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

'earnings concession' to her earnings from employment.

The legislation

At the relevant time, s.239 of the *Social Security Act* 1947 specified a series of offences for knowingly obtaining payments under the Act by means of a false or misleading statement. By s.239(7), a court was empowered to order a person convicted to pay reparation to the Commonwealth.

Section 246(1) provided that amounts paid in consequence of a false statement or representation or a failure or omission to comply with any provision of the Act were a debt due to the Commonwealth, while s.246(2) provided that amounts paid that should not have been paid are recoverable by means of withholdings.

Section 251 provided that the Secretary may write off debts, or waive the right of the Commonwealth to recover the whole or a part of a debt, or allow an amount payable to the Commonwealth to be paid by instalments.

Under the 1991 Act, s.1236 deals with the power to write off debts while s.1237 deals with the power to waive the Commonwealth's right to recover a debt. The exercise of the power under s.1237 is limited by a direction made by the Minister for Social Security on 8 July 1991 pursuant to s.1237(3).

The AAT's jurisdiction

The Department submitted that the AAT did not have jurisdiction as the SSAT decision concerning the earnings concession did not arise under the Act and therefore could not be the subject of review under s.205 of the 1947 Act.

Alternatively, it was submitted that no primary decision had been made by the delegate in respect of waiver and hence there was no jurisdiction to review a decision.

It was also argued that a reparation order made by a court of petty sessions was not reviewable as it was not made under the Act, and the existence of that order effectively precluded the AAT from exercising any jurisdiction to waive recovery of the overpayment.

The earnings concession

The AAT accepted the DSS argument that, as there was no statutory basis for a decision about the 'earnings concession', a decision to apply or withhold the concession could not be the subject of review under the Act. (The AAT noted that the 'earnings concession', as it was at the time, was a policy with no legislative status which allowed persons who received earnings in a short continuous period to continue to receive pension at full rate until the amount of income received was equal to their notional annual allowable amount.)

However, the AAT decided that WVC's appeal had not been limited to that question: rather, her basic concern was with her financial difficulties and the financial hardship she was experiencing. While the earnings concession 'crystallized' her concern, it did not exhaust it: Reasons, para. 22. To confine her appeal to that issue would be 'to take too restrictive a view of the matter'. The decision against which WVC was appealing was the decision to raise the overpayment and recover it in full.

Jurisdiction to waive

Consistently with its decisions in *Mariot* (1992) 66 *SSR* 937, and *Ibbotson* (noted in this issue), the AAT decided that there is a close connection between the recovery of a debt owing its origin to s.246 of the Act and the exercise of the discretion to waive recovery, write off the debt or modify repayments pursuant to s.251 of the Act, and that a decision to recover necessarily involved a decision not to waive a debt. The Tribunal therefore had jurisdiction to consider waiver under s.251 of the Act and had the same in relation to its successor, s.1237 of the 1991 Act.

The AAT also rejected the argument that, if it were to waive any or all of the debt owing to the Commonwealth, this would constitute an interference with the judicially made reparation order. While the AAT agreed that s.246 of the Act gave rise to a separate basis of recovery from that constituted by the reparation order made under s.239(7), it did not consider that two separate debts are created, 'though the same set of circumstances can give rise to a single liability that is enforceable through two different legislative means or systems'. Although the AAT conceded that the effect of waiving the debt-

> 'may have the consequence that the reparation order can have no meaningful operation . . . the fact that subsequent waiver by the Tribunal might preclude, effectively, later resort to the reparation order is no bar to the exercise by the Tribunal of the discretion clearly made available by the Act in s.251.'

(Reasons, para. 28).

After referring to the recent decisions in *Pomersbach* (1992) 65 *SSR* 912 and *Campbell* (1992) 65 *SSR* 914, the AAT noted that this case differed in that, unlike in those cases, the reparation order was made pursuant to s.239(7) of the Act and a question then arose as to whether there was any internal conflict between s.246(1) and s.239(7) of the Act.

The AAT held that there was no mutual exclusivity or conflict between the 2 provisions each of which gave rise to a liability which shared a common substratum of fact; and the making of an order under s.239(7) did not effectively preclude recovery under s.246. The provisions meant that the Commonwealth 'has a choice and may pursue the debt in alternative ways': Reasons, para. 29.

Accordingly, the AAT ruled that it had jurisdiction and considered the matter of waiver.

Waiver

The AAT noted that there was some uncertainty as to whether s.251 of the 1947 Act had been supplanted by s.1237 of the 1991 Act at the time of making the decision. As a matter of caution, it decided to consider waiver under both provisions.

The AAT considered the applicant's circumstances in some detail and after canvassing her personal history, her income and expenditure, the health of her children, the circumstances in which the debt arose (she worked as an escort at a time when she was drinking heavily and taking drugs and claimed not to have reported her earnings to DSS because of the nature of her work) and the steps she was taking to overcome her problems, the AAT noted that at the time of the hearing, the amount of the debt outstanding was $1625.07.

Applying the factors from the Federal Court decision in *Hales* (1983) 13 *SSR* 136, the moneys were obtained through conscious dishonesty, though driven by extremely desperate circumstances. WVC had not shirked her liability to the Commonwealth and had made what the AAT considered to be quite a reasonable offer for repayment; while she was not 'entirely bereft of the capacity to make repayment', her financial circumstances were extremely difficult; and it was undesirable that a mother supporting young children should have to make repayments over an extended period of time to the detriment of her children.

Formal decision

After considering s.1237 of the 1991 Act and the ministerial direction, the Tribunal **varied** the decision by requiring the applicant to recommence repayments of $20 a fortnight and directed

the DSS to review her financial circumstances after two years. If they had not materially improved in the meantime, the AAT recommended that the balance of the debt then outstanding be waived.

[R.G.]

Overpayment: jurisdiction

SECRETARY TO DSS and IBBOTSON

(No. 7814)

Decided: 11 March 1992 by T.E. Barnett

Background

The DSS asked the AAT to review a decision of the SSAT, setting aside a DSS decision that the applicant had been overpaid $18 671.20.

The DSS claimed that Ibbotson had received single unemployment benefit while living with RF as his *de facto* spouse for a period between 1984 and 1987. During that time, it was alleged that she had used the name 'F' for various purposes, but had used her own name (Ibbotson) when she applied for unemployment benefit on 20 September 1984. It was also alleged that she had used her brother's address for some of the time and that she had deliberately provided false information to the DSS.

It was argued that, as a 'dependent female' and later as a de facto spouse, Ibbotson had had no entitlement to benefit as F was in receipt of unemployment benefit (including an additional component for Ibbotson as a dependent spouse) throughout the period. As the payments she received were made in consequence of her having made a false statement or representation, the debt was recoverable under s.246(1) of the Act.

Ibbotson maintained that by the time she claimed benefit in September 1984, she and F were separated and she had notified the DSS that she had just left a *de facto* relationship where the father of her daughter was claiming for her as a dependent spouse.

Even though F followed her and they shared accommodation again for a time, Ibbotson argued that throughout the period she remained a single person as the relationship never resumed. She continued to share accommodation with F only because he refused to leave and because she had insufficient finance to move into separate rented accommodation. Her explanation for having made damaging admissions to a DSS officer was that F was present throughout the interview and she was frightened that he would be violent towards her if she told the officer she was no longer a *de facto* spouse.

Ibbotson's second submission was that, even if the AAT found that she was living in a *de facto* marriage during some or all of the relevant period, that did not preclude her from unemployment benefit as s.112(2)(d) (as it was in 1984) entitled her to receive a low rate of benefit. It was argued that if there had been any overpayment, it was an overpayment to F in respect of her as a dependent spouse.

Finally it was submitted that if there had been an overpayment to her, the Tribunal should waive the debt in whole or in part under s.251. If any repayment was necessary, it should be by means of very low instalments.

To this argument, the DSS submitted that the AAT had no jurisdiction to consider waiver as no primary decision had been made by a duly authorised delegate.

The legislation

At the time that the alleged overpayment commenced, s.107 of the *Social Security Act* 1947 governed the qualifications for unemployment benefit; s.112 dealt with the rate at which it was payable, while s.114 imposed an income test.

Section 106 defined a 'dependent female' as a woman living with a man as his wife on a *bona fide* domestic basis though not legally married to him. This was later changed to a '*de facto* spouse'.

At the time the overpayment was raised, s.246(1) provided that an overpayment made in consequence of a false statement or breach of the Act was a debt due to the Commonwealth, while s.251 gave the Secretary a discretion to write off, waive or allow payment by instalments of any debt due. (Section 1237 of the *Social Security Act* 1991 currently provides for the waiver of debts.)

The AAT's findings

The AAT found that Ibbotson commenced to live with F as his wife on a *bona fide* domestic basis sometime in the late 1970s and that this relationship continued through the relevant periods. This meant that she was a 'dependent female' and later, his *de facto* spouse. The AAT also found that the relationship was characterised by arguments and occasional violence and that Ibbotson was not financially dependent on F.

The AAT accepted that, when she applied for benefit on 20 September 1984, Ibbotson was living separately from F and had notified the DSS officer of that fact. However, shortly after that time, F insisted on joining her and the relationship was resumed and 'limped on'. The relationship was under severe stress when, on 3 August 1987, Ibbotson and F were interviewed by a DSS officer during which time Ibbotson made admissions about the relationship. Shortly after that, she moved to Western Australia with her parents.

The AAT found that Ibbotson was aware that F continued to receive a benefit in respect of her as a dependant, and that she had signed forms as his dependent spouse. This amounted to a false statement which may have contributed to *him* obtaining a benefit to which he was not entitled.

There was no dispute about Ibbotson satisfying the criteria set out in s.107(1), i.e. the work test requirement for payment of unemployment benefit. Notwithstanding the fact that she was a *de facto* spouse, the AAT determined that, subject to her satisfying the income test in s.114, she was entitled to be paid the 'catch all' rate provided for by s.112(1)(d), and that F should have been entitled to exactly the same amount. That is, Ibbotson was entitled to receive benefit throughout the relevant period as a married person pursuant to s.112(1)(d) and entitled to receive a benefit in relation to her child.

However, the AAT said, F had been overpaid by having received additional payments for Ibbotson during the relevant period. As there was no information on which it could assess her entitlement under the income test, the AAT could not determine whether she had been overpaid and remitted the matter to the DSS to recalculate her entitlement in the light of the decision.

However, in the event that she had been overpaid, the AAT went on to consider recovery action.

Jurisdiction to waive

Relying on the decisions of the Federal Court in *Hales* (1983) 13 *SSR* 136 and *Hangan* (1982) 11 *SSR* 115, and a decision of the AAT in *Mariot* (1992) 66