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).

The court observed that the Minister's directions had 'a number of textual difficulties', partly as a result of inadequate drafting, partly because of confusion over legal principles and partly because of a misunderstanding of the issues involved in *Beadle* (1985) 26 *SSR* 321, a point discussed in *Hodgson* (1992) 68 *SSR* 982.

The court then noted that the purpose of the Minister's directions was to limit the very wide discretion conferred on the Secretary by s.1237(1). The directions confined the exercise of that discretion to certain specified situations and compelled its exercise in the cases referred to in the schedule – or, perhaps, in all the cases specified in the directions.

However, the court said, s.1237(3) was not expressed in terms which authorised the Minister to circumscribe the wide discretion vested in the Secretary by s.1237(1); rather, s.1237(3) authorised -

> 'the Minister to give general guidance to the Secretary, whether by way of statements of policy or otherwise, in the exercise by him of the discretion vested in him but guidance which will leave the Secretary free, in any particular case, to depart from the guidance provided by the Minister's directions if the circumstances of the individual case warrant such a departure'.

(Reasons, pp.13-14)

The court said that the directions in the determination issued by the Minister on 8 July 191 could not be reconciled with s.1237 of the 1991 Act:

> 'When the determination purports to lay down quite precise rules dictating the result of all, or nearly all, applications, it departs radically from the statutory scheme because it is not giving guidance in the exercise of the power, but attempting to deny the existence of the power.'

(Reasons, p.14)

It followed that the directions issued on 8 July 1991 were not authorised by s.1237(3) of the 1991 Act.

Determination of 5 May 1992

The court noted that a new determination had been issued on 5 May 1992, to replace the earlier directions. Although the court thought that the new directions may have removed some of the textual difficulties in the earlier directions, the judges indicated that the determination of 5 May 1992 was also invalid:

> '. . . the considerations which have led us to conclude that the instrument of 8 July 1991 was not authorised by s.1237(3) are equally applicable to the later instrument.'

(Reasons, p.16)

The court held that the AAT had made an error of law in treating the notice as valid and binding on it, and that the matter must be remitted to the AAT for further decision of the question whether the debt should be waived. The court declined to give any general guidance as to the circumstances relevant to the exercise of the s.1237(1) discretion:

> 'Each particular case must be considered on its merits. It is the essential nature of the provision to create a broad discretion to meet the great variety of circumstances which must occur, raising considerations of individual hardship, need, fairness, reasonableness, and whatever else may move an administrator, keeping in mind the scope and purpose of the Act, to make a decision one way or another.'

(Reasons, pp.16-17)

Formal decision

The Federal Court declared that the Minister's determination of 8 July 1991 was not authorised by s.1237(3) of the *Social Security Act* 1991; set aside the AAT's decision; and remitted the matter to the AAT to determine whether the circumstances of the case justified an exercise of the power in s.1237(1).

[P.H.]

Background

Mediation and the AAT

Since September 1991 in Victoria and Queensland, all applicants requesting review by the AAT of SSAT decisions, have been offered the option of having their case referred to mediation. In March 1992 mediation was introduced in New South Wales, and from September 1992 in all other States.

The first Preliminary Conference is conducted by a Member of the AAT who is a trained mediator. If the matter does not settle at this conference, the parties are asked if they wish the matter to be referred to mediation. It is emphasised that mediation is voluntary, and an applicant will not be disadvantaged if this option is agreed to. No fee is charged.

If the parties agree, the matter is set down for a mediation conference within 2 to 3 weeks of the preliminary conference. Half a day is set aside for each conference to give the parties sufficient time to canvass all the issues. A mediation conference usually takes 1 to 2 hours.

The aim of the conference is to settle the matter in a way which is satisfactory to both parties. This may mean that the applicant withdraws the appeal and lodges another claim with the DSS for a more appropriate benefit. The person's rights are explained, and this presumably includes the right to have a claim for a benefit treated as a claim for another benefit where appropriate.

If the matter settles, a consent agreement is drawn up which ultimately becomes an Order of the AAT. If a party subsequently becomes unhappy with the decision reached, that person can appeal to the Federal Court, but only on a question of law. To date there have been no appeals from an AAT decision made following mediation.

Generally, if a person is uncertain the AAT will urge that person to seek independent advice before signing the consent agreement.

Mediation has become a permanent part of the AAT procedure. The *Administrative Appeals Tribunal Act* 1975 will be amended shortly to give the AAT the same powers in mediation as the Federal Court and the Family Court.

The difficulty with this procedure for settling appeals is that the basis of any settlement is not known because, by its very nature, mediation is confidential. The DSS could be conceding issues in mediation conferences, which are contested before the SSAT because of the DSS policy at the regional level.

[C.H.]