The decision to cancel Garratt's family allowance was made under s.168(1)(a) of the Act, which allowed the Secretary to cancel an allowance, 'having regard to anything that affects the payment of [the] allowance'.

Section 168(3) of the Act gave the Secretary power to grant a claim for, or direct the payment of, a family allowance.

Section 168(4) fixed the date from which a decision under s.168(3) could take effect:

> '(a) where the s.168(3) decision was made following a person applying for review of a previous decision, from the date of that previous decision, if
>
> (i) the review was requested within 3 months of the person being given notice of the previous decision; or
>
> (ii) no notice was given to the person of the previous decision;
>
> (b) where the s.168(3) decision was made following a person applying for review of a previous decision, from the date of the s.168(3) decision, if the person requested review more than 3 months after being given notice of the previous decision;
>
> (c) where the s.168(3) decision was made following a person advising a change in circumstances, from the date of the advice;
>
> (ca) where the s.168(3) decision granted a claim 'when none of the preceding paragraphs applies', on the day when the s.168(3) decision was made or such later day or earlier day as is specified in the s.168(3) decision;
>
> (d) in any other case, on the day when the s.168(3) decision was made or such later day or earlier day (no more than 3 months before the s.168(3) decision) as is specified in the s.168(3) decision.'

No request for review

Gummow J found that Garratt had not requested the Secretary to review the cancellation decision but had simply lodged a new claim for family allowance and asked that the grant of that claim take effect from the date of cancellation.

Accordingly, neither s.168(4)(a) nor s.168(4)(b) of the 1947 Act was applicable: those paragraphs could only apply where a person had requested a review by the Secretary of an earlier decision. Section 168(4)(c), dealing with advice of a change in circumstances, was also irrelevant.

This left s. 168(4)(ca), which was expressed to apply to a decision 'granting a claim when none of the preceding paragraphs applies'. Gummow J could see no reason to limit this provision to the situation where an earlier decision unfavourable to a person had been set aside, as the AAT had done in *Perkins* (1990) 56 *SSR* 754.

Section 168(4)(ca) gave the Secretary a discretion to fix, as the date of effect of the decision to re-grant family allowance in July 1990, such later or earlier date as the Secretary specified. Gummow J said that the Secretary's delegate had made an error of law in failing to exercise the discretion given by s.168(4)(ca); and the AAT had perpetuated that error.

As there had been no exercise of the discretion conferred by s.168(4)(ca), the AAT's decision should be set aside and the matter sent back to the AAT for determination according to law.

Gummow J observed that, on the point of the possible date of effect of the decision to re-grant family allowance, he had derived no assistance from the Federal Court decision in *O'Connell* (1992) 67 *SSR* 964, because the judge in that case had apparently not been referred to ss. 168(3) and 168(4), which Gummow J saw as central to the payment of 'arrears'.

Notice by post

Gummow J then considered the position which would have applied if Garratt had applied in July 1990 for review of the November 1989 cancellation decision, rather than claiming a new grant of allowance.

If she had applied for review by the Secretary, then any decision to set aside the earlier cancellation would have taken effect either on the date of the cancellation, if Garratt had not been given notice of the cancellation: s.168(4)(a); or on the date of her request for review, if she had been given notice of the cancellation: s.168(4)(b).

In the present case, Gummow J said, s.168(4)(a) would have been the applicable provision because Garratt had not been given notice of the cancellation. According to the judge, s.168(4) did not authorise or require a document to be served by post; so that s.29 of the *Acts Interpretation Act 1901* did not operate so as to treat the notice as having been given to Garratt when a letter containing that notice was posted to Garratt's last known address. The rights of persons to have decisions reviewed and altered by the Secretary, Gummow J said,

> 'should not readily be construed so as to fix upon something less than the giving of notice and to accept an imputed notification as sufficient for the operation of the legislation.'

(Reasons, pp. 17-18)

Gummow J also rejected the Secretary's argument that s.28A of the *Acts Interpretation Act* authorised the giving of notice of a decision by posting the notice to the last known address of the recipient. That provision, which declares that such a method may be used where an Act requires a document to be served on a person, is expressed to apply 'unless the contrary intention appears'. Section 168(4)(a) and s.168(4)(b) displayed a contrary intention because they provided

> 'that persons would not be subject to an adverse operation of those paragraphs by the fixing of the 3 months' period there referred to by reference to notice they never had.'

(Reasons, pp. 17-18)

Formal decision

Gummow J allowed the appeal and set aside the decision of the AAT. He remitted the matter to the AAT to be determined according to law.

[P.H.]

Overpayment: waiver and write-off of recovery

SECRETARY TO DSS v HODGSON

(Federal Court of Australia)

Decided: 17 July 1992 by Hill J.

Hodgson had received payments of unemployment benefit after concealing the fact that he was employed. A delegate of the Secretary decided that Hodgson was indebted to the Commonwealth under s.246 of the *Social Security Act* 1947 and that this amount should be recovered from Hodgson.

Hodgson was subsequently convicted on 43 counts of obtaining unemployment benefit which was not payable and making false statements contrary to s.239(1) of the *Social Security Act* 1947, and sentenced to imprisonment. While still in prison, he appealed to the SSAT against the recovery decision. The SSAT affirmed the 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.

On review, the AAT decided to waive $6748.86 of the debt and write off the balance of $6000 for 3 years. (See *Hodgson* (1992) 68 *SSR* 977.)

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

Jurisdiction to consider waiver

The Secretary first argued that the AAT lacked jurisdiction to consider the question of waiver of the debt, because the Secretary's delegate had not made a decision on that issue, so that the decision under review by the AAT (and by the SSAT) was confined to the existence of the debt.

Hill J considered the dicta of Lee J in *Salvona* (1989) 18 ALD 289; 52 *SSR* 695. Lee J had observed that the exercise by the AAT in that case of the Secretary's waiver power when reviewing the Secretary's decision to recover an overpayment 'may have exceeded the Tribunal's powers' because a decision to seek recovery of a debt and a decision not to waive recovery of that debt were not interdependent.

Hill J said that he agreed 'that the power to recover and the power to waive are not coextensive and that there is no necessary obligation upon a decision maker concerned with whether to proceed to recover an overpayment to consider whether the overpayment should be waived': Reasons, p. 14

However, it did not follow that the AAT was precluded from exercising the power to waive when reviewing a decision to proceed to recover an overpayment. Section 43(1) of the *AAT Act* was clear and unambiguous, empowering the AAT —

> 'to exercise all the powers and discretions conferred on the original decision maker provided it does so *for the purpose of reviewing a decision.* Provided the necessary purpose is present, the power conferred on the tribunal is not otherwise limited.'

(Reasons, p. 15 — Hill J's emphasis)

It was not a question, Hill J said, whether the two powers (recovery and waiver) were interpendent but whether the exercise of the power or discretion was relevant to the making of the decision under review: if that relevance was established then the AAT could, if requested, exercise the discretion.

Hill J concluded that the necessary relevance was present:

> 'If the original decision maker could legitimately have considered the issue of waiver before the issue of recovery and would have been obliged so to do if requested by the recipient of the overpayment, why should the tribunal be precluded from so doing when for the purposes of the review it stands in the shoes of the original decision maker?'
>
> It follows that the Tribunal had jurisdiction to determine for itself, but as part of its review of the decision to recover the overpaid benefits, the question of whether some or all of the benefit should be waived.'

(Reasons, p. 16)

In any event, Hill J said, the AAT could properly have inferred, from the fact that the Secretary's delegate had completed a form which included a box (un-ticked) referring to waiver of recovery, that the delegate had decided not to exercise the waiver power:

> 'This inference may more confidently be drawn where the decision maker in question does not give evidence.'

(Reasons, p. 17)

Exercise of the discretion

Hill J then considered the Secretary's objection that the AAT had not exercised the discretion to waive recovery in accordance with the Minister's Direction of July 1991 under s.1237(3) of the *Social Security Act* 1991. [This Direction was replaced with a new Direction in May 1992.]

One of the situations in which, according to the Direction, waiver was permissible was where there were 'special circumstances' which were 'extremely unusual, uncommon or exceptional (as discussed by the Federal Court of Australia in *Beadle v Director-General of Social Security* (1985) 7 ALD 670)'.

Hill J said that the terms of the Direction were 'almost nonsensical' because of the reference to *Beadle*, where the Court had been considering a quite different issue and had not used the words extremely unusual, uncommon or exceptional': Reasons, pp. 19-20. [The current Notice, published in the *Gazette* on 13 May 1992, has omitted the reference to *Beadle*.]

However, the AAT had read the language used in the Direction 'in a way which could be said to be most detrimental to Hodgson'. The Tribunal had considered both financial factors and the health of Hodgson and his family; and these factors were, in combination, capable of being seen as special circumstances. The question whether the factors were special circumstances was a question of fact and degree for the AAT, and involved no error of law: Reasons, p. 21.

Write off

Hill J said that the term 'write off' was used in s.1236 of the *Social Security Act* 1991 in the accounting sense: a write-off indicated that the debt was unlikely to be pursued, but did not release the debtor from liability.

The term contemplated that a debt would be written off once and for all, not for a period. There was nothing to stop a written off debt later being 'written back', if it was in fact recovered. But there was no power to write off a debt for a fixed period.

But it was open to the AAT to achieve a similar result by exercising the Secretary's power under s.1234 of the 1991 Act to decide to recover a debt by instalments.

Liberty to apply

Finally, Hill J doubted whether the AAT had the power, which it claimed to have exercised in this matter, to allow the parties 'liberty to apply' for further consideration by the Tribunal 3 years after the Tribunal's decision. Once the AAT had decided an application for review, Hill J said, it might be argued that the Tribunal was *functus officio* and lacked jurisdiction to reconsider the matter. However, Hill J did not decide this question.

Formal decision

The Federal Court allowed the appeal in part by setting aside the AAT's order to write off the balance of the debt for 3 years and substituting an order that the balance be recovered by one instalment 3 years after the date of the AAT's decision. The Court ordered the Secretary to pay Hodgson's costs of the appeal.

[P.H.]