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

The legislation

Under the *Social Security Act* 1947, eligibility for FAS was determined for a calendar year: s.76(1). That eligibility depended in part on the combined taxable income of the claimant and the claimant's spouse. The relevant taxable income would normally be taxable income in the 'base year of income', that is, the tax year which ended in the previous calendar year.

However, a more recent tax year could be used if a 'notifiable event' occurred while a person was receiving FAS, as a result of which the total taxable income in the more recent tax year was likely to be 25% higher than the total taxable income in the base year of income: s.74B(2).

Similarly, a more recent tax year could be used if a 'notional notifiable event' had occurred before a person claimed FAS but after the end of the base year of income, and if that event was likely to produce a total taxable income in the more recent tax 25% higher than the total taxable income in the base year of income: s.74B(1A).

According to s.72(1), a 'notifiable event' was an event (a) specified in a notice given to a person under s.163(1) relating to FAS and (b) described in that notice as a notifiable event for the purposes of s.72.

Section 72(1) also defined a 'notional notifiable event' as—

> 'an event specified by the Secretary in writing for the purposes of this definition, being an event that is specified in some or all notices given under s.163(1) to persons who are granted allowances'.

Equivalent provisions are found in the *Social Security Act* 1991, which uses the terms 'FAS notifiable event' and 'FAS assumed notifiable event'.

Which Act?

The AAT decided that the right of the Secretary to have the SSAT's decision reviewed under the 1947 Act and the right of Doravelu to have her claim for FAS determined under the 1947 Act were preserved by s.8 of the *Acts Interpretation Act* 1901.

This finding, the AAT said, was consistent with the decisions in *Reilly* (1987) 39 *SSR* 495 and *Szelag* (21 February 1992).

No 'notifiable event'

The AAT decided that to make an event a 'notifiable event', there must be strict compliance by the DSS with the requirements of the definition of that term in s.72(1). This was because failure by a FAS recipient to notify the DSS of such an event could lead to civil liability (a debt to the Commonwealth) under s.246(1) and criminal liability under s.239(1) of the 1947 Act. As the House of Lords had said in *London and North Eastern Railway Co v Berriman* [1946] AC 278, 313: 'A man is not to be put in peril upon an ambiguity'.

The notice issued to Doravelu in January 1990 had not described commencement of work as a 'notifiable event' for the purposes of s.72 of the Act, as required by para. (b) of the statutory definition of that term. Accordingly, the AAT decided, Doravelu's starting work in July 1990 was not a 'notifiable event'. However, as the decision to cancel payment of FAS was not under review, the AAT made no decision in relation to it.

No 'notional notifiable event'

For similar reasons, the AAT decided that Doravelu's starting work in July 1991 was not a 'notional notifiable event'. It was essential that the requirements of the definition of that term be strictly complied with. The inclusion in the claim form of a question asking whether Doravelu had started work did not specify that event in writing for the purposes of the definition of 'notional notifiable event', as required by the s.72(1) definition. It was probable, the AAT said, that the purpose of the requirement related 'to the need for precision in the definition of matters which may give rise to legal proceedings, both civil and criminal': Reasons, para. 28.

As there had been no 'notional notifiable event', the relevant tax year was the 1989-90 tax year (the year before Doravelu started work). It followed that Doravelu's entitlement to FAS was to be determined by reference to total taxable income in 1989-90 which, it was agreed, meant that she was eligible for FAS from the date of her claim in 1991.

The parties agreed, and the AAT found, that Doravelu had lodged her claim on 20 May 1991, not 16 May 1991 as found by the SSAT.

Formal decision

The AAT varied the SSAT's decision by substituting the date 20 May 1991 for the date 16 May 1991. In all other respects, the AAT affirmed the SSAT's decision.

[P.H.]

Bereavement allowance: 'pensioner couple'

ANDERSON and SECRETARY TO DSS

(No. 7773)

Decided: 21 February 1992 by P.W. Johnston.

Mr Anderson received carer's pension in respect of his father-in-law, who received an age pension. Following his father-in-law's death, Mr Anderson sought payment of a bereavement allowance under s.66 of the *Social Security Act* 1947. Both the DSS and the SSAT refused his application.

The legislation

Under s.66, where a member of a 'pensioner couple' dies, the surviving pensioner was entitled to 7 fortnightly payments of the combined amount that would have been payable to the deceased and the survivor, if the deceased had not died.

'Pensioner couple' was defined in s.3(1) of the Act as 2 pensioners 'each of whom is a married person because of being the spouse of the other pensioner'. Under the same section, 'spouse' was defined to include a '*de facto* spouse' which was in turn defined to cover persons of the opposite sex living in a marriage-like relationship.

A bereavement allowance was paid to Anderson pursuant to s.67 of the *Social Security Act 1947*. Under that section a person other than the deceased's spouse who qualified for carer's pension in respect of the deceased before his death, was qualified to receive a carer's pension for 14 weeks after the death at a rate 'to be determined having regard to the carer's actual circumstances'. (By contrast, the s.66 entitlement was to the total of both pensioners' pensions.)

Not a member of a pensioner couple

Mr Anderson argued that as he had lived in a family relationship in which he undertook the role of carer for his father-in-law and both of them had drawn pensions they should be equated with a pensioner couple.

However, the AAT decided that it was bound to apply the actual terms of the Act which confined the meaning of 'pensioner couple' to persons of the opposite sex as 'no other meaning, natural or artificial, can be given to that

term': Reasons, para. 13. The Tribunal concluded:

> 'Where there is a statutory definition, as in the case of "pensioner couple", the Tribunal errs if it seeks to distort the meaning of such an expression by reference to wider considerations of purpose or policy. To do so would involve an error of law that would make the decision susceptible to being reversed by the Federal Court on appeal.
>
> Though the Tribunal is moved by Mr Anderson's situation, it would do him no good to receive a decision that cannot stand up in law.'

(Reasons, paras 19-20)

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Federal Court decisions

Overpayment: cause

SECRETARY TO DSS v GREENWOOD

Federal Court of Australia

Decided: 7 April 1992 by French J.

Margaret Greenwood was granted supporting parent's benefit from 8 January 1987. At the time of the grant, the DSS gave Greenwood a notice to the effect that she was obliged to notify the DSS within 14 days of any variation in her income. In a series of 12-weekly review forms completed and lodged over the succeeding 2 years (the last on 7 March 1989), Greenwood told the DSS that her income had not changed.

On 27 April 1989, Greenwood advised a DSS officer that she had started work on 9 March 1989 (by this time her supporting parent's benefit had been converted to sole parent's pension).

The DSS took no action in response to this advice for more than a year. A file note suggested that Greenwood was advised that she should 'phone the Department every 6 weeks to report details of her income from work. Greenwood did this in June, July, August, September, October and December 1989. DSS file notes indicated that Greenwood was told that these 'phone advices were appropriate.

On 8 December 1989, the Secretary's delegate cancelled Greenwood's sole parent's pension because of the level of her income. Greenwood lodged a new claim on 22 December 1989, advising the DSS that she had ceased work. She was granted the pension and given a notice requiring her to notify the DSS within 14 days if her income exceeded $64 a week or if she started paid work.

Greenwood started work on 23 February 1990 but did not notify the DSS until 27 April 1990. In August 1990, a delegate of the Secretary decided that Greenwood had been overpaid sole parent's pension because of her failure to report changes in income within 14 days. Most of the overpayment related to pension paid in 2 periods – 13-27 April 1989 and 29 March-26 April 1990.

On review, the AAT affirmed the decision to recover the 1989 overpayment; and set aside the decision to recover the 1990 overpayment: *Greenwood* (1991) 64 *SSR* 897.

The AAT said that the 1989 overpayment had occurred in consequence of Greenwood's failure to notify the DSS within 14 days of starting work on 9 March 1989 and would not have occurred but for that failure; but the 1990 overpayment had been caused by the inaction of the DSS and by representations probably made to Greenwood by an officer of the DSS that she could continue reporting her income by 'phone every 5 to 6 weeks.

The Secretary appealed to the Federal Court under s.44 of the *AAT Act* 1975.

The Federal Court's decision

The question for the Federal Court was whether the AAT had made an error of law in deciding that the overpayment made between 29 March and 26 April 1990 was not made in consequence of Greenwood's failure or omission to comply with the *Social Security Act*.

French J accepted that the AAT had applied the correct test in reviewing the DSS decision that Greenwood had received an overpayment in consequence of her failure or omission to comply with the Act within s.246(1) of the *Social Security Act* 1947. The AAT had correctly proceeded on the basis that it was sufficient, for the purposes of s.246(1), that the person's failure or omission was a contributing cause to the overpayment. This was consistent with the Federal Court decisions in *Hangan* (1982) 11 *SSR* 115 and *Hales* (1983) 13 *SSR* 136.

Traditionally, French J said, a decision on a matter of causation was regarded as a question of fact and would not be subject to review on an appeal to the Federal Court under s.44 of the *AAT Act*. However, there had been an error of law on the part of the AAT in the present case.

The error of law consisted in the application of correct legal principles to irrelevant facts. The AAT had considered only whether Greenwood's failure to notify the DSS of increases in her income within 14 days (a failure in which the Department had acquiesced, if not encouraged) had contributed to the relevant overpayment. But the AAT had not addressed Greenwood's failure to advise within 14 days of starting work on 23 February 1990, a failure which could be said to have contributed to the overpayment between 29 March and 26 April 1990:

> 'That error of logic means that the legal principles which were correctly stated by the Tribunal, were misapplied and that therefore there was an error of law. In my opinion the Tribunal's decisions