respondent withdrew money from one of the fraudulent banking accounts he stole money belonging to the Commonwealth. Having stolen that money, he became liable to pay it back so that at all relevant times it was a debt due to the Commonwealth.'

(Reasons, paras 21 and 23)

[Note: the reference to s.249 was presumably intended to be a reference to s.246.]

The AAT stressed that

> 'There is nothing in the [*Social Security*] Act which says that a person from whom recovery is sought must be a claimant under the Act. See Department of Social Security v Mathias (1991) 22 ALD 655 at 662-3.' [60 SSR 823].

(Reasons, para. 24)

**The issuing of the s.162 notice**

The DSS advised the Tribunal that $935 had been recovered from the 4 false name accounts and conceded that the amount covered by the s.162 notice should be reduced by $935. However, the AAT decided not to interfere with the notice:

> 'I cannot now change the terms of the s.162 notice . . . for several reasons not the least of which is that the amount shown in the notice as the debt due to the Commonwealth has been recovered from the . . . bank account operated by the respondent in his own name. Clearly [DSS] was entitled to issue the notice and the amount shown in it seems to have been the appropriate amount at the time. I do not have any evidence before me which shows exactly when the various amounts were recovered from the false name accounts. Therefore I should not speculate as to whether the amount set out in the s.162 notice was incorrect when it issued. Given that the . . . bank has acted on the s.162 notice and there is no basis before me for saying that the notice was incorrectly issued, I will affirm the decision to issue the notice.'

(Reasons, para. 27)

[Note: it seems as though the bank complied with the s.162 notice prior to the matter being decided by the appeals process.]

**Formal decision**

The AAT decided that:

(a) the decision under review be set aside;

(b) the respondent was a person indebted to the Commonwealth within the terms of s.162 of the *Social Security Act* 1947;

(c) the decision to issue the notice pursuant to s.162 was affirmed; and

(d) $935 be paid to Ponsford by the DSS.

**[D.M.]**

# Overpayment and reparation orders

**WVC and SECRETARY TO DSS (No. 7812)**

**Decided:** 10 March 1992 by P.W. Johnston, T.E. Barnett and R.D. Fayle.

**Background**

WVC was paid supporting parent's benefit from 12 January 1984. On 24 March 1988, a DSS delegate decided to raise and recover a debt of $4314.40, on the basis that WVC had failed to notify the DSS of income from earnings. The debt was subsequently recalculated and revised to $3572.40.

WVC appealed to the SSAT, which recommended that the debt should stand but that the rate of repayment should be $20 per fortnight. A DSS delegate affirmed that recommendation.

The matter was then referred to the DPP and WVC pleaded guilty to 3 charges of making a false statement under the Act on 19 September 1988. In addition to a good behaviour bond and a recognizance of $1000, the court made a reparation order for $3431 (assumed by the AAT to have been pursuant to s.239(7) of the *Social Security Act* 1947).

WVC did not dispute that she had been working, but asked the AAT to exercise the discretion under s.251 of the 1947 Act to waive some or all of the overpayment on the grounds of hardship. In particular, WVC asked the AAT to consider the circumstances in which the debt arose and to apply the