

Under s.251(1A) the exercise of this power by the Secretary was to be in accordance with Ministerial Directions issued under s.251(1B). No such directions were issued while the 1947 Act was in force.

The AAT referred to the decision in *Bradley* (1992) 70 SSR 1003 which decided that where a debt had arisen under the 1947 Act then the issue of waiver of the debt should be decided under that Act without regard to the 1991 Act and directions issued under s.1237. The AAT decided to follow this decision and determine whether the debt should be waived in accordance with the 1947 Act.

Waiver of the debt

The discretion to waive recovery under s.251 of the 1947 Act had to be determined according to the principles set out in the Federal Court's decision in *Director-General of Social Services v Hales* (1983) 47 ALR 281. That decision referred to the need to consider such matters as: the fact that public moneys have been paid to a person who was not lawfully entitled to them; the circumstances in which the overpayment arose – whether as a result of innocent mistake or fraud; the present financial circumstances of the payee; the prospect of recovery; whether a compromise has been offered; whether recovery should be delayed because the payee's financial circumstances might improve; compassionate circumstances as the 1947 Act is social welfare legislation.

The applicant did not deny the receipt of the overpayment and that this occurred as the result of false statements or representations or the failure or omission to comply with the 1947 Act on his part. He gave evidence that his financial circumstances were such that his monthly income was \$215.71 less than his required monthly expenditure. He also owned a house worth \$80,000 and household contents worth \$15,000 and a car valued at \$800. The applicant also claimed that, as a result of his recent marriage, his pension income had been reduced to the married rate. The AAT ascertained that his wife also received a married rate pension from the Department of Veterans' Affairs. His wife had no assets of her own, paid for her own food and clothing but did not contribute to other household expenses. The combined monthly family income was \$1151.60. The AAT noted with respect to the prospect of recovery that with deductions of \$18 a fortnight the debt would be repaid within four years. There was

little prospect of the applicant's financial circumstances improving.

The applicant claimed that he was suffering extreme financial hardship. He could not afford to pay for dental treatment, spectacles, an ambulance subscription, the repair of his solar hot-water system and guttering in his house and lawn-mowing. He told the AAT that he had to steal food to survive.

The AAT noted that he had a substantial asset in his house which was not mortgaged. Also, the family income exceeded the applicant's expenses by \$150 a fortnight. The AAT expressed the view that it would not be unreasonable to require his wife to contribute to other household expenses apart from food.

The AAT's conclusion was that it was not appropriate to exercise the discretion to waive recovery wholly or in part. It was also decided that deductions at the rate of \$18 a fortnight were appropriate. It was also noted that had the matter been decided under the 1991 Act the decision would have been the same, as the discretion to waive debts under that Act 'is more narrowly circumscribed than the corresponding discretion conferred by s.251(1) of the 1947 Act'.

Formal decision

The AAT affirmed the decision under review.

[B.S.]

[Comment: The AAT concluded that the combined income of the applicant and his wife exceeded the applicant's expenses by \$150 a fortnight, although there was no evidence of the wife's expenses other than food and clothing. Furthermore, the AAT did not explain how the applicant could realise the 'substantial asset in his house' (valued at \$80,000), nor how the realisation would affect his financial position.]

Payment of claimant's benefits to another person

EVERY and SECRETARY TO DSS
(No. 8522)

Decided: 10 February 1993 by S.A. Forgie.

Allan Every was injured in 1980. His mother lodged a claim for sickness benefits on his behalf. A form, purporting to authorise payment of pension (but not sickness benefit) to Every's mother, was also lodged with the DSS. The form was signed by a welfare officer at the hospital where Every was a patient. A doctor at the hospital wrote to the DSS, declaring that Every was unable to transact any business on his own account.

The DSS granted sickness benefit to Every and made payments covering 2 months to his mother. When Every was discharged from hospital, he asked that future payments be made to him and the DSS complied with that request.

Every subsequently recovered damages for his injury and the DSS recovered from him an amount equal to the sickness benefits paid out, including the amounts paid to Every's mother.

Every then applied to the DSS for payment to him of the benefits paid to his mother. The DSS refused to make that payment and the SSAT affirmed the DSS decision. Every appealed to the AAT.

Legislation

Section 161(1) of the *Social Security Act 1947* provides that, subject to s.161(2), a pension, benefit or allowance shall be paid to the person to whom the pension, benefit or allowance was granted or was originally payable.

Section 161(2) gave the Secretary a discretion to direct that payment of benefits be made to a person on behalf of a grantee.

The DSS Guide contained instructions on the exercise of the s.161(2) discretion. The Guide stated that 'payment processes should endeavour as far as possible to place clients in control of their own finances and avoid conflict with s.249 of the Act, which declared that benefits were 'absolutely inalienable'.

In determining whether a person was incapable of managing his or her financial affairs, the Guide said, the DSS should seek 'reliable medical evidence' and should interview the proposed nominee to ensure that he or she understood the responsibilities being taken on.

Insufficient basis for payment to mother

The AAT decided that the DSS had acted properly in accepting and granting the claim for sickness benefits signed by Every's mother.

Turning to the DSS decision to pay benefits to Every's mother, the AAT said that there had been sufficient evidence before the DSS to establish that

Every was not capable of handling his own affairs at the time of the claim for sickness benefit.

However, the basis for the decision to make payments to Every's mother had been less clear. The DSS had not enquired whether there was a more appropriate person. Nor had the DSS attempted to interview Every's mother before deciding to make payments to her – although the Guide stated that such an interview was required.

As Every was married and had a child (although he and his wife had separated at the time of his injury), it was possible that there was a more appropriate person to whom the payments should have been made.

The AAT concluded that the decision to pay Every's sickness benefits to his mother should not have been made on the evidence then available to the DSS, which should now pay to Every the amount which it had paid to his mother in 1980.

Formal decision

The AAT set aside the decision under review and decided that the DSS should pay to Every \$610.50, representing the payments made to his mother between July and September 1980.

[P.H.]

[Editor's Note: The AAT did not indicate in its Reasons whether Every's mother had accounted to Every for the payments made to her.]

Federal Court Decisions

Dependent child: informal variation of custody order

SECRETARY TO DSS v WETTER

(Federal Court of Australia)

Decided: 4 February 1993 by Hill J.

This was an appeal from the AAT's decision in *Wetter* (1991) 64 SSR 905. The AAT had decided that, although Wetter's former husband had been given sole guardianship and custody of their child, Wetter could qualify for family allowance and sole parent pension for the child.

This was because, the AAT had said, Wetter and her former husband had agreed informally to vary the terms of Wetter's access to the child, so that the child spent every second week with each parent.

Family allowance

Hill J said that the child was not Wetter's 'dependent child' within s.3(1) of the *Social Security Act* 1947 because the informal agreement made between Wetter and her former husband did not operate to vary the custody order over the child, so that Wetter did not have a right of access to her child for a sufficient period to allow her to be regarded as having the right to have the daily care and control of the child within s. 3(2) of the 1947 Act.

Hill J said that the Full Court's decision in *Field* (1989) 52 SSR 694 had decided that the legal right to the daily care and control of a child was central to the question whether a person had a dependent child; and that the question of factual responsibility was not important.

Further, Hill J said, Wetter could not be regarded as having the right to have the daily care and control of the child as the delegate of her husband. It followed that Wetter's child was not her 'dependent child' within s.82 of the 1947 Act and the AAT had erred in law in holding that Wetter was entitled to family allowance in respect of her child.

Sole parent pension

Hill J noted that the child could be Wetter's 'dependent child' and 'qualifying child' for the purpose of sole parent pension if the child was 'substantially maintained' by Wetter: s.43(1) of the 1947 Act.

The child would fall within this description if the child was maintained in the main or as to the greater part by Wetter: in context, the word 'substantially' meant something less than 'wholly' but more than merely 'insubstantial' or 'insignificant'.

As the AAT had not made any finding on whether Wetter was substantially maintaining the child, this aspect of the matter was remitted to the AAT for further determination. Hill J observed that, in the course of making that determination, the AAT should bear in mind

that only one person could qualify for sole parent pension in respect of the one child.

Formal decision

The Federal Court allowed the appeal, set aside the AAT's decision and confirmed the decision of the Secretary's delegate that Wetter was not eligible for family allowance. The court remitted to the AAT for re-determination the question whether Wetter was eligible for sole parent pension.

[P.H.]

Overpayment: is a criminal conviction conclusive?

SECRETARY TO DSS v RIDLEY

(Federal Court of Australia)

Decided: 23 December 1992 by Hill J.

This was an appeal from a decision of the AAT which had set aside a DSS decision that Ridley was living in a *de facto* marriage relationship and, therefore, had received payments of widow's pension to which she was not entitled.

The AAT had reached this decision despite the fact that Ridley had been