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

in relation to the second overpayment cannot be supported and must be set aside.'

(Reasons, p.29)

Formal decision

The Federal Court allowed the appeal; set aside the AAT's decision to set aside the Secretary's decision to recover an overpayment from Greenwood in respect of payments of sole parent's pension made between 29 March and 26 April 1990; and set aside the AAT's decision to direct the Secretary to refund to Greenwood any amounts recovered from her.

[P.H.]

Family allowance: cancellation set aside by SSAT

SECRETARY TO DSS v O'CONNELL

Federal Court of Australia

Decided: 19 May 1992 by Jenkinson J.

This was an appeal, under s.44 of the *AAT Act* 1975, from the decision of the AAT in *O'Connell* (1991) 61 *SSR* 851.

O'Connell's family allowance was cancelled by the Secretary in January 1990, after she had not responded to a notice posted to her former address. O'Connell reclaimed the allowance in August 1990, as soon as she discovered that payments had stopped. The DSS granted her the allowance but refused, in September 1990, to pay her the 8 months arrears between January and August 1990.

The SSAT affirmed the decision not to pay O'Connell the arrears. O'Connell applied to the AAT for review. The AAT decided that the January cancellation had not been the preferable decision, set it and the September decision aside and directed that the arrears be paid to the respondent.

Jenkinson J decided that the AAT's decision had not involved any error of law.

What was the decision under review?

Jenkinson J said that the decision under review by the AAT was the September decision not to pay arrears of family allowance. But that decision could only be effectively reviewed if the AAT also reviewed the January decision to cancel family allowance: because O'Connell's application for payment of arrears could be granted only by first setting aside the January decision, any consideration of that application required a review of the January decision: Reasons, para. 14.

Cancellation decision: discretion

The January decision to cancel family allowance had been made under s.168(1) of the *Social Security Act* 1947, which authorised the Secretary to cancel a pension, benefit or allowance if the person did not respond to a notice. This provision, Jenkinson J said, imported a discretionary judgment.

In concluding that it would have been preferable for the Secretary's delegate not to cancel O'Connell's allowance, the AAT had not committed an error of law, Jenkinson J held. In particular, the AAT had not, as the DSS argued, confined itself to deciding whether the evidence available to the delegate in January 1990 had justified that decision. If the AAT had confined its consideration to the material available to the delegate, it would have fallen into the error of approaching its review task as if it were judicial review rather than administrative review.

Jenkinson J said that the appropriateness of the delegate's decision on the material available to the delegate had been treated by the AAT as no more than a relevant consideration; that was not an error of law. The AAT had considered other relevant factors – the claims of O'Connell's children to public support and the interests of efficient administration.

Jenkinson J decided that the decision of the AAT to set aside the January decision to cancel family allowance was not open to appeal on the ground of error of law.

Date of effect of AAT's decision

The DSS then argued that the AAT had made an error of law in deciding that O'Connell should be paid arrears of family allowance. This argument was based on the rule, expressed in s.183(5) of the 1947 Act, that a decision to set aside a DSS decision can only take effect from the date of the DSS decision where the person affected has applied for review within 3 months of being given notice of the DSS decision.

The AAT had decided that O'Connell was never given effective notice of the January decision. Jenkinson J found it unnecessary to deal with this issue. Although Jenkinson J agreed with the AAT that s.183(5) did not allow written notice to be served on a person, his Honour said that the deficiency was supplied by s.28A of the *Acts Interpretation Act* 1901.

It was not necessary to deal with this issue, Jenkinson J said, because, even if s.183(5) operated to limit the date of effect of the AAT's decision to set aside the January decision, O'Connell would still be entitled to the arrears of allowance:

> 'What is in my opinion important is to recognise that a decision to set aside a decision to cancel a family allowance has its effect when it comes into operation. It makes legally inoperative the decision which it sets aside when it is made, and once the January decision to cancel the allowance ceased to have legal effect there was revived Mrs O'Connell's legal entitlement to receive payment of family allowance payable on each family allowance pay day falling after the cancellation, until some disentitling event or act in the law should supervene. The other important consideration, in my opinion, is that the "decision under review" contemplated by s.183 is the September decision, not the January decision. And whenever a decision to set aside the January decision was "taken to have effect", that effect would be the same: to remove the only obstacle to the continued legal entitlement of Mrs O'Connell to receive family allowance after cancellation as it had existed before cancellation. In such a case the deeming provisions of s.183(4) and (5) do not produce any different result from that which s.183(1) produces, in my opinion.'

(Reasons, para. 14)

Formal decision

The Federal Court dismissed the appeal.

[P.H.]