

convicted and sentenced to 18 months imprisonment on 5 charges of making false statements and 120 charges of obtaining payment of pension which was not payable under the *Social Security Act*.

Conviction not conclusive

Hill J rejected the Secretary's argument that Ridley's conviction on charges under the 1947 Act was conclusive proof of the essential facts on which the conviction had been based so as to preclude the admission before the AAT of evidence contradicting those essential facts.

Hill J also rejected the argument that it was an abuse of process for the AAT to go behind Ridley's conviction. Both arguments were inconsistent with the decision of the Full Federal Court in *Saffron v Federal Commissioner of Taxation* (1991) 102 ALR 19, Hill J said.

Failure to give proper weight to conviction

However, Hill J said, the AAT should have taken into account and give due weight to Ridley's conviction, where guilt had been found beyond reasonable doubt and where the charges were directly relevant to the decision being reviewed by the AAT. Because the AAT had not given any weight at all to Ridley's criminal conviction but had reached its decision unaffected by the conviction, the AAT had committed an error of law requiring that the appeal be allowed and the matter remitted to the Tribunal for reconsideration.

Inadequate reasons

Hill J also found an error of law in the failure of the AAT to explain, in its reasons for decision, whether certain inferences could be drawn from the evidence before it. Hill J criticised the practice, adopted by the AAT, of referring to earlier decisions, rather than explaining its reasons on other aspects of the matter:

'I would like to emphasize that, in my view, the practice of incorporating reasons by reference while perhaps seemingly economical in time and resources, is, in truth, productive of difficulty and likely to lead to appeals. It is to be avoided wherever possible.'

Inappropriate direction

Hill J held that the AAT had also committed an error of law by directing the secretary to calculate the amount of pension payable to Ridley in respect of the period after her pension had been suspended, because the AAT's jurisdic-

tion had been confined to reviewing the decision to recover an overpayment from Ridley.

Formal decision

The Federal Court allowed the appeal, and remitted the matter to the AAT for re-consideration.

[P.H.]

Overpayment: relevance of criminal conviction

RIDLEY v SECRETARY TO DSS

(Full Federal Court)

Decided: 5 May 1993 by Spender, Gummow and Lee JJ.

This was an appeal from the decision of Hill J (noted immediately above).

The Full Federal Court agreed with some aspects of Hill J's decision but disagreed with Hill J's analysis of the AAT's decision and held that the AAT had not made an error of law.

Conviction not conclusive

First, the Full Court noted that the decision to recover an overpayment from Ridley had not been dependent upon her conviction on charges under the s.239(1) of the *Social Security Act* 1947. The court agreed with Hill J that Ridley's conviction, on charges of making false statements and obtaining payment of pension which was not payable under the *Social Security Act*, was not conclusive of any issue relating to the decision of the Secretary's delegate that there had been an overpayment.

The Full Court said that it was open to a person seeking review by the AAT of an overpayment decision to challenge, before the Tribunal, the essential facts on which the person's convictions had been based.

No abuse of process

Nor was it contrary to public policy or an abuse of process for the AAT to permit Ridley to re-open an issue determined against her by the recording of the convictions. The Full Court explained:

'The adoption by the Tribunal of an adversarial procedure in the conduct of

its review does not make that review part of the process of litigation. It follows, therefore, that review of an administrative decision does not involve consideration of whether the conduct of the review may bring the administration of justice into disrepute. Whatever procedure the Tribunal may adopt to carry out its statutory duties, it performs solely administrative functions in deciding what administrative decision is appropriate.

The AAT Act provides to a person affected by the exercise under an enactment of an administrative decision-making power the right to seek to have a reviewing authority (the Tribunal) exercise that decision-making power. That person is entitled to present to the Tribunal any material that ought to be taken into account in the making of that decision. If that material also challenges facts that were essential for the conviction of that person of an offence, it is not a requirement of law under the rubric of public policy that the review of an administrative decision and the exercise of an administrative discretion or decision-making power be carried out by excluding from the consideration of the reviewing authority material which challenges the grounds on which the prior conviction was based.'

(Reasons, p. 14)

Convictions taken into account

The Full Court disagreed with Hill J's decision that the AAT had failed to give any weight to Ridley's convictions. It was apparent from the whole of the Tribunal's reasons, the Full Court said, that it had acknowledged that some weight had to be given to Ridley's conviction on charges which involved facts very pertinent to facts to be determined by the AAT.

Reasons not inadequate

The Full Court also disagreed with Hill J's conclusion that the AAT had failed to give adequate reasons for its finding that the issue before it was different from the issue involved in the criminal proceedings against Ridley.

No other error of law

Nor had the Tribunal committed an error of law in directing the Secretary to calculate the amount payable to the appellant in respect of the period after her pension had been suspended.

The AAT had merely intended that the DSS should calculate the amount of family allowance which, having been withheld from Ridley in order to recover part of the overpayment of widow's pension, was correctly payable to Ridley.

Once the AAT had determined that the allowance should not have been

withheld and had set aside the decision to do so, it was within the AAT's power under s.43(1)(c)(ii) of the *AAT Act* to direct that the Secretary calculate the amount of allowance to which Ridley was entitled and which had not been paid to her.

Formal decision

The Full Court allowed the appeal and ordered that the appeal from the decision of the AAT be dismissed.

[P.H.]

Overpayment: relevance of criminal conviction

SECRETARY TO DSS v MARIOT
(Federal Court of Australia)

Decided: 8 April 1993 by Einfeld J.

This was an appeal from the decision of the AAT in *Mariot* (1992) 66 SSR 937.

Mariot had received \$31,329.20 in supporting parent's benefits between May 1985 and June 1988. The DSS decided that this amount was an overpayment recoverable from Mariot because she was living with her husband throughout the period.

The SSAT affirmed that decision but decided to exercise the discretion under s.251(1) of the *Social Security Act* 1947 to waive recovery.

The DSS appealed to the AAT. Mariot was then convicted on 39 counts of knowingly obtaining payment of a benefit which was not payable and on 8 counts of making false statements under s.239(1) of the 1947 Act.

The AAT decided that Mariot's convictions did not provide evidence of all matters required to prove an overpayment under s.246(1), that it was open to the AAT to review the factual basis of the alleged overpayment and that, on the evidence before the AAT, Mariot had been estranged from, and not living with, her husband during the relevant period.

Convictions not conclusive

Einfeld J held that Mariot's convictions were not conclusive proof of the facts needed to establish that she had received moneys in consequence of a

false statement or of a failure to comply with the Act within s.246(1) of the 1947 Act, so as to create a debt due to the Commonwealth.

Nor was Mariot's attempt to resist liability an abuse of process.

Obligation to conduct review

Einfeld J said that, while the AAT should take care to avoid findings which were inconsistent with criminal convictions, the AAT could not be impeded in assessing a *bona fide* application for review on the basis of the relevant law in question and the evidence called before it.

'It is an administrative tribunal bound by its own and various other statutes to hear certain types of cases in certain defined ways. It is not permitted to ignore these statutes because a magistrate has made certain findings and orders. If it had done so, a breach of natural justice may well have occurred because procedural fairness and statutory obligations would have been abused in a way this Court would not have been permitted to, or should not, condone.'

(Reasons, p. 8)

Interrogation

Einfeld J noted that the AAT had criticised the procedure adopted by DSS officers in obtaining admissions from Mariot. Those criticisms were careful, thoughtful and correct, the judge said. The procedure adopted by the officers had ignored the requirements developed by the courts for fair and proper interrogation practices.

Jurisdiction to waive recovery

Einfeld J also concluded that the AAT had been correct in holding that, if there had been an overpayment to Mariot, the AAT had jurisdiction to consider waiver of any such overpayment. The question of waiver had been properly regarded as an aspect of the decision under review.

Formal decision

The Federal Court dismissed the appeal.

[P.H.]

Waiver of overpayments: Minister's directions

RIDDELL v SECRETARY TO DSS
(Full Federal Court)

Decided: 3 June 1993 by Neaves, Burchett and O'Loughlin JJ.

This was an appeal, under s.44 of the *AAT Act*, from the AAT's decision in *Riddell* (1992) 68 SSR 978. The AAT had decided that, when reviewing a decision of the SSAT to waive recovery of an overpayment first raised in 1985, its power to consider waiver arose under s.1237 of the *Social Security Act* 1991 and that the power was controlled by the Minister's directions, issued under s.1237(3) of the *Social Security Act* on 8 July 1991.

The legislation

Section 1237(1) authorises the Secretary to waive the right of the Commonwealth to recover an overpayment or a debt.

Section 1237(2) directs the Secretary, in exercising the waiver power, to 'act in accordance with directions from time to time in force under s.1237(3)'.

Section 1237(3) authorises the Minister, by written determination, to 'give directions relating to the exercise of the Secretary's power under subsection (1)'.

On 8 July 1991, the Minister issued written directions. The directions declared that the Secretary's power to waive recovery under s.1237 'must, subject to the attached schedule, be exercised in the following circumstances only'. The directions then listed 7 situations, in paras (a) to (g). The schedule set out 2 situations in which a debt 'must be waived'.

Minister's determination too restrictive

In its joint judgment, the court noted that the parties to the appeal had accepted that the 1991 Act, and the power conferred by s.1237(1) to waive recovery of a debt to the Commonwealth, were applicable to the AAT's consideration of waiver of the debt raised in 1985. However, Riddell's counsel challenged the validity of the Minister's directions on the ground that they went beyond the authority of s.1237(3).