with sickness benefit and invalid pension had been repealed and replaced with provisions dealing with sickness allowance and disability support pension (from 12 November 1991).

Section 159(5) 'right' extinguished

The AAT found, on the medical evidence before it, that Calderaro had become qualified for invalid pension in 1982, 6 years after lodging her claim for sickness benefit and 7 years before lodging her claim for invalid pension.

The lodgment of the claim for invalid pension in 1989 gave rise to the Secretary's discretion under s.159(5) of the 1947 Act to treat the earlier claim for sickness benefit as a claim for invalid pension. When Calderaro had requested that the Secretary exercise this discretion, the Secretary was placed under a duty to consider whether to exercise the discretion.

However, the AAT said, Calderaro had not acquired any right to have the discretion exercised in her favour. Because she had no 'vested right' under the 1947 Act, the repeal of that Act and its replacement by the 1991 Act from 1 July 1991 meant that Calderaro's position had to be considered under the 1991 Act, consistent with the decision in *Cirkovski* (1992) 67 *SSR* 955.

The 1991 Act had, until 12 November 1991, conferred a discretion on the Secretary to treat a claim for a pension, benefit or allowance as a claim for invalid pension: s.100(2).

However, the AAT said, the repeal from 12 November 1991 of the provisions relating to invalid pension and sickness benefit and their replacement with provisions relating to disability support pension and sickness allowance had removed any discretion which the Secretary had to treat Calderaro's claim for sickness benefit as a claim for invalid pension. Calderaro had no vested right which might have survived that repeal.

Even if the Secretary's discretion to treat a claim for sickness benefit as a claim for invalid pension had survived the legislative changes, the AAT said, the addition to the 1947 Act, from 1 July 1986, of s.158(2) created a barrier to an exercise of that discretion in favour of Calderaro.

Section 158(2), in combination with s.159(2), deemed a claim for invalid pension 'not to have been made' where the claimant was not qualified for that pension within 3 months of the claim being made.

Calderaro had lodged her claim for sickness benefit in November 1976. It followed that the Secretary and the AAT lacked the power to grant her an invalid pension on the basis of that claim from any date after February 1977.

Sections 158(2) and 159(2) were to be applied in the present matter, the AAT said, notwithstanding that they were introduced some 4 years after Calderaro had become qualified for invalid pension (in 1982). Calderaro had no accrued right to be paid the pension from 1982 as no claim for invalid pension had been made until 1989.

As the AAT was satisfied that Calderaro had become qualified for invalid pension some 6 years after lodging her claim for sickness benefit, the treatment of that claim as a claim for invalid pension (under s.159(5) of the 1947 Act) must lead to the notional claim for invalid pension being deemed not to have been made (under s.158(2) of the 1947 Act) — thereby removing the basis on which Calderaro might have been granted invalid pension prior to her 1989 claim for that pension.

The AAT concluded by observing that the present case was one where an exercise of the discretion given by the former s.159(5) 'would have been appropriate' if the AAT had possessed the power to grant that pension from 1982.

Formal decision

The AAT affirmed the decision of the SSAT not to grant invalid pension before 13 April 1989.

[P.H.]

Recovery of overpayment: alternative benefit?

SECRETARY TO DSS and BURWELL

(No. 7928)

Decided: 10 April 1992 by W.J.F. Purcell.

Jodie Burwell received payments of sole parent's pension between September 1990 and June 1991. She then applied for unemployment benefit. In her claim, Burwell sought additional benefit for her dependent de facto spouse, L.

The DSS then decided that Burwell had been living in a marriage-like relationship with L since 9 March 1991; that she had failed to advise the DSS of the relationship; that she had been overpaid sole parent's pension while living in that relationship; and that she was now indebted to the Commonwealth.

Burwell appealed to the SSAT, which affirmed the DSS decision that she had been overpaid but decided to reduce the amount to be recovered from Burwell by the amount that she would have received if she had been advised by the DSS to apply for unemployment benefit in February 1991.

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

The evidence

Burwell told the AAT that she had spoken with a DSS officer in February 1991 and asked the officer for advice on her social security entitlements if L were to move in and live with her. Burwell said that, at that time, L was then in Australia on a visitor's visa and was not permitted to work nor eligible for any social security benefits.

According to Burwell, the DSS officer had advised against this course of action, but had offered no advice as to Burwell's eligibility for unemployment benefit if she and L were living together.

Burwell told the AAT that, as L had nowhere to live and they had developed a close relationship, L moved in with her on 9 March 1991. In April 1991, Burwell was confirmed to be pregnant; and, in June 1991, L was granted permanent resident status by the Department of Immigration, Local Government and Ethnic Affairs.

The DSS officer who had interviewed Burwell in February 1991 gave evidence to the AAT. The officer said that he had advised Burwell that she would need to claim an alternative benefit (probably unemployment benefit) if she commenced to live in a marriage-like relationship. A file-note made at the time confirmed this, as did the evidence given by another DSS officer.

The AAT's conclusion

The AAT accepted the evidence given by the DSS officer that Burwell had been advised in February 1991 on the alternative benefits available to her. She had understood that, once she started living in a marriage-like relationship, her eligibility for sole parent's

pension would cease. She had made a deliberate decision not to advise the DSS of her relationship with L.

Waiver

The AAT said that, although L's immigration status had placed her in a dilemma, her circumstances did not justify an exercise of the discretion to waive recovery of any part of the overpayment received by her. That discretion was conferred by s.1237 of the *Social Security Act 1991* and was limited by the Minister's Notice, issued under s.1237(3) of the Act. In particular, there were not, in this case, sufficient "special circumstances" to justify waiver of recovery.

Formal decision

The AAT set aside the SSAT's decision and substituted a decision that the overpayment of supporting parent's benefit made to Burwell was recoverable.

[P.H.]

Overpayment: waiver and write-off of recovery

HODGSON and SECRETARY TO DSS

(No. 7903)

Decided: 13 April 1992 by T.E. Barnett.

Between November 1986 and August 1988, Geoffrey Hodgson received payments of unemployment benefit. These payments were made because Hodgson had concealed the fact that he was employed.

In May 1989, the DSS decided that Hodgson was indebted to the Commonwealth under s.246 of the *Social Security Act 1947* because he had received payments in consequence of his false statements. The DSS demanded that Hodgson repay the debt.

Hodgson was subsequently prosecuted on 43 charges of obtaining unemployment benefit which was not payable and making false statements contrary to s.239(1) of the *Social Security Act 1947*. He pleaded guilty and was sentenced to a term of imprisonment. The sentencing court made a reparation order in the amount of $14 380.86.

While still in prison, Hodgson appealed to the SSAT against the DSS decision to recover the debt arising under s.246. The SSAT affirmed the DSS recovery decision to recover the debt and refused to exercise the Secretary's discretion, conferred by s.251 of the 1947 Act, to waive recovery of the debt.

Hodgson applied to the AAT for review of the SSAT's decision. At the time of the hearing, Hodgson was still in prison.

Jurisdiction

The AAT referred to the decisions in *Mariot* (1992) 66 *SSR* 937 and *Ibbotson* (1992) 67 *SSR* 953; and said that the DSS decision to recover the debt to the Commonwealth arising as a result of Hodgson's actions had also involved a decision not to write off or waive recovery of the debt.

Waiver

The AAT noted that the discretion to waive recovery was conferred by s.1237 of the *Social Security Act 1991*, and was exercised in accordance with the Minister's Notice of 8 July 1991. The AAT noted that Hodgson had received moneys to which he was not entitled as a result of making false statements. He had been convicted of criminal offences and served a sentence of imprisonment. The sentencing court had ordered reparation.

On the other hand, Hodgson suffered a serious disease of thrombosis and his health was so poor that he was unlikely to be able to work again. His wife and 2 young children had suffered considerable hardship as a result of his imprisonment.

Hodgson had substantial debts and to face him with the prospect of repaying the outstanding amount, $12 748.86, would 'add a crushing burden and there is no realistic possibility that the amount could be recovered'. But there were strong policy reasons why it would be inappropriate to waive the whole of the outstanding sum in view of the criminal activities which led to the overpayment.

The AAT decided to waive $6748.86 of the debt and write off the balance for 3 years, after which the DSS could seek recovery by instalments. This would give Hodgson a 'breathing space . . . to let him try and improve the welfare of his family'.

Formal decision

The AAT decided to waive $6748.86 of the overpayment; write off $6000 of the balance for 3 years; direct the Secretary to re-assess the recovery of the balance in the light of the circumstances existing at that time; and allow each party liberty to apply on the question of recovery of the balance.

[P.H.]

[Editors' note: See Federal Court decision on appeal from the AAT, p.983 of this issue.]

Recovery of overpayment: Minister's discretion

SECRETARY TO DSS and RIDDELL

(No. 7913)

Decided: 24 April 1992 by B.G. Gibbs, N.J. Attwood and E.H. Stephenson.

The DSS applied to the AAT for review of a SSAT decision to waive the balance of a supporting parent's benefit debt owed by Mrs Riddell.

The facts

A debt of $8163 was raised against Mrs Riddell in September 1985 because she was living in a *de facto* relationship which affected her entitlement to supporting parent's benefit. She accepted that she owed this amount and deductions were made from her family allowance payments.

In October 1990, Mrs Riddell asked the DSS to waive the balance then owing of $4250.85 under s.251 of the 1947 Act. She made this request on the basis that she was suffering extreme financial hardship which was being compounded by the repayments to the DSS. The request was rejected.

Should recovery be waived?

As the debt was not disputed the issue was whether recovery should be waived. Section 1237 allowed waiver of the debt or part thereof in accordance with Ministerial directions. [The relevant extracts from the Ministerial directions are reproduced in *VXC*, reported in this issue.]