sibility of a prosecution, until almost the end of the interview. The interviewer had written down Anderson's answers to questions, but these were not word-for-word, and furthermore there were important omissions in her record of interview.

The record of interview contained no in-depth investigation of the matters relevant to the existence of a marriage-like relationship. The interviewing officer appeared to have had a closed mind about relevant aspects of the relationship. Some of the questions were framed ambiguously. The form of questions used should have been open-ended rather than of a pre-empting leading kind. The AAT referred to previous comments on the need to develop more acceptable interrogation procedures (*Marriott* (1992) 66 *SSR* 937 and *Secretary DSS v Marriott* (1993) 73 *SSR* 1067).

**The relationship: findings**

The Tribunal found that there was no joint ownership of property or assets, nor the incurring of any joint liabilities. There was no significant pooling of financial resources. There was some sharing of day-to-day household expenses including responsibility for providing food on occasions.

There was a considerable and significant sharing of responsibility for providing care and support to the two children. There was no close personal relationship between them, although the house provided a facility for keeping them in some kind of family relationship. There was an acceptance of some degree of shared responsibility for housework. There was no sexual relationship, which was precluded by Mr Anderson's continuance of a relationship with another woman.

They did not live together for the purpose of seeking any companionship or emotional support. The relationship was argumentative and distant.

Taken over all, the AAT concluded that despite the independence in financial and social matters, the lack of any sexual relationship, and the absence of any consortium and intimacy, the couple were not living 'separately and apart'. The desire of the applicant and her husband to ensure a family-like environment for the children was the main purpose of the sharing of accommodation and provided a significant bond between the two.

The AAT concluded that the applicant was not qualified for sole parent pension during the relevant period.

**Did an overpayment arise?**

The Tribunal found that the applicant made false statements to the department in her sole parent pension review forms and also failed to inform the department of material changes in her circumstances affecting her entitlement to sole parent pension. The Tribunal expressly did not make a finding that she deliberately or consciously sought to mislead the department.

She was caught by the terms of s.246(1), giving rise to a debt due by her to the Commonwealth.

**Waiver**

The Court of Petty Sessions had made an order for reparation of the debt, and had made repayment a condition of her recognisance. The AAT followed previous decisions of *Secretary, DSS and Pomersbach* (1991) 65 *SSR* 912 and *Secretary, DSS and Campbell* (1991) 65 *SSR* 914 in holding that the making of a reparation order by criminal court does not preclude the Tribunal from exercising the power of waiver.

In answer to the DSS submission that waiver of the debt would place the applicant at risk of breaching the condition of her recognisance, the AAT pointed out that the recognisance was not self-executing and said that it would be a serious matter if the DSS, notwithstanding a decision of the Tribunal to waive the debt, sought to enforce the recognisance.

The AAT did not have the benefit of the Full Federal Court's decision in *Riddell* (1993) 73 *SSR* 1067. Applying the approach adopted in *Secretary to DSS and Bradley* (1992) 70 *SSR* 1003, it held that as the debt arose under the 1947 Act, the ministerial direction made under s.1237(3) on 5 May 1992 was inapplicable. The AAT was required instead to have regard to the criteria enunciated in *Director-General of Social Security v Hales* (1983) 13 *SSR* 136. The Tribunal, having regard to the applicant's illness, inability to work, difficult financial circumstances, and continuing responsibility for supporting children decided to waive the debt in part. It also took into account that there was a considerable, though not unduly large, amount of public money involved, and that it was not clear that the applicant had a deliberate intention to defraud the Commonwealth.

**Decision**

The AAT set aside the decision under review and substituted a decision that a debt was due by the applicant to the Commonwealth, that all but $1000 of that debt be waived, and that the debt of $1000 be repaid by deducting $30 a fortnight from the applicant's pension.

**Prosecution policy**

The AAT added the comment that the difficulties that had arisen in this and earlier cases in the way of actual or potential conflict between the Tribunal and the criminal courts were brought about by the department's practice of referring alleged offences to the DSS for prosecution while the individual concerned was still pursuing avenues of administrative appeal.

**[P.O'C.]**

# *Overpayment: waiver: special circumstances and administrative error*

**SHERLOCK and SECRETARY TO DSS**

**(No. 8665)**

**Decided:** 27 April 1993 by S.A. Forgie, H.M. Pavlin and J.B. Morley.

The applicant asked the AAT to review a DSS decision to recover an overpayment of invalid pension.

**The facts**

Mr Sherlock applied for an invalid pension in November 1983. He was then in receipt of sickness benefit. In May 1984 his application for invalid pension was refused. He applied again in March 1985 and was once again refused. But in October 1985 he was granted invalid pension and this payment was backdated to the date of his initial application in November 1983.

Mr Sherlock had advised the DSS from the outset that he was also pursuing a claim for compensation in respect of his medical condition. Upon the completion of that case in 1986 an amount of $2,170.30 was repaid to the DSS for sickness benefits paid during part of the period for which he then received compensation. This repayment

covered the period 1 July 1983 to 23 September 1983. The DSS did not bank this cheque for some nine to ten months after its receipt.

In May 1986 the applicant responded to a DSS amnesty and advised the Department that he was no longer entitled to rent assistance as he had purchased his own house in October 1985. The following week the DSS advised him that his rate of invalid pension had been reduced. The applicant thought that his rate had been reduced because the DSS had received notice of the amount of weekly compensation payments he was to receive.

In July 1986 the applicant began to receive rehabilitation allowance. This payment stopped in December 1988. In May 1989 the DSS received notice that the applicant was receiving compensation payments and had been so since 1983. In July 1989 the applicant completed an income review form. From the evidence presented in relation to the completion of this form it appeared that back payment of compensation payments only occurred in April 1986. There was also evidence that the applicant had engaged in a business venture from which he claimed to receive an income of $2350 per month when he applied for a personal loan in September 1989. This business operated between July 1989 and July 1990.

In March 1991 the DSS raised an overpayment against the applicant of $5,033.60. In 1992 Mr Sherlock inherited $42,000, but after expenses and various items were purchased only $10,000 remained. At the time of the hearing the household income, which included pension, family allowance, compensation and a son's Austudy payments totalled $550.00 per week. The applicant's assets came to just over $10,000 in savings and a mortgaged house worth $80,000. The applicant was also paying off the overpayment at the rate of $40 per week and $3,612,10 remained to be paid.

**Should recovery be waived?**

There was no dispute that the applicant owed the amount claimed by the DSS. The only issue was whether the amount should be waived or written off in accordance with the Ministerial Guidelines issued in July 1991. Those guidelines provide that the DSS may waive recovery under s.1237 of the *Social Security Act* 1991:

> '(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 would cause financial hardship to the person . . .
>
> (g) where in the opinion of the Secretary special circumstances apply such that the circumstances are extremely unusual, uncommon or exceptional.' [as discussed by the Federal Court of Australia in *Beadle v Director-General of Social Security* (1985) 7 ALD 670].

The applicant contended that in determining the application of these guidelines the situation of the applicant at the date of the SSAT hearing only should be considered. This would result in ignoring the inheritance received by the applicant since that date. The AAT rejected this contention.

> 'Following the principles in *Tiknaz* (1981) 4 ALN N44, we are of the view that we may have regard to evidence which may become known and new events which may occur after the date on which we are considering the waiver. Considering whether payment will cause financial hardship or whether circumstances are special, for example, is no different from determining whether an incapacity is permanent or not. Both require a certain amount of conjecture although that conjecture takes place within the boundaries of the evidence and reasoned analysis of it. When subsequent evidence reveals what was in fact the situation at a particular time and removes it from the realms of conjecture, it is relevant in the determination of the issue and regard should be paid to it.'

(Reasons, para.10)

**Paragraph (a) of the guidelines**

The AAT could not find that the overpayment occurred as the result of administrative error. The applicant could have done more to establish whether he had to repay more than the amount he initially repaid. He had focused on only one period in respect of sickness benefits and had not sought information on the effect of compensation payments on his general entitlement to sickness benefits and invalid pension.

**Paragraph (b) of the guidelines**

The AAT did not consider the circumstances of the case to be 'special' and decided that there should not be waiver of the payment or any part of it. The applicant had received money to which he was not entitled even though he did not do so because of any lack of good faith on his part. The DSS procedures also left something to be desired, said the Tribunal:

> 'It seemed not to know what to do with the cheque when it received it and that should have been the time at which it looked at Mr Sherlock's situation. Instead it delayed for nine or ten months before banking it and then another two years before looking at Mr Sherlock's situation again. A further two years followed to the Department's pursuing recovery although no further overpayments have been made since 1989 it would seem.'

(Reasons, para.13)

But the applicant had been repaying the debt by instalments since 1989 and had received an inheritance in 1992 which would have enabled him to repay it.

> 'His wish to spend the inheritance upon some comforts for his family is understandable but is a factor which militates against his being in special circumstances. He chose to spend it in that way rather than to repay his debt. When the family's assets and income are viewed overall, and we consider that they must be for we take an overall view of the family's expenses in a case such as this, he cannot be said to be in financial hardship.'

(Reasons, para.13)

**Formal decision**

The AAT affirmed the decision under review.

**[B.S.]**

**[Editor's Note:** The AAT's decision was given prior to the decision of the Full Federal Court in *Riddell* (see 73 *SSR* 1067.]

# Overpayment of family allowance: changed custody arrangements

**GILBERT and SECRETARY TO DSS**

**(No. 8631)**

**Decided:** 2 April 1993 by A.M. Blow.

The applicant asked the AAT to review a DSS decision to recover an overpayment of $1,230.20 in family allowance.

**The facts**

The applicant and her husband separated in November 1990. From that date their two children lived with her hus-