The 1991 Act contained, in Schedule 1A, transitional provisions.

Clause 15(1) declared that an application for review made before 1 July 1991 but not determined before that date 'has effect, from 1 July 1991, as if it were an application under subs 1283(1) of this Act'.

Clause 15(2) provided that, where an application was determined on or after 1 July 1991 but decision on that application took effect before 1 July 1991, the decision 'has effect for the period [before 1 July 1991] as if it were a decision made under . . . the 1947 Act'.

The debt

The AAT said that the question whether a debt had arisen was to be decided under the 1947 Act. It examined the background to the DSS decision that VXR had incurred an assurance of support debt. It decided that VXR had signed an assurance of support for her parents, her parents had been paid social security benefits and VXR had accordingly incurred the debt under Part 6 of the *Migration Regulations*.

Waiver: which legislation?

The AAT referred to the transitional provisions set out in Schedule 1A of the 1991 Act.

Clause 15(1) declared that an application for review made before 1 July 1991 but not determined before that date 'has effect, from 1 July 1991, as if it were an application under subs. 1283(1) of this Act'.

Clause 15(2) provided that, where an application was determined on or after 1 July 1991 but decision on that application took effect before 1 July 1991, the decision 'has effect for the period [before 1 July 1991] as if it were a decision made under . . . the 1947 Act'.

The AAT said that the question whether the debt should be waived was to be decided by applying s.1237 of the 1991 Act and not s.251(1) of the 1947 Act. It seems that the AAT adopted the view that any decision to waive recovery of a debt would take effect from the date of that decision and not from the date on which the debt arose.

Because s.43(1) of the *AAT Act* authorised the AAT to exercise the power conferred on the Secretary by s.1237(1), the AAT said and because that power had been, since 24 July 1991, restricted by the Minister's Notice, the discretion of the AAT was, since that date, similarly restricted. The Tribunal said:

> 'The power to waive is discretionary, and [VXR's representative], rightly in our view, did not submit that his client had acquired before 24 July 1991 any accrued right to have that discretion exercised unfettered by the terms of the Minister's Notice. The debt arose under the operation of the 1947 Act and continues to exist: but the Tribunal's power to waive the debt can only be exercised as it exists at the date of its exercise, which is to say, the date of this decision. At that date, the Minister's Notice restricts that power.'

(Reasons, para. 18)

Applying the restrictive terms of the Minister's Notice, the AAT could find no ground to waive recovery of the debt.

Formal decision

The AAT set aside the SSAT decision and substituted the decisions that VXR was indebted to the Commonwealth in respect of benefits paid to her parents and this debt should be recovered.

[P.H.]

CLARK and SECRETARY to DSS

(No. N90/919)

Decided: 21 January 1992 by D.J. Grimes, J.H. McClintock and A.I. Terrell.

Georgina Clark received social security payments between 1978 and 1985. The DSS decided that she had received these payments in consequence of false statements and that she owed the Commonwealth a debt of $28 298. The DSS decided to recover this amount by placing a garnishee on Clark's income from employment.

Clark appealed to the SSAT, which affirmed the DSS decision. She then appealed to the AAT.

No false statement?

Clark argued, first, that she had not made any false statements to the DSS in connection with the overpayments. She had described herself as 'divorced' because she had not thought she was living in a de facto relationship, although she was living in the same house as the father of her child. However, the AAT concluded that Clark had falsely stated her marital status, so that a debt to the Commonwealth had arisen under the former s.140(1) of the *Social Security Act* 1947 (later s.246(1) of that Act).

Waiver

Clark's representative contended that this was an appropriate case for waiver of recovery. In support of waiver, Clark said that she had not acted dishonestly and that she now had substantial financial commitments.

The DSS referred to the Minister's notice which came into effect on 24 July 1991 and imposed strict conditions on the exercise of the waiver power conferred by s.1237 of the 1991 Act (see *VXR* in this issue of the *Reporter*).

The AAT said that the Minister's notice did not apply in the present case:

> 'The Tribunal accepts the contention of the Applicant that the absence of a date of effect raises a presumption against retrospectivity and is therefore not bound by it in this case. Further, the Tribunal believes Mrs Clark has accrued rights to have the exercise of the discretion reviewed unrestricted by the Minister's notice of 24 July 1991 issued pursuant to s.1237(3) of the 1991 Act.'

(Reasons, p. 11)

However, applying the factors enunciated in *Hales* (1983) 13 *SSR* 136, the AAT could see no basis for waiving recovery. Provided that recovery was done by instalments, it would not cause her too much hardship; and she had given false statements to the DSS.

Formal decision

The AAT affirmed the decision under review

[P.H.]

Family allowance supplement: proof of income

PATRIKI and SECRETARY TO DSS

(No. 7386)

Decided: 1 October 1991 by R.A. Balmford, P. Burns and D. Elsum.

Corina Patriki sought review of a decision of the SSAT of 5 February 1991 to affirm a decision of the Department made on 13 November 1989 to cancel payment of Family Allowance Supplement (FAS).

Facts

Patriki received FAS in 1989. On 24 October 1989 Patriki lodged a review

form in respect of her payments for 1990 informing the Department that Mr Patriki had started a new sales job, working on commission, and that he expected his income to be at least 25% more than previously. His income for 1987/88 was $17 904. On 13 November 1989, Patriki asked that her FAS be cancelled as the family income was over the limit. The Department did so and wrote to Patriki advising her of her appeal rights on 17 November 1989. On 6 July 1990 Patriki lodged a new claim for FAS, providing proof that her husband's taxable income for 1988/89 was $23 431. Estimates for taxable income for 1989/90 of $20 644 and for 1990/91 of $21 000 were provided in early November. FAS was granted from the first pay-day after the claim. In November 1989, maximum FAS was payable if taxable family income was below $16 648 ($17 998 in July 1990) with part payment up to a taxable income of $24 336 ($25 333 in July 1990). Patriki sought arrears of FAS from 30 November 1989 to 28 June 1990. She appealed to the SSAT against failure to pay these in December 1990.

Legislation

The AAT decided that it should apply the substantive law of the 1947 Act, given the provisions of sub-clause 15(1) of the 1991 Act. The then s.72 of the Act provided that the eligibility for and the amount of FAS to be paid was based on taxable income for the previous year; this could be either the actual amount assessed by the Commissioner, or an estimate. If neither was provided, the relevant taxable income became an unascertainable amount and according to s.74C, FAS was not payable. Section 76 provided that FAS was payable from the first allowance pay-day after the day before the day the claim was lodged. Section 168(1) gave the Secretary power to cancel payments and s.168(4) provided that where a person was notified of such a decision and failed to seek review of it within 3 months, arrears could only be paid from the date review was sought not the date of the decision.

Decision under review

The AAT stated that although the decision the SSAT said it was reviewing was the decision to cancel FAS, applying the decision in *Moore* (1991) 62 *SSR* 867, the correct decision under review was the decision of the review officer affirming the original departmental decision, and effectively the SSAT was reviewing both the decision to cancel the first claim and the decision not to pay arrears on the second claim.

The arguments

The DSS argued that Patriki's FAS was correctly cancelled in November 1989 regardless of the request to cancel because the family income had become an 'unascertainable amount'.

It was also argued that the claim lodged in July 1990, based on the 1989/90 income year, was correctly granted from the first pay-day after the claim, though it could not be paid until estimates of income were lodged in November 1990.

Thirdly, the DSS argued that no arrears could be paid on the July 1990 claim because Patriki, although notified of her rights of review in November 1989, did not seek review until December 1990 of the decision to grant FAS only from July 1990, well outside the three month limit in s.168.

Mr Patriki, acting for his wife, submitted that the legislation was unfair to self-employed people. He argued that a period longer than three months should be provided to allow such people to provide an accurate assessment of income.

The legislation applied

Whilst the Tribunal expressed sympathy with Patriki's position, it accepted the DSS arguments that the legislation did not allow FAS to be paid from the time Mr Patriki changed jobs in November 1989 until the new claim was lodged in July 1990.

Formal decision

The AAT affirmed the decision under review.

[J.M.]

Unemployment benefit: entitlement

KERNYI and SECRETARY TO DSS

(No. 7275)

Decided: 3 September 1991 by B.H. Burns.

The applicant sought review of a decision made by the SSAT to affirm a decision of the DSS rejecting his claim for unemployment benefit.

The facts

Kernyi lodged a claim for unemployment benefit on 26 July 1990. This was rejected on the grounds that the delegate did not accept that Kernyi was willing to undertake suitable work, or was taking reasonable steps to find full-time work.

Kernyi had moved to Coober Pedy in 1989 when a friend offered him work in a jewellery shop there. The work offer fell through and in April 1989 his unemployment benefit was cancelled. It was accepted by an SSAT that he had moved to Coober Pedy to take up an offer of work and did not make his chances of obtaining employment more remote. His benefit was then restored.

On 31 October 1989 his entitlement was reviewed and benefit was cancelled. On review, the SSAT decided that Kernyi was not willing to undertake suitable work and had not taken reasonable steps to find work. On 26 July 1990 he again applied for unemployment benefit and the rejection of this claim was the subject of the present appeal.

The legislation

The issue was whether Kernyi could satisfy s.116(1)(c) of the *Social Security Act* 1947. Under s.116(1)(c) an applicant for unemployment benefit must satisfy the Secretary that throughout the relevant period he was unemployed and was capable of undertaking, and was willing to undertake, paid work, that, in the opinion of the Secretary was suitable to be undertaken by him, and that he had taken reasonable steps to obtain such work.

The Tribunal said there were 2 limbs to s.116(1)(c) and Kernyi must satisfy both to qualify for unemployment benefit. Willingness to undertake work was a subjective test referring to the person's state of mind at the relevant time. The second limb imposed a more objective test; but what was 'reasonable' for the purposes of the section would depend upon the particular circumstances of the applicant at the time he applied for benefit.

The findings

The DSS argued that, at the relevant time, Kernyi was engaged in opal mining. He had a mining licence, had pegged a claim and informed DSS that he was engaged in hand noodling for approximately 10 hours per week. He said he had earned approximately $150 from this activity since his arrival in Coober Pedy. The DSS relied upon the fact that Kernyi had remained in