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.]