The majority found that, had Saracik been advised that his mother had applied for special benefit prior to the first payment on 4 July 1988, he would have been prepared to meet his obligation under the Assurance. No explanation had been provided as to why the issue of the Assurance was not raised with Mrs Saracik, and why she was not informed of the liability that her son would incur if she received a benefit prior to the grant of Australian citizenship. The majority concluded, therefore, that the amount of special benefit in issue was unnecessarily paid, given Saracik's willingness to support his parents.

Secrecy obligations

The Department had argued that they were unable to notify Saracik of the grant and payment of special benefit because of the operation of the *Privacy Act* 1988 and of s.19 of the *Social Security Act* 1947 which provided that an officer could not, *except in the performance or exercise of any duty function or power as an officer*, divulge any information concerning any person under the Act to another person. The majority pointed out that at no time had this argument appeared in the reasons explaining why Mr Saracik was not informed about his mother's claim. The majority rejected the argument concerning the *Privacy Act* as the Act was not in force at the relevant time, and therefore focused on s.19 of the 1947 Act.

It was noted that past departmental practice had been to inform assurors of claims for benefit which could give rise to liability on their part. Certainly the current guidelines indicated that this was the case. The Guide to the Administration of the Act also required the assuror's financial circumstances to be closely examined before a grant of special benefit could be made.

The majority commented that presumably these procedures had regard to s.1312 of the 1991 Act which imposes confidentiality requirements similar to those that were contained in s.19 of the 1947 Act. The Tribunal concluded that it had been the usual and authorised practice of the Department to advise both the claimant and the assuror of the obligations imposed under an Assurance of Support and the consequences of a grant of special benefit. However, the fact that these procedures were long standing did not necessarily make them legitimate if they are unlawful, and the majority then turned to consider whether s.19 prevented the DSS from disclosing this information.

The majority held that informing an assuror about a claim by the assured forms part of the duties and functions of an officer and, hence, falls within the exception: s.19(2). As Saracik was both the person whose affairs were necessarily involved (because he was incurring a collateral liability) and to whom, in the public interest, inquiries should have been made in order to avoid unnecessary expenditure of public funds by the Commonwealth, the majority rejected the submission that s.19 constituted a bar on disclosure.

Having held that both Mr Saracik and his mother should have been fully informed of the nature of the payments and the consequences in light of the Assurance, the majority went on to consider whether it was appropriate to exercise the discretion to waive recovery.

Special circumstances

In assessing 'special circumstances' justifying waiver, the majority stated that regard must be had to the context and purposes of the Act and all relevant circumstances must be considered. The AAT considered several cases in which the failure to provide advice to an assuror had been given considerable weight by the Tribunal (see for example, *Secretary to DSS and Aquino-Montgomery* (1991) 63 *SSR* 883 and *Secretary to DSS and VXR* (1992) 65 *SSR* 914). Similarly, in *Re Vuong* (1992) 70 *SSR* 1001 the Tribunal had waived the debt as a result of the failure to explain matters to the applicant or to notify him of circumstances which might have a deleterious effect on his financial well-being.

As a result, a majority of the Tribunal considered that the failure to inform Saracik, which was a failure even to follow the Department's own procedures, warranted a conclusion that the decision to recover the money was unfair. This conclusion was further warranted by the fact that no action had been taken until early 1992 to recover the debt, a matter that was also not explained by the Department. 'The situation is therefore one where the respondent finds himself some considerable time after the event called upon to pay a debt arising from circumstances over which he had no control at the time': Reasons, para. 60.

The failure to inform Saracik of the grant of benefit, taken in conjunction with the failure to inform him of the existence of the debt, were considered sufficient 'to warrant a finding by the Tribunal that there were special circumstances in the sense that the combination of those circumstances gives rise to a situation which is extremely unusual and exceptional': Reasons, para. 61. For that reason, the majority affirmed the decision of the SSAT to waive recovery of the debt.

The minority (K.J. Taylor)

The dissenting member did not agree with the conclusion on waiver. In his view, insufficient attention had been paid to Saracik's obligations, and too much to the obligations of the DSS. Having signed an assurance for his parents, Saracik had a duty to ensure that they understood the nature of his undertaking and as he had failed to honour his obligation under the assurance, he should now pay the moneys due. Despite the failure of the DSS to raise the debt in a more timely fashion, the minority did not consider the circumstances sufficiently extreme to contemplate the exercise of the discretion to waive the debt.

Formal decision

The AAT, by majority, affirmed the SSAT decision to waive the Commonwealth's right to recover the debt.

[R.G.]

Overpayment: waiver; decision under review

SUMMERS and SECRETARY TO DSS

(No. 8524)

Decided: 10 February 1993 by S.A. Forgie, J.D. Horrigan and E.T. Keane.

On 6 November 1991 DSS decided to recover an overpayment of unemployment benefit and job search allowance in respect of the period 6 June to 22 August 1991 totalling $1408.40 from Mr Summers. This decision was affirmed by an SSAT on 5 March 1992.

Decision under review

The AAT first decided that, although the application for review by the AAT under s.1283(1) of the *Social Security Act* 1991 was in respect of the decision of the SSAT, it did not agree with the conclusion of the AAT in *Hawat* (16 November 1992) that the decision

under review was not the primary decision which had been reviewed by the SSAT. Instead, the AAT followed an earlier AAT decision in *Gee* (1981) 3 ALD 132 and said that:

> 'The Tribunal in Gee's case decided . . . that the affirmation of a decision simply leaves the original decision in place. It is that original decision which remains operative and which is under review rather than the affirmation itself. It does not follow from this, however, that the original decision is necessarily the decision under review in every case. As the Tribunal said in that case, where a decision is set aside, that is the end of that decision and it no longer operates. . . . the decision under review must be determined according to the relevant legislation and the facts of each case.'

(Reasons, para.14)

However the AAT did not explain why it was necessary to consider this issue and its determination of this case did not seem to depend on its resolution.

The facts

Mr Summers lodged a claim for unemployment benefit on 17 May 1991. A few days later his wife lodged a claim for age pension. In her claim form Mrs Summers did not answer a question which asked whether her partner was also claiming a pension and in answer to a question enquiring whether her partner had ever claimed a social security benefit answered 'yes' and stated this was in 1971.

Mr Summers started receiving unemployment benefit payments on 6 June 1991 but received no payment advice from DSS about it. Mrs Summers was granted age pension on 6 June 1991 and received her first payment in early July.

Between 6 August and 9 September 1991 Mr Summers made four enquiries of DSS as to whether he was being paid too much by DSS, the last one being in writing to the local DSS Office Manager. It was not until 17 September 1991 that DSS realised that it was incorrectly paying Mr Summers in respect of his wife. Before then he had been told that he was being paid at the correct rate. Mr Summers also had informed DSS in forms lodged on 8 August and 5 September 1991 that his wife was receiving age pension.

Waiver

The amount of the overpayment was not in dispute and the whole amount was recovered by DSS by 1 October 1992, before the AAT hearing. The only issue was whether the overpayment should be waived. Because the overpayment had not been fully recovered at the time of the SSAT decision, the AAT commented that:

> 'As we are considering the issue of waiver as at the date of the SSAT's decision and in view of our final decision [not to waive], we do not need to consider at this stage whether we have power to waive a debt which has been recovered in full.'

(Reasons, para.48)

The AAT decided that 'Ministerial Directions of one kind or another bind the Tribunal in considering the power to waive' an overpayment under s.1237 of the *Social Security Act* 1991: Reasons, para. 39 and that there was no difference in substance between the provisions in the July 1991 and May 1992 directions that were relevant to this case. These were paragraphs (a) and (d) of the May 1992 directions which permit waiver:

> '(a) where the debt was caused solely by administrative error on the part of the Commonwealth, and was received by the person in good faith, and recovery of the debt would cause financial hardship to the person; . . .
>
> (d) where, in the opinion of the Secretary, special circumstances apply such that the circumstances are extremely unusual, uncommon or exceptional'

The AAT was satisfied that the overpayment was caused by the DSS's failure to cross check Mr and Mrs Summers' applications. However, although Mrs Summers acted in good faith, the AAT was of the view that the answers in her age pension application 'lulled the Department into a false sense of security' and contributed to the error being made in the first place by DSS. On that basis it was decided that the overpayment was not caused solely by DSS administrative error and paragraph (a) of the directions was inapplicable.

The circumstances were not considered to be special within the meaning of paragraph (d) of the directions, principally because the AAT could not find that Mr and Mrs Summers were placed in a position of financial hardship by recovery of the debt. They had savings of $8794, some fixed trust units (of undisclosed value), owned their own house unencumbered, Mrs Summers continued to receive age pension and Mr Summers received a reduced amount of 'unemployment benefit'. The cause of the overpayment and Mr Summers' efforts to have his rate recalculated were also considered in deciding whether the circumstances were special.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Overpayment: cause and waiver

SECRETARY TO DSS and LEA

(No. 8551)

Decided: 19 February 1993 by P.W. Johnston, J.G. Billings and R.D. Fayle.

The DSS claimed an overpayment of sole parent's pension from the respondent. There were three separate occasions on which an overpayment had been made. On the first two occasions the respondent had notified the DSS about her other income, but the information was supplied about a week outside the 14-day period required by the *Social Security Act*. On the third occasion it was not clear whether she had provided the information within the 14-day period but she may have done so.

The SSAT had set aside the decision of the DSS to recover the overpayment and substituted a decision that the third overpayment be waived and that the balance be written off over two years. The DSS applied to the AAT for review of that decision.

The applicable legislation

The SSAT had decided to apply the *Social Security Act* 1947 in relation to liability for the debt, but the provisions of the *Social Security Act* 1991 in relation to waiver. The legislation is set out in *Thick* (reported in this issue). The significance of determining which legislation should apply was that the Ministerial determinations issued under the 1991 Act restricted the exercise of the discretion under the relevant section. The restrictive nature of the 1991 Act arose from the effect of the Ministerial determination which had been issued under s.1237. The effect was that

> 'in relation to the 1992 [Ministerial] determination, the exercise depends on a finding that as a matter of objective fact . . . that under [the determination] the Secretary or his delegate forms the opinion that there are "special circumstances" which are "extremely unusual, uncommon or exceptional". The forma-